consistent with the Act because they clarify the operation of the Hybrid System with respect to Preferred Market Maker participation entitlements.

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[24] that the proposed rule change (File No. SR–CBOE–2009–070) is approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[25]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9–27258 Filed 11–10–09; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–60933; File No. SR–FINRA–2008–067]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of Amendment No. 2 and Order Granting Accelerated Approval to a Proposed Rule Change, as Modified by Amendment Nos. 1 and 2, to Adopt Rules Governing Financial Responsibility in the Consolidated FINRA Rulebook

November 4, 2009.

I. Introduction

On December 30, 2008, 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''), 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 adopt a new, consolidated set of financial responsibility rules as part of the process of developing a new consolidated rulebook (''Consolidated FINRA Rulebook'')[3] without material change. The proposed rule change was published for comment in the **Federal Register** on January 28, 2009.[4] The Commission received two comment letters in response to the proposed rule change,[5] along with one letter from FINRA addressing certain of the comments.[6] FINRA filed Amendment No. 1 to the proposed rule change on June 17, 2009.[7] FINRA filed Amendment No. 2 to the proposed rule change on June 30, 2009.[8] This Order approves the proposed rule change, as modified by Amendment No. 1 and issues notice of, and solicits comments on, Amendment No. 2, and approves the filing, as modified by Amendment No. 2, on an accelerated basis.

II. Description of the Proposed Rule Change

The proposed rule change would adopt FINRA Rules 4110 (Capital Compliance), 4120 (Regulatory Notification and Business Curtailment), 4130 (Regulation of Activities of Section 15C Members Experiencing Financial and/or Operational Difficulties), 4140 (Audit) and 4521 (Notifications, Questionnaires and Reports) in the Consolidated FINRA Rulebook and delete NASD Rules 3130 and 3131, NASD IM–3130, Incorporated NYSE Rules 312(h), 313(d), 325, 326, 328, 416.20, 418, 420, 421 and NYSE Rule Interpretations 313(d)/01, 313(d)/02, 325(c)(1), 325(c)(1)/01 and 416/01. FINRA also proposed to revise FINRA Rule 9557 (Procedures for Regulating Activities Under Rules 4110, 4120 and 4130 Regarding a Member Experiencing Financial or Operational Difficulties) and FINRA Rule 9559 (Hearing Procedures for Expedited Proceedings Under the Rule 9550 Series). Lastly, FINRA proposed to make conforming revisions to Section 4(g) of Schedule A to the FINRA By-Laws.

A. Background

Currently, both NASD and NYSE Rules[9] contain provisions governing financial responsibility. These provisions have played an important role in supporting the SEC's minimum net capital and other financial responsibility requirements by establishing criteria promoting the permanency of member's capital, requiring the review and approval of material financial transactions and establishing criteria intended to identify member firms approaching financial difficulty and to monitor their financial and operational condition. For that reason, FINRA has placed high priority on expeditiously developing the unified set of proposed rules for inclusion in the Consolidated FINRA Rulebook. FINRA believes that the proposed rules would incorporate many of the provisions in the existing rules but would streamline and reorganize the provisions. In addition, FINRA has tiered many provisions to apply only to those firms that clear or carry customer accounts.[10]

B. Proposed FINRA Rule 4110 (Capital Compliance)

1. Authority to Increase Capital Requirements

Proposed FINRA Rule 4110(a), based primarily on NYSE Rule 325(d), would enable FINRA to prescribe greater net capital requirements for carrying and clearing members, or require any such member to restore or increase its net capital or net worth, when deemed necessary for the protection of investors or in the public interest. The authority to act under the proposed rule would reside with FINRA's Executive Vice President charged with oversight for financial responsibility (or his or her written officer delegate) (referred to as ''FINRA's EVP''). To execute such authority, FINRA would be required to issue a notice pursuant to Proposed FINRA Rule 9557 (a ''Rule 9557 notice''). FINRA believes that proposed FINRA Rule 9557, much like the current rule, would afford a member adequate safeguards because, among other things,

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[24] 15 U.S.C. 78s(b)(2).

