

the protection of investors.¹⁴⁴ This is especially true in light of the increasing complexity of certain products and strategies.

Elimination of Interpretive Material Following NASD Rule 2310

In connection with the new suitability rule, FINRA proposes eliminating many and modifying some of the IMs that follow NASD Rule 2310. This aspect of the proposal also generated several comments.

- *Comments:*

A few commenters were concerned that the proposal did not include some of the current IMs, especially IM-2310-2.¹⁴⁵ These commenters believe that it is important to maintain the statement in IM-2310-2 that brokers can be disciplined for excessive trading, unauthorized trading, and fraud.¹⁴⁶ One commenter noted in particular that this IM was the only place in the entire NASD conduct rules explicitly prohibiting unauthorized trading.¹⁴⁷

- *FINRA's Response:*

FINRA continues to believe that most of the current IMs following NASD Rule 2310 should be eliminated or modified because they are no longer necessary. As discussed in detail in Item II.A. of this filing, some are duplicative of other rules and others would be rendered unnecessary by changes proposed in the new suitability rule. For example, as noted in Item II.A., it is well-settled that unauthorized trading violates just and equitable principles of trade under FINRA Rule 2010. Consequently, the elimination of the discussion of unauthorized trading in the IMs following the suitability rule in no way alters the longstanding view that unauthorized trading clearly violates FINRA's rules.

¹⁴⁴ See *F.J. Kaufman & Co.*, 50 S.E.C. at 168-69 (discussing both reasonable-basis and customer-specific suitability); *Siegel*, 2007 NASD Discip. LEXIS 20, at *36-40 (discussing reasonable-basis suitability and due-diligence requirement thereunder); see also *Regulatory Notice* 10-22, 2010 FINRA LEXIS 43, at *10-20 (April 2010) (discussing due diligence required for reasonable-basis suitability in context of recommended private offerings); *Notice to Members* 03-71, 2003 NASD LEXIS 81, *5-6 (Nov. 11, 2003) (discussing due diligence requirement for reasonable-basis suitability in context of recommendations of non-conventional investments).

¹⁴⁵ See Cornell Letter, *supra* note 34; Corporate Law Center & Investor Rights Clinic Letter, *supra* note 61; NASAA Letter, *supra* note 47.

¹⁴⁶ See Cornell Letter, *supra* note 34; Corporate Law Center & Investor Rights Clinic Letter, *supra* note 61; NASAA Letter, *supra* note 47.

¹⁴⁷ See Corporate Law Center & Investor Rights Clinic Letter, *supra* note 61.

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

Within 45 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 or disapprove 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. Please include File Number SR-FINRA-2010-039 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-2010-039. 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 Web site viewing and printing 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-2010-039 and should be submitted on or before September 9, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁴⁸

Florence E. Harmon,
Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-62748; File No. SR-FINRA-2010-043]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of Proposed Rule Change To Reinstigate Short Exempt Marking for Trade Reporting and OATS

August 20, 2010.

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 August 6, 2010, 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 and II 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 amend FINRA's trade reporting and Order Audit Trail System ("OATS") rules, including changes relating to recent amendments to SEC Regulation SHO.

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.

¹⁴⁸ 17 CFR 200.30-3(a)(12).

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 Statutory Basis for, the Proposed Rule Change

1. Purpose

On February 26, 2010, the SEC adopted amendments to SEC Regulation SHO.³ These amendments, among other things, implement a short sale circuit breaker for NMS stocks⁴ triggered by a 10% or more decrease in the price of the security from such security's closing price as determined by the listing market for that security at the end of regular trading hours on the prior trading day. Once the circuit breaker is triggered, Regulation SHO, as amended, is designed to generally prohibit the execution or display of short sale orders of a covered security at a price that is less than or equal to the current national best bid for the remainder of the day and the following day ("short sale price test restriction"). In addition to the short sale price test restriction, the amendments to Regulation SHO reinstate a short sale exempt marking category by providing that a broker-dealer may mark certain qualifying sell orders "short exempt."⁵

Paragraphs (c) and (d) of Rule 201 of SEC Regulation SHO set forth the provisions pursuant to which an order may be marked "short exempt" once the circuit breaker has been triggered pursuant to paragraph (b)(3). These provisions include:

- Broker-dealer policies and procedures provision.

