

substantive change into the Consolidated FINRA Rulebook as FINRA Rule 3310 (AML 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 independent testing exception. The Financial Crimes Enforcement Network ("FinCEN"), a bureau within the Department of the Treasury that is responsible for administering the BSA and its implementing regulations, has stated that the independent testing provision of the BSA<sup>9</sup> 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 the BSA's independent testing provision and FinCEN's interpretation of this provision.<sup>10</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.

### III. Comment Letters

Seven commenters raised objections to the elimination of the independent testing exception.<sup>11</sup> Three commenters expressed their view that the exception was being eliminated to address a problem that has not been shown to exist.<sup>12</sup> These commenters also took exception with FinCEN's view that the independent testing exception was

inconsistent with the requirements of the BSA.<sup>13</sup> Commenters also expressed concern that elimination of the independent testing exception would require small firms to incur additional expenses.<sup>14</sup> Some commenters also suggested that FINRA should seek additional member comment on the proposed elimination of the independent testing exception.<sup>15</sup> In responding to the comments, FINRA stated that it was proposing to eliminate the independent testing exception to be consistent with FinCEN's views regarding the BSA's independent testing requirements.<sup>16</sup>

### IV. Discussion and Findings

After a careful review of the proposal, the comments received, and FINRA's Response, the Commission finds that the proposed rule change is consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to FINRA.<sup>17</sup> In particular, the Commission finds that the proposed rule change is consistent with Section 15A(b)(6) of the Exchange Act,<sup>18</sup> which requires, among other things, that FINRA's rules be designed to prevent fraudulent and manipulative practices and to promote just and equitable principles of trade.

The Commission finds that the proposed rule change is reasonably designed to accomplish these ends by aligning the independent testing requirements of proposed FINRA Rule 3310 with FinCEN's interpretation of the BSA's independent testing requirement. The Commission notes in particular that FinCEN is responsible for administering the BSA and its implementing regulations. In light of FinCEN's view that the independent testing provisions of the BSA preclude AML program testing by persons with an interest in the outcome of the test, the independent testing exception in NASD IM-3011-1, is not consistent with the BSA.<sup>19</sup>

### V. Conclusion

*It is therefore concluded*, pursuant to Section 19(b)(2) of the Exchange Act,<sup>20</sup> that the proposed rule change (SR-FINRA-2009-039) be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>21</sup>

**Florence E. Harmon,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-60642; File No. SR-ISE-2009-61]

### Self-Regulatory Organizations; International Securities Exchange, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Regarding Exposure of Reserve Orders

September 9, 2009.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on August 27, 2009, the International Securities Exchange, LLC (the "Exchange" or the "ISE") filed with the Securities and Exchange Commission the proposed rule change as described in Items I, II, and III below, which items have been prepared by the self-regulatory organization. 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

The Exchange is proposing to amend its rules to adopt an interpretation to its rules related to the exposure of reserve orders. The text of the proposed rule change is as follows, with additions in *italics*:

Rule 717. Limitations on Orders

(a) through (g) no change.

Supplementary Material to Rule 717

.01-.04 no change.

.05 *With respect to the non-displayed reserve portion of a reserve order, the exposure requirement of paragraphs (d) and (e) are satisfied if the displayable*

<sup>9</sup> See 31 U.S.C. 5318(h)(1)(D). See also 31 CFR 103.120 (AML programs requirements for financial institutions regulated by, among others, self-regulatory organizations).

<sup>10</sup> See Letter from Jamal El-Hindi, Associate Director, Regulatory Policy & Programs Division, FinCEN, to Nancy M. Morris, Secretary, SEC (August 22, 2007) ("FinCEN Comment Letter"). FinCEN submitted the letter to the SEC in response to the NYSE's "omnibus filing," which sought to achieve greater harmonization between the NYSE and NASD rules, including the AML compliance program rules (SR-NYSE-2007-22). See Securities Exchange Act Release No. 56142 (July 16, 2007), 72 FR 42195 (August 1, 2007).

<sup>11</sup> See *supra* note 4.

<sup>12</sup> Cutter, Dorn, and Nestlerode.

<sup>13</sup> *Id.* The commenters asserted that employees of a small broker-dealer have an interest in bringing problems to light, not ignoring them.

<sup>14</sup> Cutter, Dorn, Joseph James, RW Smith, Sage Rutty, and Trubee Collins.

<sup>15</sup> Nestlerode, Cutter, RW Smith, and Dorn.

<sup>16</sup> See FINRA's Response, *supra* note 5. See also FinCEN Comment Letter, *supra* note 10 and accompanying text.

<sup>17</sup> In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>18</sup> 15 U.S.C. 78o-3(b)(6).

<sup>19</sup> See FinCEN Comment Letter, *supra* note 10 and accompanying text.

<sup>20</sup> 15 U.S.C. 78s(b)(2).

<sup>21</sup> 17 CFR 200.30-3(a)(12).

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

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

portion of the reserve order is displayed at its displayable price for one second.

\* \* \* \* \*

## II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization 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. The self-regulatory organization 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

(a) *Purpose*—The purpose of the proposal is to adopt an interpretation to ISE Rule 717(d) and (e) to specify that the exposure requirement contained in these paragraphs is satisfied with respect to the non-displayed reserve portion of a reserve order if the displayable portion is displayed at its displayable price for one second. A reserve order is an order where only a portion of the full size is included in the Exchange's disseminated quotation.<sup>3</sup> The displayed size is executed according to the Exchange's regular priority rules, and is refreshed with additional volume from the non-displayed portion of the order. The non-displayed portion of the reserve order is available for execution only after the exchange's displayed quote is fully exhausted.