[25] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The current FINRA rulebook includes, in addition to FINRA Rules, (1) NASD Rules and (2) 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''). For more information about the rulebook consolidation process, *see* FINRA *Information Notice,* March 12, 2008 (Rulebook Consolidation Process).

[4] *See* Securities Exchange Act Release No. 59273 (January 22, 2009), 74 FR 4992 (January 28, 2009) (hereinafter the ''Proposing Release'').

[5] *See* letters from Holly H. Smith and Eric A. Arnold of Sutherland, Asbill & Brennan, LLP on behalf of the Committee of Annuity Insurers dated February 18, 2009 (the ''CAI Letter'') and Julian Rainero of Bracewell & Guiliani, LLP dated April 17, 2009 (the ''B&G Letter'').

[6] *See* letter from Adam H. Arkel of FINRA, dated April 14, 2009 (the ''FINRA Letter'').

[7] Amendment No. 1 is a technical amendment designed to clarify one sentence in the rule text.

[8] Amendment No. 2 adds Supplementary Material to the proposed FINRA Rules 4110, 4120 and 4521 to clarify that, for purposes of each of those rules, all requirements that apply to a member that clear or carry customer accounts also shall apply to any member that, operating pursuant to the exemptive provisions of Rule 15c3–3(k)(2)(i), either clears customer transactions pursuant to such exemptive provisions or holds customer funds in a bank account established thereunder. FINRA explained this aspect of the rule change in its Notice to Members 08–23, and in greater detail in its original filing with the Commission. Further, one of the two commenters commented on this aspect of the proposed rule changes (*See* the CAI Letter). FINRA believes that incorporating this Supplementary Material will reduce any possible ambiguity with respect to this issue.

[9] For convenience, the Incorporated NYSE Rules are referred to as the ''NYSE Rules.''

[10] All requirements set forth in the proposed rules that would apply to firms that clear or carry customer accounts would also apply to firms that operate pursuant to the exemptive provisions of SEA Rule 15c3–3(k)(2)(i). For further clarification in response to commenter concerns, *see* Section 2 under Item II C. *See also infra* note 12.

it provides opportunity for an expedited hearing pursuant to Proposed FINRA Rule 9559.[11]

Proposed FINRA Rule 4110(a) would be a new provision for FINRA members that are not Dual Members (''non-NYSE members'') that are carrying or clearing members. However, it would not apply to introducing firms or to certain firms with limited business models (together, ''non-clearing firms'').[12] In this regard, certain Dual Members that currently are subject to NYSE Rule 325(d)—namely those NYSE member firms that are not carrying or clearing members (''NYSE non-clearing firms'')—would not be subject to the similar requirement in the FINRA Rule. All member firms that are subject to the requirement would have an opportunity to request an expedited hearing if they receive a Rule 9557 notice, which would be a new procedural right not available under NYSE Rule 325(d).

As FINRA has explained in the Notice, the NYSE staff historically employed NYSE Rule 325(d) in limited circumstances, and FINRA anticipates that it would apply Proposed FINRA Rule 4110(a) in similar fashion. The proposed rule would enable FINRA to respond promptly to extraordinary, unanticipated or emergency circumstances. Under Proposed FINRA Rule 4110(a), FINRA's EVP could require a carrying or clearing member to comply with increased capital requirements in circumstances such as where unanticipated systemic market events threaten the member firm's capital, or where the member firm maintains an undue concentration in illiquid products. In such instances, FINRA's EVP may, for example, find it appropriate, in the public interest, to raise the applicable ''haircut'' (that is, to increase the percentage of the market value of certain securities or commodities positions by which the member must reduce its net worth) or treat certain assets as non-allowable in computing net capital.

