

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-60070; File No. SR-FINRA-2009-038)

June 8, 2009

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of Proposed Rule Change to Repeal Incorporated NYSE Rule 134 (Differences and Omissions – Cleared Transactions) and NYSE Rule 440I (Records of Compensation Arrangements – Floor Brokerage) as Part of the Process to Develop 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 June 1, 2009, 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 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 repeal Incorporated NYSE Rule 134 (Differences and Omissions – Cleared Transactions) and Incorporated NYSE Rule 440I (Records of Compensation Arrangements – Floor Brokerage), as part of the process of developing the consolidated FINRA rulebook.

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.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

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 the Statutory Basis for, the Proposed Rule Change

1. Purpose

As part of the process of developing a new consolidated rulebook (“Consolidated FINRA Rulebook”),³ FINRA is proposing to repeal NYSE Incorporated Rule 134 (Differences and Omissions – Cleared Transactions) and NYSE Incorporated Rule 440I (Records of Compensation Arrangements – Floor Brokerage), to remove rules that are specific to the New York Stock Exchange, LLC (“NYSE”) marketplace and relate primarily to activities by floor brokers.

Incorporated NYSE Rule 134 (Differences and Omissions—Cleared Transactions)

³ 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 FINRA Information Notice, March 12, 2008 (Rulebook Consolidation Process).

The proposed rule change would repeal Incorporated NYSE Rule 134, which sets forth procedures for clearing member firms to identify uncomparing transactions and resolve them by making any necessary additions, deletions or changes to their data on the facility system. The rule provides guidelines for the review of uncomparing transactions by clearing member firms and details the manner and timing of notifications that must be provided and the types of records that must be maintained.

Further, NYSE Rule 134(d) requires floor brokers to maintain or participate in an error account in which all bona fide error transactions are processed and recorded. The rule defines an “error” to include an execution outside of an order’s written instructions (e.g., wrong security, wrong side of the market, outside the limit price, over buying or selling, duplicate execution, etc.) or missing the market on a “held” order. In such cases, floor brokers use their error account to assume or acquire a position as a result of a legitimate error. Floor brokers are required pursuant to the rule to maintain a signed, time-stamped record, including supporting documentation of such error. The rule further requires every member not associated with a member organization, and every member associated with a member organization that derives at least 75% of its revenue from floor brokerage based on execution of orders on the floor to report to the NYSE error transactions in such member's or his or her member organization's account which result in a profit of more than \$500 for any transaction, or for more than \$3,000 in any calendar week. Such reports must contain a detailed record of the errors and liquidating transactions.

FINRA is proposing to delete Incorporated NYSE Rule 134 from the Transitional Rulebook and not adopt the rule into the Consolidated FINRA Rulebook because the rule is narrowly directed to the trading activities of NYSE floor brokers. FINRA believes that it is not

necessary to transfer NYSE Rule 134 into the Consolidated FINRA Rulebook because the resolution of trading errors on the NYSE and recordkeeping of error accounts is specific to the NYSE.⁴

Incorporated NYSE Rule 440I (Records of Compensation Arrangements—Floor Brokerage)

The proposed rule change would also repeal Incorporated NYSE Rule 440I, which requires each member and member organization that is “primarily engaged as an agent in executing transactions on the Floor of the Exchange” (e.g., \$2 brokers or independent brokers) to maintain certain records of compensation arrangements in excess of \$5,000 per year. The records must include a description of each type of arrangement and identify, by name, the parties to each type of arrangement in effect. The rule applies only if the member or member organization derives at least 75 percent of its revenue from floor brokerage. The rule also excludes any compensation arrangement involving the transmission of orders solely through the NYSE’s electronic order routing system.

NYSE Rule 440I was adopted in 1999 following an SEC order relating to the settlement of an enforcement action against the NYSE for failure to enforce compliance with Section 11(a) of the Act,⁵ Rule 11a-1 thereunder,⁶ and NYSE Rules 90, 95, and 111, which relate to conduct

⁴ In addition to being subject to SEC and FINRA rules, Dual Members also remain subject to the NYSE’s rulebook. FINRA notes that the NYSE may determine to retain NYSE Rule 134 for its own purposes.

⁵ 15 U.S.C. 78k(a).

⁶ 17 CFR 240.11a-1.

by floor brokers.⁷ NYSE Rule 440I was adopted to enhance the NYSE's oversight of floor brokerage compensation arrangements while also fulfilling some of the requirements imposed by the SEC's order. Thus, the NYSE determined to limit the rule to floor brokers and exclude other members in part because "the requirements would be unduly burdensome on and impractical for those members and member organizations, based on the diverse nature and size of their business activities and customer base."⁸

The proposed rule change would delete Incorporated NYSE Rule 440I from the Transitional Rulebook and would not adopt the rule into the Consolidated FINRA Rulebook. NYSE Rule 440I was adopted following the issuance of an SEC order to enhance the NYSE's ability to surveil the activity and compensation arrangements of floor brokers and to examine for their compliance with Section 11(a) of the Act, Rule 11a-1 thereunder, and NYSE Rules 90, 95, and 111.⁹ FINRA does not believe it is necessary to incorporate NYSE Rule 440I into the Consolidated FINRA Rulebook.¹⁰

⁷ See Securities Exchange Act Release No. 41996 (October 8, 1999), 64 FR 56560 (October 20, 1999). Subject to certain exceptions, these provisions generally prohibit exchange members from effecting transactions on the floor of an exchange for their own accounts, the accounts of associated persons, or an account over which they or their associated persons have investment discretion. See also Securities Exchange Act Release No. 41574, Admin. Proceeding File No. 3-9925 (June 29, 1999).

⁸ See Securities Exchange Act Release No. 41441 (May 24, 1999), 64 FR 29723 (June 2, 1999).

⁹ NYSE Rules 90, 95, and 111 were not incorporated into the Transitional FINRA Rulebook. Those rules, however, remain part of the NYSE's rulebook.

¹⁰ In addition to being subject to SEC rules (including SEA Rule 17a-4(b)(7) (requiring every member, broker, or dealer to retain all written agreements (or copies thereof) entered into by such member, broker, or dealer relating to its business as such, including agreements with respect to any account) and FINRA rules, Dual Members also remain subject to the NYSE's rulebook. FINRA notes that the NYSE may determine to retain NYSE Rule 440I for its own purposes.

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.

2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,¹¹ 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 would remove rules that are specific to the NYSE marketplace and relate primarily to activities by floor brokers. The proposed rule change would also advance the development of a more efficient and effective Consolidated FINRA Rulebook.

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 the proposed rule change, or

¹¹ 15 U.S.C. 78q-3(b)(6).

- (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-2009-038 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-2009-038. 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 the 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-2009-038 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.¹²

Florence E. Harmon
Deputy Secretary

¹² 17 CFR 200.30-3(a)(12).