

Representative-Investment Banking—which will have an examination tailored for associated persons whose activities are limited to investment banking.⁵ The proposed rule change also sets forth the registration requirements for principals who supervise investment banking activities.

III. Summary of Comments

The Commission received letters from six commenters in response to the proposed rule change.⁶ All of the commenters supported the proposal.⁷ The commenters commended FINRA's acknowledgment of the specialized obligations of investment banking professionals. One commenter noted that this new category of limited registration will allow investment banking employees to become better trained in the rules and regulations applicable to the profession.⁸

IV. Discussion and Commission's Findings

After careful consideration of the proposal and the comments submitted, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities association.⁹ In particular, the Commission finds that the proposed rule change is consistent with Section 15A(g)(3) of the Act,¹⁰ which requires FINRA to prescribe standards of training, experience, and competence for persons associated with FINRA members. The Commission believes that the proposal is consistent with the provisions of the Act noted above because it allows FINRA members to more efficiently allocate resources in order to better train their specialized personnel, which should result in

⁵ FINRA is in the process of developing an accompanying qualification examination that will provide a more targeted assessment of the job functions performed by the individuals that would fall within the proposed registration category. The examination itself, including the content outline and test specifications, and fees associated with it will be the subject of a separate proposed rule change.

⁶ *Supra* note 4.

⁷ Four of the six commenters raised the issue of a proposal previously made to the Division of Trading & Markets (the "Division") that would create a Federal registration exemption and simplified system of regulation for merger and acquisition intermediaries. See AM&AA Letter; ICBC Letter; M&A Source Letter; MBBI Letter. The proposal is not germane to this proposed rule change and is being considered separately by the Division.

⁸ See Starlight Investments Letter.

⁹ In approving this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

¹⁰ 15 U.S.C. 78o-3(g)(3).

improved compliance by principals and the employees they supervise.

V. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,¹¹ that the proposed rule change (SR-FINRA-2009-006) be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹²

Florence E. Harmon,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-59762; File No. SR-FINRA-2009-023]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of Proposed Rule Change To Adopt FINRA Rule 2320 in the Consolidated FINRA Rulebook

April 14, 2009.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act")¹ and Rule 19b-4 thereunder,² notice is hereby given that on March 31, 2009, the 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 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 2820 (Variable Contracts of an Insurance Company) as a FINRA rule in the consolidated FINRA rulebook with minor changes. The proposed rule change would renumber NASD Rule 2820 as FINRA Rule 2320 in 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.

¹¹ 15 U.S.C. 78s(b)(2).

¹² 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

As part of the process of developing a new consolidated rulebook ("Consolidated FINRA Rulebook"),³ FINRA is proposing to adopt NASD Rule 2820 into the Consolidated FINRA Rulebook with minor changes discussed below. The proposed rule change would renumber NASD Rule 2820 as FINRA Rule 2320.

NASD Rule 2820 regulates members in connection with the sale and distribution of variable life insurance and variable annuity contracts (together, "variable contracts"). It prohibits members from participating in the offer or sale of a variable contract unless certain conditions are met. Members may not participate in the offering or sale of a variable contract on any basis other than at a value to be determined following receipt of payment in accordance with the provisions of the contract, the prospectus and the Investment Company Act. Members must promptly transmit to the issuing insurance company all contract applications and at least the portion of the purchase payment required to be credited to the contract. NASD Rule 2820 also requires selling agreements between principal underwriters of variable contracts and selling broker-dealers. Such agreements must provide that the sales commission will be

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).

returned to the issuer if the contract is tendered for redemption within seven business days after acceptance. In addition, members may not sell variable contracts unless the insurance company promptly honors customer redemption requests in accordance with the contract, its prospectus and the Investment Company Act.

NASD Rule 2820(g) regulates member compensation in connection with the sale and distribution of variable contracts, including both cash and non-cash compensation arrangements. Generally, NASD Rule 2820(g) prohibits associated persons of a member from accepting any compensation from any person other than the member with which the person is associated. The rule contains an exception to allow arrangements where a non-member pays compensation directly to associated persons, provided that the member agrees to the arrangement, and relies on appropriate rules or guidance from the SEC that apply to the specific fact situation of the arrangement, and the relevant associated persons treat the funds as compensation.⁴ NASD Rule 2820(g) also prohibits associated persons from accepting securities as compensation, limits the payment or receipt of non-cash compensation (such as gifts, entertainment, training or education meetings and sales contests), and requires certain records to be kept.