2. Suspension of Business Operations

Proposed FINRA Rule 4110(b)(1) is based in part on NASD Rule 3130(e) and would provide that, unless otherwise permitted by FINRA, a member firm must suspend all business operations during any period of time in which it is not in compliance with SEA Rule 15c3–1. This requirement is consistent with current law.[13]

As with NASD Rule 3130(e), Proposed FINRA Rule 4110(b)(1) is self-operative (that is, a firm would automatically be required to comply with the provision without any direction from FINRA). Notwithstanding that the proposed provision is self-operative, FINRA may issue a Rule 9557 notice directing a member that is not in compliance with SEA Rule 15c3–1 to suspend all or a portion of its business. Upon receipt of a Rule 9557 notice, the firm would have the right to request an expedited hearing. Neither the fact that FINRA may issue a Rule 9557 notice nor the right to an expedited hearing would be a defense in any subsequent disciplinary proceeding with respect to a member firm's non-compliance with Proposed FINRA Rule 4110(b)(1).

3. Withdrawal of Equity Capital

To further the goal of financial stability, Proposed FINRA Rule 4110(c)(1) would prohibit a member from withdrawing equity capital for a period of one year, unless otherwise permitted by FINRA in writing. In response to commenter [14] requests for clarification of this provision, the proposed rule expressly provides that, subject to the requirements of Proposed FINRA Rule 4110(c)(2), members would not be precluded from withdrawing profits earned.

FINRA anticipates that approvals for the early withdrawal of equity capital pursuant to Proposed FINRA Rule 4110(c)(1) would be granted on a limited basis.[15]

Proposed FINRA Rule 4110(c)(2) would apply only to carrying or clearing members and would prohibit any such member, without the prior written approval of FINRA, from withdrawing capital, paying a dividend or effecting a similar distribution that would reduce the member's equity, or making any unsecured advance or loan to a stockholder, partner, sole proprietor, employee or affiliate, where such withdrawals, payments, reductions, advances or loans in the aggregate, in any rolling 35-calendar-day period, on a net basis, would exceed 10 percent of the member's excess net capital.[16] This provision is based in part on NYSE Rule 312(h) and SEA Rule 15c3–1(e). While it would be a new requirement for non-NYSE members that are carrying or clearing members, it would not apply to non-clearing firms. In this regard, NYSE non-clearing firms that currently are subject to NYSE Rule 312(h) would not be subject to the similar provision in the FINRA Rule. FINRA further notes that the 10 percent limit set forth in Proposed FINRA Rule 4110(c)(2) would provide a *de minimis* exception; current NYSE Rule 312(h) does not include such an exception.

4. Sale-and-Leasebacks, Factoring, Financing, Loans and Similar Arrangements

To ensure the permanency of net capital in contemplated sale-and-leaseback, factoring, financing and similar arrangements, Proposed FINRA Rule 4110(d)(1)(A) would provide that no carrying or clearing member may consummate a sale-and-leaseback arrangement with respect to any of its assets, or a sale, factoring or financing arrangement with respect to any unsecured accounts receivable, where any such arrangement would increase the member's tentative net capital by 10 percent or more,[17] without the prior written authorization of FINRA.

Proposed FINRA Rule 4110(d)(1)(A) is based on NYSE Rule 328(a), but would apply only to carrying and clearing members. While the provision would be new for non-NYSE members that are carrying or clearing members, it would not apply to non-clearing firms. In this regard, NYSE non-clearing firms that currently are subject to NYSE Rule 328(a) would no longer be subject to the similar provision in the FINRA Rule. Moreover, unlike NYSE Rule 328(a), Proposed FINRA Rule 4110(d)(1)(A) includes a *de minimis* exception by permitting a member to consummate, without FINRA's prior authorization, a sale-and-leaseback arrangement with respect to any of its assets, or a sale, factoring or financing arrangement with

[11] *See also* Section F under this Item.

[12] For clarification, introducing firms and firms with limited business models (for example, firms that engage exclusively in subscription-basis mutual fund transactions, direct participation programs, or mergers and acquisitions activities) are not deemed carrying or clearing members and therefore would not be subject to Proposed FINRA Rule 4110(a), or for that matter any of the other provisions of the proposed rules that would apply only to carrying or clearing members.

[13] The Commission notes that the net capital rule requires that ''every broker or dealer shall at all times have and maintain'' certain specified levels of net capital. The Commission further notes that to the extent a broker-dealer fails to maintain at least the amount of net capital specified in that rule, it must cease doing a securities business. [*See* 72 FR 12862, at 12872.]