³ See Securities Exchange Act Release No. 61595 (February 26, 2010), 75 FR 11232 (March 10, 2010).

⁴ NMS stock means any NMS security other than an option. Rule 600(b)(46) of SEC Regulation NMS defines "NMS security" as any security or class of securities for which transaction reports are collected, processed, and made available pursuant to an effective transaction reporting plan, or an effective national market system plan for reporting transactions in listed options. See 17 CFR 242.600(b)(46).

⁵ The amendments to SEC Regulation SHO became effective on May 10, 2010 with a compliance date of November 10, 2010. See *supra* note 3.

- Seller's delay in delivery.
- Odd lot transactions.
- Domestic arbitrage.
- International arbitrage.
- Over-allotments and lay-off sales.
- Riskless principal transactions.
- Transactions on a volume-weighted average price basis (or "VWAP").⁶

In light of the reinstatement of the "short exempt" marking category, FINRA is proposing to amend its trade reporting rules applicable to over-the-counter trades in NMS stocks to reintroduce the short sale exempt category.⁷ Specifically, FINRA is proposing that, for short sales in all NMS stocks as defined in Rule 600(b)(47) of SEC Regulation NMS, members must indicate on trade reports submitted to FINRA if a transaction is "short sale exempt" (*i.e.*, if it is a short sale transaction in a "covered security" that may be marked "short exempt" pursuant to SEC Regulation SHO).⁸

Similarly, FINRA is proposing to amend its OATS rules to provide that, when an order is received or originated, members must record the designation of an order as a short sale exempt order if the order may be marked "short exempt" pursuant to SEC Regulation SHO.⁹ FINRA also is proposing to require that members include the price on all route reports and a short exempt identifier, if applicable.¹⁰

FINRA is proposing certain additional amendments to its trade reporting rules, including those applicable to OTC Equity Securities, as defined in Rule

⁶ SEC staff has confirmed that members may use the existing ".W" modifier in connection with the VWAP exception of Rule 201(d)(7) of Regulation SHO. The use of the .W modifier would be in addition to the requirement to report the trade as short exempt.

⁷ See FINRA Rules 6182 (Trade Reporting of Short Sales), 6282 (Alternative Display Facility), 6380A (FINRA/Nasdaq TRF), 6380B (FINRA/NYSE TRF), 7230A (FINRA/Nasdaq TRF), and 7230B (FINRA/NYSE TRF).

⁸ FINRA previously required trade reports to indicate if a transaction was marked "short exempt"; however, these requirements were eliminated following the repeal of SEC Rule 10a-1. See Securities Exchange Act Release No. 56279 (August 17, 2007), 72 FR 48713 (August 24, 2007) (Notice of Filing and Immediate Effectiveness of File No. SR-NASD-2007-047).

⁹ See FINRA Rule 7440(b)(9).

¹⁰ Whenever a member transmits an order to another member, ECN, non-member or national securities exchange for handling or execution, the routing member is responsible for recording and reporting a route report to OATS. Under the proposal, route reports would be required to include the price at which the order was routed, which may be different from the price received from the customer, and whether the routed order is short exempt. The short exempt identifier is important for purposes of route reports because certain short sale orders will be eligible to be marked exempt solely as a result of the timing and price of the routed order (See Rule 201(c) of SEC Regulation SHO).

6420 (*i.e.*, non-NMS stocks) to clarify certain existing reporting requirements.¹¹ First, FINRA is proposing to clarify that the short sale indicator (and short sale exempt indicator, for NMS stocks) is required on reports of a "cross," as well as reports of a "sell."

