

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-60028; File No. SR-FINRA-2009-035)

June 2, 2009

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of Proposed Rule Change to Adopt a Temporary and Permanent Cease and Desist Authority Pilot Program on a Permanent Basis

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 18, 2009, 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 prepared 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 is proposing to adopt the temporary and permanent cease and desist authority pilot program on a permanent basis without any substantive changes to the terms of the existing program.

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

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

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

In May 2003, the Commission approved, on a two-year pilot basis, a rule change that gave FINRA authority to issue temporary cease and desist orders (“TCDOs”)³ and made explicit FINRA’s ability to impose permanent cease and desist orders as a remedy in disciplinary cases.⁴ The pilot program also gave FINRA authority to enforce cease and desist orders. In June 2005 and June 2007, the SEC approved [sic] two-year extensions of the pilot program.⁵ The current two-year pilot expires on June 23, 2009.⁶

FINRA is proposing to make the pilot program permanent without any substantive changes to the terms of the existing program.⁷ The proposed action would enable FINRA to

³ A TCDO is a preliminary order issued in connection with an underlying disciplinary proceeding that has been initiated or will be initiated immediately.

⁴ See Securities Exchange Act Release No. 47925 (May 23, 2003), 68 FR 33548 (June 4, 2003) (Order Approving File No. SR-NASD-98-80).

⁵ See Securities Exchange Act Release No. 51860 (June 16, 2005), 70 FR 36427 (June 23, 2005) (Notice of Filing and Immediate Effectiveness of File No. SR-NASD-2005-061); Securities Exchange Act Release No. 55819 (May 25, 2007), 72 FR 30895 (June 4, 2007) (Notice of Filing and Immediate Effectiveness of File No. SR-NASD-2007-033). The Commission notes that it did not approve these filings.

⁶ See Securities Exchange Act Release No. 55819 (May 25, 2007), 72 FR 30895 (June 4, 2007) (Notice of Filing and Immediate Effectiveness of File No. SR-NASD-2007-033).

⁷ In a companion rule filing filed with the SEC today, FINRA seeks to extend the pilot until the SEC approves or disapproves the proposal to make the pilot permanent so that the cease and desist authority does not lapse while the proposal is pending at the SEC. See SR-FINRA-2009-034. The companion rule filing proposed certain technical amendments to the rule text, namely to correct punctuation in FINRA Rule 9556 and update FINRA Rule 9810 to reflect a change in FINRA style convention when

continue to issue TCDOs and impose permanent cease and desist orders as a remedy in disciplinary cases. The proposed action also would give FINRA authority to continue to initiate expedited proceedings when respondents violate temporary or permanent cease and desist orders.

When it first sought cease and desist authority, FINRA stated that it would use the authority sparingly. That has been the case. Since the pilot program was first approved in 2003, FINRA has issued only one TCDO and one permanent cease and desist order (both in the same case, which is described below). If adopted on a permanent basis, the cease and desist rules would continue to be used judiciously. There are times, however, when their use is crucial.

In the one case initiated under the pilot program, FINRA's Department of Enforcement ("Enforcement") alleged that the member in question was engaged in widespread fraud that included, among other things, making material misrepresentations and omissions in connection with the private offering of its own stock, effecting unauthorized transactions and using customer funds improperly.⁸ Enforcement showed that not only was the member attempting to continue the fraudulent offering, it also was funneling money and assets to a non-member affiliate. Enforcement alleged, and a hearing panel found, that a TCDO was necessary because the member's continuation of the misconduct was likely to result in further dissipation or conversion of assets and other significant harm to investors before the completion of the underlying disciplinary proceeding. After the hearing panel issued a permanent cease and desist order following a full disciplinary hearing, the parties settled the case, resulting in the expulsion of the member, the bar of its owner and the imposition of almost \$12 million in fines and restitution.

referencing the federal securities laws. The companion rule filing does not proposal [sic] any substantive changes to the existing pilot.

⁸ See L.H. Ross & Company, Securities Exchange Act Release No. 51270, 2005 SEC LEXIS 452 (February 28, 2005).

The proposed permanent adoption of the pilot program will provide FINRA with a mechanism to continue to take appropriate remedial action against a member or an associated person that has engaged (or is engaging) in violative conduct that could cause continuing harm to the investing public if not addressed expeditiously. It must be emphasized, however, that the cease and desist provisions contain numerous procedural protections for respondents to ensure that the proceedings are fair.

The proposed rule change will become effective on the date of the SEC's approval.

2. Statutory Basis

The proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,⁹ which requires, among other things, that FINRA's 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. The proposed rule change also is consistent with the provisions of Section 15A(b)(7) of the Act,¹⁰ which provides that FINRA members, or persons associated with its members, must be appropriately disciplined for violations of any provisions of the Act or FINRA's rules. Making the pilot program permanent is consistent with FINRA's obligations under the Act because cease and desist orders are designed to stop violative conduct that is likely to cause dissipation or conversion of assets or other significant harm to investors.

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.

⁹ 15 U.S.C. 78o-3(b)(6).

¹⁰ 15 U.S.C. 78o-3(b)(7).

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 the 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-2009-035 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-2009-035. 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 10:00 a.m. and 3:00 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 No. SR-FINRA-2009-035 and should be submitted on or before [insert date 21 days from date of publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹¹

Florence E. Harmon
Deputy Secretary

¹¹ 17 CFR 200.30-3(a)(12).