The rule's non-cash compensation provision requires a member to keep records of all compensation received by the member or its associated persons from "offerors" (generally insurance companies and their affiliates), other than small gifts and entertainment permitted by the rule. Currently, this provision requires the records to include the nature of, and "if known," the value of any non-cash compensation received. FINRA proposes to modify this requirement by deleting the phrase "if known" regarding the value of non-cash compensation. The proposed change to Rule 2820 would require members to determine and keep records of the value of non-cash compensation received from offerors in all cases. This

⁴ For example, the SEC staff has issued a number of "no-action" letters permitting, among other things, associated persons of members to receive compensation for the sale of variable contract products from a licensed corporate insurance agent acting on behalf of one or more insurance companies. See *First of America Brokerage Service, Inc.* (Sept. 28, 1995) (noting that the staff will no longer respond to letters regarding networking agreements between registered broker-dealers, insurance companies, and insurance agencies in connection with the offer and sale of Insurance Securities unless the [sic] present novel or unusual issues); *FIMCO Securities, Inc.* (July 16, 1993); *Traditional Equinet Corporation of New York* (January 8, 1992).

change would make the provision more consistent with the non-cash compensation recordkeeping requirements regarding public offerings of securities (FINRA Rule 5110(i)(2)) and direct participation programs (NASD Rule 2810(c)(2)).⁵ Members would be permitted to estimate the actual value of non-cash compensation for which a receipt (or similar documentation) assigning a value is not available.

The proposed rule change also would make certain non-substantive, technical changes to the rule to reflect FINRA's corporate name and the new format of the Consolidated FINRA Rulebook.

Over the past several years, variable life insurance products have continued to be of interest to members and the investing public. FINRA has noted the growth in sales and popularity of variable life insurance products, and has published information, including several *Notices*, addressing regulatory concerns regarding these products.⁶

FINRA believes that the provisions of NASD Rule 2820 continue to be an important tool in the effective regulation of variable contracts. Accordingly, for the reasons set forth above, FINRA recommends that NASD Rule 2820 be transferred with minor changes into the Consolidated FINRA Rulebook as FINRA Rule 2320. As noted above, 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,⁷ 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 will continue to allow FINRA to effectively regulate members in connection with the sale and distribution of variable contracts.

⁵ FINRA has proposed to transfer NASD Rule 2810 without material change into the Consolidated FINRA Rulebook as FINRA Rule 2310. See SR-FINRA-2009-016.

⁶ See, e.g., the following *Notices to Members*: 98-75 (SEC Approves Rule Change Relating to Non-Cash Compensation for Mutual Funds and Variable Products) (Sept. 1998); 99-103 (SEC Approves Rule Change Relating to Sales Charges for Investment Companies and Variable Contracts) (Dec. 1999); 00-44 (NASD Reminds Members of Their Responsibilities Regarding the Sale of Variable Life Insurance) (July 2000).

⁷ 15 U.S.C. 78o-3(b)(6).

The proposed rule change makes minor changes to a rule that has proven effective in meeting statutory mandates.

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. Please include File Number SR-FINRA-2009-023 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-2009-023. 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 the filing will also 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 No. SR-FINRA-2009-023 and should be submitted on or before May 12, 2009.

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

Florence E. Harmon,
Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-59768; File No. SR-FINRA-2009-004]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of Amendment No. 1 and Order Granting Accelerated Approval to Proposed Rule Change, as Modified by Amendment No. 1, To Expand the Definition of "TRACE-Eligible Security"

April 14, 2009.

I. Introduction

On February 11, 2009, the Financial Industry Regulatory Authority, Inc. ("FINRA") (f/k/a the National Association of Securities Dealers, Inc. ("NASD")) filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934

("Act")¹ and Rule 19b-4 thereunder,² a proposed rule change to expand the definition of "TRACE-eligible security" in FINRA Rule 6710(a). The proposed rule change was published for comment in the **Federal Register** on March 11, 2009.³ The Commission received two comments on the proposal.⁴ On April 9, 2009, FINRA filed Amendment No. 1 to the proposed rule change, in which FINRA also responded to the comments.⁵ The Commission is publishing this notice and order to solicit comments on Amendment No. 1 and to approve the proposed rule change, as modified by Amendment No. 1, on an accelerated basis.

