

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-60199; File No. SR-FINRA-2009-042]

### Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of Proposed Rule Change Relating to Outside Business Activities of Registered Persons

June 30, 2009.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Exchange Act" or "Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on June 8, 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 NASD Rule 3030 (Outside Business Activities of an Associated Person) as FINRA Rule 3270 (Outside Business Activities of Registered Persons) in the consolidated FINRA rulebook with moderate changes. The proposed rule change would delete Incorporated NYSE Rule 346 (Limitations—Employment and Association with Members and Member Organizations) and its interpretations. The proposed rule change would require registered persons to give notice to member firms prior to engaging in an outside business activity (as defined therein).

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 NASD Rule 3030 (Outside Business Activities of an Associated Person) as FINRA Rule 3270 (Outside Business Activities of Registered Persons) in the Consolidated FINRA Rulebook with moderate changes. The proposed rule change would delete NYSE Rule 346<sup>4</sup> (Limitations—Employment and Association with Members and Member Organizations) and its interpretations. However, as further described below, the proposed rule change would incorporate certain provisions of NYSE Rule 346 into new FINRA Rule 3270.

#### (1) Proposed FINRA Rule 3270 (Outside Business Activities of Registered Persons)

Proposed FINRA Rule 3270 would prohibit any registered person from being an employee, independent contractor, sole proprietor, officer, director or partner of another person, or being compensated, or having the reasonable expectation of compensation, from another person as a result of any business activity outside the scope of the relationship with his or her member firm, unless he or she has provided prior written notice to the member. The proposed rule change would expand the obligations imposed under NASD Rule 3030, which prohibits any registered person from being employed by or accepting any compensation from any person as a result of any outside business activity, other than passive investment, unless he has provided prompt written notice to his member

firm. In contrast, NYSE Rule 346(b) generally prohibits any member (as defined in the NYSE rules) or employee of a member organization from being engaged in any other business, or being employed or compensated by any other person, or serving as an officer, director, partner or employee of another business organization or owning any stock or having any direct or indirect financial interest in any other organization engaged in any securities, financial or kindred business unless such person has made a written request to, and received prior written consent from, his or her member organization employer.

The primary difference between the existing NASD and NYSE rules is the timing of the required notice and the requirement in the NYSE rule for a member's prior written consent. With respect to timing, FINRA believes that registered persons should not be permitted to engage in outside business activities without the firm's prior knowledge. Potential investor harm could ensue in the interim period between the time the registered person commences an outside business activity and the time a firm receives "prompt" written notice. Also, because the term "prompt" is susceptible to differing interpretations, adopting a prior written notice standard in this context would promote consistency within the securities industry, though FINRA understands that, in practice, many firms already require prior written notice. Further, a prior written notice standard would allow a firm an opportunity to determine whether the proposed outside business activity is properly being characterized by the registered representative as an outside business activity, or whether it is an outside securities activity, subject to NASD Rule 3040 (Private Securities Transactions of an Associated Person).<sup>5</sup>

For these reasons, FINRA proposes that FINRA Rule 3270 require prior written notice whenever a registered representative will be an employee, independent contractor, sole proprietor, officer, director or partner of another person, or will be compensated, or have the reasonable expectation of compensation, from any other person as a result of any outside business activity.

With respect to the requirement in NYSE Rule 346(b) for prior written consent, FINRA believes that requiring prior written consent for outside business activities is unnecessary. To the extent that these activities may

<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 new 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).

<sup>4</sup> For convenience, the proposed rule change refers to Incorporated NYSE Rules as NYSE Rules.

<sup>5</sup> FINRA is proposing to replace NASD Rule 3040 with new provisions in proposed FINRA Rule 3110(b)(3), as part of the consolidated FINRA rules addressing supervision and supervisory controls. See FINRA Regulatory Notice 08-24 (May 2008).

