

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-60112; File No. SR-FINRA-2009-039)

June 15, 2009

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of Proposed Rule Change to Adopt FINRA Rule 3310 (Anti-Money Laundering Compliance Program) in the Consolidated FINRA Rulebook

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 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 (“SEC” or “Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been substantially 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: (1) NASD Rule 3011 (Anti-Money Laundering Compliance Program) as FINRA Rule 3310 (Anti-Money Laundering Compliance Program), without substantive change; (2) NASD IM-3011-1 (Independent Testing Requirements) as supplementary material to proposed FINRA Rule 3310, subject to certain amendments; and (3) NASD IM-3011-2 (Review of Anti-Money Laundering Compliance Person Information) as supplementary material to proposed FINRA Rule 3310, without substantive change. The proposed rule change would delete Incorporated NYSE Rule 445 (Anti-Money Laundering Compliance Program) in its entirety as duplicative.

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

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"),<sup>3</sup> FINRA is proposing to adopt: (1) NASD Rule 3011 (Anti-Money Laundering Compliance Program) as FINRA Rule 3310 (Anti-Money Laundering Compliance Program), without substantive change; (2) NASD IM-3011-1 (Independent Testing Requirements) as supplementary material to proposed FINRA Rule 3310, subject to certain amendments; and (3) NASD IM-3011-2 (Review of Anti-Money Laundering Compliance Person Information) as

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<sup>3</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 FINRA Information Notice, March 12, 2008 (Rulebook Consolidation Process).

supplementary material to proposed FINRA Rule 3310, without substantive change. The proposed rule change would delete Incorporated NYSE Rule 445 in its entirety (Anti-Money Laundering Compliance Program) as duplicative. The proposed rule change is discussed in further detail below.

### Background

NASD Rule 3011 (Anti-Money Laundering Compliance Program) and Incorporated NYSE Rule 445 (Anti-Money Laundering Compliance Program) are substantially similar rules requiring members to develop and implement a written anti-money laundering (“AML”) program reasonably designed to achieve and monitor compliance with the requirements of the Bank Secrecy Act (“BSA”)<sup>4</sup> and the implementing regulations promulgated by the Department of the Treasury. Each member’s AML compliance program must be approved, in writing, by a member of senior management.

The rules require that each AML compliance program, must, at a minimum: (1) establish and implement policies and procedures that can be reasonably expected to detect and cause the reporting of suspicious transactions; (2) establish and implement policies, procedures, and internal controls reasonably designed to achieve compliance with the BSA and its implementing regulations; (3) provide for annual (on a calendar-year basis) independent testing for compliance to be conducted by member personnel or a qualified outside party;<sup>5</sup> (4) designate and identify to

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<sup>4</sup> See 31 U.S.C. 5311, et seq.

<sup>5</sup> Both rules permit a member to conduct the independent testing every two years (on a calendar-year basis) if it does not execute transactions for customers or otherwise hold customer accounts or act as an introducing broker with respect to customer accounts (e.g., engages solely in proprietary trading, or conducts business only with other broker-dealers). Incorporated NYSE Rule 445 uses slightly different terminology to achieve the same result, specifically providing that a member may conduct independent testing every two years (on a calendar-year basis) if it “does not engage in a public business (e.g.,

FINRA an individual or individuals (i.e., AML compliance person(s)) who will be responsible for implementing and monitoring the day-to-day operations and internal controls of the AML compliance program and provide prompt notification to FINRA of any changes to the designation; and (5) provide on-going training for appropriate persons.

NASD IM-3011-1 (Independent Testing Requirements) and the supplementary material to Incorporated NYSE Rule 445 also contain substantially similar provisions clarifying that: (1) members should undertake more frequent testing than required if circumstances warrant; (2) the person conducting the independent test must have a working knowledge of applicable requirements under the BSA and its implementing regulations; and (3) the testing cannot be conducted by the AML compliance person(s), by any person who performs the functions being tested, or by any person who reports to any of these persons.

NASD IM-3011-1, however, permits the AML compliance program testing to be conducted by persons who report to either the AML compliance person or persons performing the functions being tested if: (1) the member has no other qualified internal personnel to conduct the test; (2) the member establishes written policies and procedures to address conflicts that may arise from allowing the test to be conducted by a person who reports to the person(s) whose activities he or she is testing (e.g., anti-retaliation procedures); (3) to the extent possible, the person conducting the test reports the results of the test to someone who is senior to the AML compliance person or persons performing the functions being tested; and (4) the member documents its rationale, which must be reasonable, for determining there is no other alternative than to comply in this manner. In addition, if the person does not report the results consistent

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engages solely in proprietary trading, or conducts business only with other broker-dealers).”

with (3) above, the member must document a reasonable explanation for not doing so.

Incorporated NYSE Rule 445 does not have a comparable provision.

Finally, NASD IM-3011-2 (Review of Anti-Money Laundering Compliance Person Information) requires each member to identify, review, and if necessary, update the information regarding its AML compliance person in the manner prescribed in NASD Rule 1160.<sup>6</sup> This provision is comparable to SM .03 of NYSE Rule 445.

#### Proposed FINRA Rule 3310 and Related Supplementary Material

The proposed rule change would adopt NASD Rule 3011 without substantive change into the Consolidated FINRA Rulebook as FINRA Rule 3310 (Anti-Money Laundering Compliance Program). In addition, the proposed rule change would adopt NASD IM-3011-2, without substantive change, as supplementary material to proposed FINRA Rule 3310.

With respect to NASD IM-3011-1, the proposed rule change would adopt its provisions as supplementary material to proposed FINRA Rule 3310, but would eliminate the provision that currently allows, subject to specified conditions, the AML compliance program testing to be conducted by persons who report to either the AML compliance person or persons performing the functions being tested (referred to as the “independent testing exception”). The Financial Crimes Enforcement Network (“FinCEN”), which is responsible for administering the BSA and its implementing regulations, has stated that the independent testing provision of the BSA precludes AML program testing by personnel with an interest in the outcome of the testing and that an independent testing exception, such as the one in NASD IM-3011-1, is inconsistent with this BSA provision and FinCEN’s interpretive guidance on the BSA’s independent testing

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<sup>6</sup> FINRA is proposing to replace NASD Rule 1160 with FINRA Rule 4540 (Member Information and Data Reporting and Filing Requirements). See Regulatory Notice 09-02 (January 2009).

requirement.<sup>7</sup> Accordingly, consistent with FinCEN's guidance, FINRA is proposing to eliminate the independent testing exception in connection with its adoption of proposed FINRA Rule 3310.

Finally, as stated previously, the proposed rule change would delete Incorporated NYSE Rule 445 and its related supplementary material in their entirety as duplicative. 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

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<sup>7</sup> See Letter from Jamal El-Hindi, Associate Director, Regulatory Policy & Programs Division, FinCEN, to Nancy M. Morris, Secretary, SEC (August 22, 2007). FinCEN submitted the letter to the SEC in response to the NYSE's "omnibus filing," a rule filing that sought to achieve greater harmonization between the NYSE and NASD rules, including the AML compliance program rules (SR-NYSE-2007-22). See Exchange Act Release No. 56142 (July 16, 2007), 72 FR 42195 (August 1, 2007).

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 would continue to assist members in identifying and preventing money laundering abuses that can affect the integrity of the U.S. capital markets.

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.

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

#### 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-2009-039 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-2009-039. 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 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 insert SR-FINRA-2009-039 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>9</sup>

Florence E. Harmon  
Deputy Secretary

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<sup>9</sup> 17 CFR 200.30-3(a)(12).