II. Description of the Proposed Rule Change

The current definition of "TRACE-eligible security" in Rule 6710(a) was adopted in 2002 and has not been amended. FINRA generally believes that this definition is sufficiently broad to require the reporting of, and provide price transparency for, a substantial portion of corporate debt securities that are eligible for public sale. However, FINRA has identified several situations where corporate debt securities that are eligible for public sale in the secondary market are trading without TRACE price transparency. According to FINRA, such securities are in many cases "exempted securities" under Section 3 of the Securities Act.⁶ For example, debt securities that are issued subject to the jurisdiction and approval of a court of competent jurisdiction in insolvency matters might be eligible for public sale but not TRACE-eligible because they are not registered under the Securities Act.⁷ In addition, debt securities issued as part of an issuer exchange offer effected pursuant to Section 3(a)(9) of the Securities Act⁸ and those issued by a

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ Securities Exchange Act Release No. 59519 (March 5, 2009), 74 FR 10630 ("Notice").

⁴ See letter from Beth N. Lowson, The Nelson Law Firm, LLC, to Elizabeth M. Murphy, Secretary, Commission, dated March 31, 2009 ("Nelson Letter"); letter from Sean C. Davy, Managing Director, Securities Industry and Financial Markets Association ("SIFMA"), to Elizabeth M. Murphy, Secretary, Commission, dated March 31, 2009 ("SIFMA Letter").

⁵ See *infra* Section III.

⁶ 15 U.S.C. 77c.

⁷ According to FINRA, if an insolvent corporation is reorganized under Chapter 11 of the U.S. Bankruptcy Code, new debt securities are often issued. The issuance is subject to the approval of the trustee and the securities are not required to be registered under the Securities Act. See 11 U.S.C. 101 *et seq.*

⁸ 15 U.S.C. 77c(a)(9). For example, an issuer may exchange an issue of corporate debt securities that are registered under the Securities Act (and subject to both TRACE reporting and dissemination) for

bank or other financial institutions under Section 3(a)(2) of the Securities Act⁹ generally are not subject to TRACE reporting and dissemination for this reason.

Therefore, FINRA has proposed to amend Rule 6710(a), the definition of "TRACE-eligible security," by eliminating the requirement that such securities be "(1) registered under the Securities Act; or (2) issued pursuant to Section 4(2) of the Securities Act and purchased or sold pursuant to Securities Act Rule 144A." This change would expand TRACE eligibility to include additional corporate debt securities that are eligible for public sale, and may have participation by retail investors. Moreover, FINRA notes that its obligation to conduct surveillance in the corporate bond market is not limited to transactions in securities that are registered under the Securities Act, and that its equity trade reporting rules generally apply to any equity securities eligible for public sale and do not consider registration a factor. FINRA believes that expanding TRACE eligibility in this manner "is vital to its mandate to regulate the market, to promote market integrity and to protect investors."¹⁰

FINRA also has proposed to add the phrase "and, if a 'restricted security' as defined in Securities Act Rule 144(a)(3)" in place of the deleted language discussed in the preceding paragraph. Thus, if a security were a restricted security, it would be TRACE-eligible if it were sold pursuant to Rule 144A under the Securities Act¹¹ (assuming it meets the other requirements for TRACE eligibility). The current definition of TRACE-eligible security requires transaction reporting for some but not all of the large market in corporate debt securities that are restricted securities and sold to qualified institutional buyers ("QIBs")¹² in transactions effected pursuant to Rule 144A. Although a significant number of restricted securities sold in Rule 144A transactions are preceded by an offering that is exempt under Section 4(2) of the Securities Act, the limitation in the current definition excludes other Rule 144A transactions that FINRA believes should be reported. Consequently,

new securities that are not registered in reliance upon Section 3(a)(9), which permits such exchanges without registration of the new securities. Although the exchanged security was TRACE-eligible, the new security is not because it is not registered, as required by existing FINRA Rule 6710(a).

⁹ 15 U.S.C. 77c(a)(2).

¹⁰ Notice, 74 FR at 10631.

¹¹ 17 CFR 230.144A.

¹² See 17 CFR 230.144A(a)(1) (defining QIB).

⁸ 17 CFR 200.30-3(a)(12).