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

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

nevertheless raise investor protection concerns and adversely impact the individual's business within the firm, the proposed rule change has supplementary material, drawn in part from procedures required in NYSE Rule 346(e), that sets forth the obligations of a member upon receipt of a written notice of a proposed outside business activity. FINRA believes that firms must review the registered person's participation in the outside activity to determine whether it raises investor protection concerns. Specifically, the supplementary material states that a member must make a determination as to whether the proposed activity raises investor protection concerns, and if so, the firm must implement procedures or restrictions on the activity to protect investors, or prohibit the activity. A member also must evaluate the proposed activity to determine whether the activity properly is characterized as an outside business activity or whether it should be treated as an outside securities activity subject to the requirements of NASD Rule 3040.<sup>6</sup>

The proposed rule change also harmonizes and simplifies the standards for what constitutes an outside business activity. Currently, the NASD and NYSE rules have a number of overlapping provisions. NYSE Rule 346(b) generally requires, subject to certain exceptions, written notice whenever a member or employee of a member organization is employed or compensated by any other person; serves as an officer, director, partner or employee of another organization; or owns any stock or has, directly or indirectly, any financial interest in any other organization engaged in any securities, financial or kindred business. NASD Rule 3030 generally requires notice whenever a registered person is employed by or accepts any compensation from any person as a result of any outside business activity, other than passive investment. In reconciling these two standards, the proposed rule change requires prior written notice whenever a registered representative will be an employee, independent contractor, sole proprietor, officer, director or partner of another person, or will be compensated, or have the reasonable expectation of compensation, from any other person as a result of any outside business activity. The inclusion of the phrase "or have the reasonable expectation of compensation" addresses situations in

which an outside activity does not immediately yield compensation (*e.g.*, where a registered person intends to work for a start-up business). FINRA believes that a registered person should not be able to engage in an activity in which he or she reasonably expects to be compensated without providing the firm with prior written notice, and FINRA believes that a rule dependent on the prior receipt of compensation is too narrow and may be susceptible to abuse. Proposed Rule 3270 retains the exemptions in NASD Rule 3030 for "passive investments" and activities subject to the requirements of NASD Rule 3040.<sup>7</sup>

In addition, the proposed rule would streamline the text by replacing the phrase "person associated with a member in any registered capacity" with "registered person" and would re-title the rule "Outside Business Activities of Registered Persons" to better reflect its application to registered persons.

*(2) Deleted Provisions of Incorporated NYSE Rule 346 and Its Supplementary Material and Interpretations*

FINRA proposes to delete other provisions of NYSE Rule 346 that are unnecessary and/or duplicative of provisions in the federal securities laws or the FINRA Rulebook and delete NYSE Rule Interpretations that are unnecessary or inconsistent with Proposed Rule 3270.

NYSE Rule 346(a) and related NYSE Interpretation 346/01 require natural persons not associated with entities that are registered broker-dealers to register with the SEC unless specifically exempted by the Exchange Act. FINRA proposes to delete these provisions as redundant in light of Section 15(a) of the Exchange Act.<sup>8</sup>

NYSE Rule 346(c) provides that where a member organization approves an employee's participation in a private securities transaction in which regard the employee has or may receive selling compensation, the transaction shall be recorded on the books and records of the member organization, which shall supervise such participation as if the transaction were executed on its behalf. FINRA proposes to delete this provision as redundant of NASD Rule 3040 (Private Securities Transactions of an Associated Person).<sup>9</sup>

<sup>7</sup> FINRA is separately considering NASD Rule 3050 (Transactions for or by Associated Persons) as part of the rulebook consolidation process and will consider whether transactions subject to NASD Rule 3050, as proposed to be amended, also should be exempted from proposed FINRA Rule 3270.

<sup>8</sup> 15 U.S.C. 78o-3.

<sup>9</sup> See *supra* note 5.

NYSE Rule 346(d) provides that no member shall qualify more than one member organization for membership. This provision is inconsistent with FINRA's approach to membership, which allows the same individual to qualify more than one firm for membership, as appropriate. FINRA examines separately the merits of each membership application and proposes to delete the prohibition in the NYSE rule.