Second, FINRA is proposing to codify the existing requirement that the information listed in the rule must be provided for each trade that is reported to FINRA. Today, trade report information can be provided in a single report, if the reporting member submits trade information for both sides of the trade, or it can be provided in a combination of reports, if the reporting member and contra side each submits its own trade information (as described more fully below). For each trade reported to FINRA, members must indicate, among other things, whether the seller (either the reporting member or contra side, irrespective of whether the contra side is a member) is selling short or short exempt.

Unless the contra side will have an opportunity to provide its own trade information (*i.e.*, unless the contra side is a member using the trade comparison functionality of the facility),¹² the reporting member is responsible for providing complete and accurate information for both sides of the trade, including information from the contra side perspective such as sell short and sell short exempt, as applicable. Thus, the reporting member is responsible for satisfying any applicable contra side information requirements where: (1) The trade is with a customer or non-member, (2) the trade is with a member and is "locked in" pursuant to a give up agreement, or (3) the trade is reported as "tape only" (*i.e.*, for public dissemination purposes without clearing) or "non-tape, non-clearing." This reporting requirement is in effect today; however, the proposed rule change would make it an express requirement in the rule. If the contra side is a member and will have an opportunity to provide its own trade information, then the reporting member is responsible only for providing

¹¹ See FINRA Rules 6282, 6380A, 6380B, 6622, 7230A, 7230B and 7330.

¹² The trade comparison functionality allows the contra party to accept or decline the trade information submitted by the reporting party and may only be used by a contra party that is a member. FINRA notes that the Alternative Display Facility, FINRA/Nasdaq TRF and ORF offer trade comparison functionality; the FINRA/NYSE TRF does not offer such functionality. Accordingly, reporting members are responsible for accurately and completely providing all information required under the rule for the contra side when reporting to the FINRA/NYSE TRF.

information from the reporting side perspective (and the contra side will provide information from the contra side perspective).

The implementation date will be November 10, 2010.

2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,¹³ 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 adopting the proposed rule change will aid in FINRA's surveillance for member compliance, including with SEC Regulation SHO.

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 45 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 or disapprove 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. Please include File Number SR-FINRA-2010-043 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-2010-043. 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 Web site viewing and printing 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-2010-043 and should be submitted on or before September 16, 2010.

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

Florence E. Harmon,
Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-62743; File No. SR-FICC-2010-05]

Self-Regulatory Organizations; Fixed Income Clearing Corporation; Notice of Filing and Order Granting Accelerated Approval on a Temporary Basis of Proposed Rule Change To Modify the Rules of the Government Securities Division Regarding the Calculation of Clearing Fund Deposits Relating to Inter-Dealer Broker Positions

August 19, 2010.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")¹ and Rule 19b-4 thereunder² notice is hereby given that on August 18, 2010, the Fixed Income Clearing Corporation ("FICC") filed with the Securities and Exchange Commission ("Commission") the proposed rule change described in Items I and II below, which items have been prepared primarily by FICC.³ The Commission previously approved the proposal on a temporary basis.⁴ The Commission is publishing this notice and order to solicit comments on the proposed rule change from interested parties and to grant accelerated approval through February 18, 2011.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The proposed rule change seeks to modify the rules of FICC's Government Securities Division ("GSD") regarding the calculation of clearing fund requirements relating to inter-dealer broker ("IDB") positions.

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

In its filing with the Commission, FICC 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. FICC has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of these statements.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ FICC withdrew a substantively identical proposed rule change filed on August 4, 2010, that sought approval without requesting that the approval would be temporary.

⁴ Securities Exchange Act Release No. 60510 (August 17, 2009), 74 FR 42716 (August 24, 2009).

¹³ 15 U.S.C. 78o-3(b)(6).

¹⁴ 17 CFR 200.30-3(a)(12).