Under the proposed interpretation, after entering a reserve order, a member may enter a contra-side order for its own account or a contra-side order that was solicited from another broker-dealer that would execute against the displayable and non-displayed portions of the order so long as the displayable portion of the order was displayed on the ISE (*i.e.*, the price of the order is at the ISE BBO) for at least one second. This proposed interpretation is the same as an existing interpretation to the rule of the Nasdaq Options Market that contains the same exposure requirements as ISE Rule 717(d) and (e).<sup>4</sup> Accordingly, the Commission has previously determined that display of the displayable portion of a reserve order is sufficient to satisfy

the exposure requirements of ISE Rule 717(d) and (e).

(b) *Basis*—The basis under the Act for this proposed rule change is the requirement under Section 6(b)(5) that an exchange have rules that are designed to promote just and equitable principles of trade, and to remove impediments to and perfect the mechanism for a free and open market and a national market system, and in general, to protect investors and the public interest. In particular, the proposal is the same as an existing rule of another exchange,<sup>5</sup> and will provide members with certainty with respect to the applicable exposure requirements for reserve orders.

### B. Self-Regulatory Organization's Statement on Burden on Competition

The proposed rule change does not impose 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

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any unsolicited written comments from members or other interested parties.

## III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

This proposed rule change does not significantly affect the protection of investors or the public interest, does not impose any significant burden on competition, and, by its terms, does not become operative for 30 days after the date of the filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest. The Exchange provided the Commission with written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing the proposed rule change as required by Rule 19b-4(f)(6).<sup>6</sup> The proposed rule change is the same as a rule that the Commission has previously approved for another self-regulatory organization.<sup>7</sup> For the foregoing reason, this rule filing qualifies for immediate effectiveness as a "non-controversial" rule change under

paragraph (f)(6) of Rule 19b-4 of the Act.

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

## IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposal 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-ISE-2009-61 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-ISE-2009-61. 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 ISE. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You

<sup>3</sup> ISE Rule 715(g).

<sup>4</sup> Nasdaq Rules, Chapter VII, Sec. 12 (Order Exposure Requirements), Commentary .03.

<sup>5</sup> *Id.*

<sup>6</sup> 17 CFR 240.19b-4(f)(6).

<sup>7</sup> *Supra* note 4.

should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-ISE-2009-61 and should be submitted on or before October 7, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>8</sup>

**Florence E. Harmon,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-60640; File No. SR-FINRA-2009-056]

### Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Fee for Investment Banking Representative Examination

September 9, 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 August 26, 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. FINRA has designated the proposed rule change as "establishing or changing a due, fee or other charge" under Section 19(b)(3)(A)(ii) of the Act<sup>3</sup> and Rule 19b-4(f)(2) thereunder,<sup>4</sup> which renders the proposal effective upon receipt of this filing by the Commission. 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 amend Schedule A to the FINRA By-Laws to establish a fee for the new Investment Banking Representative Examination ("Series 79").

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

On April 13, 2009, the Commission approved NASD Rule 1032(i), which establishes a new limited representative category—Limited Representative-Investment Banking—for persons whose activities are limited to investment banking and those who supervise such activities.<sup>5</sup> FINRA has developed the Series 79 program to ensure that persons associated with FINRA members seeking to register as investment banking representatives have attained specified levels of competence and knowledge. On July 28, 2009, FINRA filed with the Commission the Series 79 selection specifications and content outline.<sup>6</sup> The examination will be implemented on November 2, 2009.<sup>7</sup>

The proposed rule change would amend Section 4 of Schedule A to FINRA By-Laws to establish a fee of \$265 for an associated person to take the Series 79 exam. The fee is the same as that for the General Securities Representative exam ("Series 7")<sup>8</sup> and is based on the costs to FINRA to develop and administer the exam.

FINRA has filed the proposed rule change for immediate effectiveness. The

implementation date will be November 2, 2009, to coincide with the implementation date of NASD Rule 1032(i).

###### 2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the Act, including Section 15A(b)(5) of the Act,<sup>9</sup> which requires, among other things, that FINRA rules provide for the equitable allocation of reasonable dues, fees, and other charges among members and issuers and other persons using any facility or system that FINRA operates or controls. FINRA believes the proposed rule change is designed to accomplish these ends by equitably assessing the costs associated with developing and administering the examination program.

##### 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

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>10</sup> and subparagraph (f)(2) of Rule 19b-4 thereunder.<sup>11</sup> At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

#### 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:

<sup>9</sup> 15 U.S.C. 78o-3(b)(5).

<sup>10</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>11</sup> 17 CFR 240.19b-4(f)(2).

<sup>8</sup> 17 CFR 200.30-3(a)(12).

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

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

<sup>3</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

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

<sup>5</sup> See Securities Exchange Act Release No. 59757 (April 13, 2009), 74 FR 18268 (April 21, 2009) (Order Approving File No. SR-FINRA-2009-006).

<sup>6</sup> See Securities Exchange Act Release No. 60424 (August 4, 2009), 74 FR 39984 (August 10, 2009) (Notice of Filing and Immediate Effectiveness; File No. SR-FINRA-2009-049).

<sup>7</sup> See *Regulatory Notice* 09-41 (July 2009).

<sup>8</sup> Within the six-month period following the implementation of Rule 1032(i), individuals who are registered as a General Securities Representative and function in a member's investment banking business line as described in Rule 1032(i) may opt in to the Limited Representative-Investment Banking registration category. After the six-month opt-in period, individuals who perform the job functions set out in Rule 1032(i) will be required to pass the Series 79 exam in lieu of the General Securities Representative ("Series 7") exam (or equivalent exams), unless subject to an exception in the Rule.