NYSE Rule 346(e) requires every employee of a member organization who is assigned or delegated any responsibility or authority pursuant to NYSE Rule 342 to devote his entire time during business hours to the business of such member organization unless an alternative arrangement has been approved in writing by the member organization. FINRA believes that the existing and proposed rules on supervision and outside business activities adequately ensure that the member firm's business is not adversely affected by outside activities. Moreover, associated persons in the independent broker-dealer channel at times devote substantial time to non-member business and this provision would create unnecessary administrative burdens if applied to them. Accordingly, FINRA proposes to delete this provision.

NYSE 346(f) provides that unless otherwise permitted by the Exchange, no member, member organization, approved person, employee or any person directly or indirectly controlling, controlled by or under common control with a member or member organization shall have associated with him or it any person who is known, or in the exercise of reasonable care should be known, to be subject to any "statutory disqualification" defined in Section 3(a)(39) of the Exchange Act.<sup>10</sup> In connection with FINRA's consolidation transaction, FINRA amended its definition of disqualification in its By-Laws to align with the Exchange Act definition, thereby incorporating additional categories of statutory disqualification, including certain affiliated relationships.<sup>11</sup> Accordingly, FINRA proposes to delete NYSE Rule 346(f) as redundant.<sup>12</sup>

Finally, FINRA proposes to delete NYSE Rule Interpretations 346/02 and/03, which address personal business expenses and factors to consider when

<sup>10</sup> 15 U.S.C. 78c(a)(39).

<sup>11</sup> For further discussion, see Securities Exchange Act Release No. 59586 (March 17, 2009), 74 FR 12166 (March 23, 2009) (Order Approving SR-FINRA-2008-045).

<sup>12</sup> This was confirmed in a conversation with Gary Goldshelle of FINRA on June 29, 2009.

<sup>6</sup> FINRA is proposing to replace NASD Rule 3040 with new provisions in proposed FINRA Rule 3110(b)(3), as part of the consolidated FINRA rules addressing supervision and supervisory controls. See FINRA Regulatory Notice 08-24 (May 2008).

approving outside activities, FINRA believes the Interpretations are unnecessary or inconsistent with proposed FINRA Rule 3270. In particular, the provisions in NYSE Rule Interpretation 346/02 requiring a firm to assume responsibility for all activities effected on its behalf and under its name are addressed by other FINRA rules, including supervision rules. In addition, FINRA has chosen not to impose a requirement for firms to approve all advertisements of an outside business, although a firm may impose such restrictions as part of its obligations under supplementary material .01. FINRA requires firms to approve all advertisements for member firm business, even if an advertisement relates to the firm's non-securities business; however, FINRA does not believe that approval should be required for outside business activities permitted under the proposed rule change.

For the reasons noted above, FINRA proposes to transfer NASD Rule 3030 into the Consolidated FINRA Rulebook with the changes described herein. In addition, FINRA proposes to delete NYSE Rule 346 and its interpretations from the Transitional Rulebook also as described herein.

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,<sup>13</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. The proposed rule change will clarify and streamline NASD Rule 3030 for adoption as a FINRA rule in the new Consolidated FINRA Rulebook, while also implementing additional protections such as the need for registered persons to provide prior written notice to its member firms of proposed outside business activities and for firms to determine whether the proposed activities raise investor protection concerns.

### *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](mailto:rule-comments@sec.gov). Please include File Number SR-FINRA-2009-042 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-2009-042. 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 SR-FINRA-2009-042 and should be submitted on or before July 29, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>14</sup>

**Elizabeth M. Murphy,**

*Secretary.*

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**BILLING CODE 8010-01-P**

## **SECURITIES AND EXCHANGE COMMISSION**

**[Release No. 34-60201; File No. SR-NASDAQ-2009-062]**

### **Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change To Extend the Pilot Program for NASDAQ Last Sale Data Feeds**

June 30, 2009.

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 26, 2009, the NASDAQ Stock Market LLC ("NASDAQ" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons, and is approving the proposal on an accelerated basis.

<sup>14</sup> 17 CFR 200.30-3(a)(12).

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

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

<sup>13</sup> 15 U.S.C. 78o-3(b)(6).