[14] All references to ''commenters'' are to persons that submitted comments in response to the Notice. For further information on this issue, *see infra* Item II C.

[15] *See* Section 4 under Item II C.

[16] The calculation of 10 percent of excess net capital must be based on the member's excess net capital position as reported in its most recently filed Form X–17A–5. The member must assure itself that the excess net capital so reported has not materially changed since the time the form was filed.

[17] The calculation of 10 percent of tentative net capital must be based on the member's tentative net capital position as reported in its most recently filed Form X–17A–5. The member must assure itself that the tentative net capital so reported has not materially changed since the time the form was filed.

respect to any unsecured accounts receivable where the arrangement would not increase the member firm's tentative net capital by 10 percent or more.[18]

Proposed FINRA Rule 4110(d)(1)(B), which is also based on NYSE Rule 328(a), would provide that no carrying member may consummate any arrangement concerning the sale or factoring of customer debit balances, irrespective of amount, without the prior written authorization of FINRA. The provision would be new for non-NYSE members that are carrying members.

Proposed FINRA Rule 4110(d)(2) is based on NYSE Rule 328(b), but would apply only to carrying and clearing members. The provision would require FINRA's prior approval for any loan agreement entered into by such a member, the proceeds of which exceed 10 percent of the member's tentative net capital [19] and that is intended to reduce the deduction in computing net capital for fixed assets and other assets that cannot be readily converted into cash under SEA Rule 15c3–1(c)(2)(iv). Because the provision would apply only to carrying and clearing members, NYSE non-clearing firms would be relieved from current requirements under NYSE Rule 328(b). In addition, unlike NYSE Rule 328(b), the proposed rule would include a *de minimis* exception.

Proposed FINRA Rule 4110(d)(3) provides that any member that is subject to paragraphs (d)(1)(A), (d)(1)(B) or (d)(2) of Proposed FINRA Rule 4110 would be prohibited from consummating, without FINRA's prior written authorization, any arrangement pursuant to those paragraphs if the aggregate of all such arrangements would exceed 20 percent of the member's tentative net capital.[20]

Proposed FINRA Rule 4110(d)(4) implements a requirement of the SEC's net capital rule and therefore would apply to all members. It provides that any agreement relating to a determination of a ''ready market'' for securities based upon the securities being accepted as collateral for a loan by a bank under SEA Rule 15c3–1(c)(11)(ii) must be submitted to, and be acceptable to, FINRA before the securities may be deemed to have a ''ready market.'' When determining the acceptability of a loan agreement, pursuant to Proposed FINRA Rule 4110(d)(4), FINRA staff would, as a general matter, consider such factors as whether the bank would have sole recourse under the agreement and whether the term of the loan is at least one year. FINRA expects that a determination of acceptability can generally be made within approximately one week.

5. Subordinated Loans, Notes Collateralized by Securities and Capital Borrowings

Proposed FINRA Rule 4110(e) is based in part on current NYSE Rule 420 and would address the requirements for subordinated loans and loans made to general partners of members that are partnerships.

Proposed FINRA Rule 4110(e)(1) would implement Appendix D of SEA Rule 15c3–1 and require that all subordinated loans or notes collateralized by securities must meet such standards as FINRA may require to ensure the continued financial stability and operational capability of a member, in addition to meeting those standards specified in Appendix D of SEA Rule 15c3–1.[21] Appendix D of SEA Rule 15c3–1 requires that all subordination agreements must be found acceptable by the Examining Authority before they can become effective.

Proposed FINRA Rule 4110(e)(2) would require that, unless otherwise permitted by FINRA, each member whose general partner enters into any secured or unsecured borrowing, the proceeds of which will be contributed to the capital of the member, must, in order for the proceeds to qualify as capital acceptable for inclusion in computation of the member's net capital, submit to FINRA for approval a signed copy of the loan agreement. The loan agreement must have at least a 12-month duration and provide non-recourse to the assets of the member firm. Moreover, because a general partner's interest may allow the lender to reach into the assets of the broker-dealer, FINRA is requiring a provision in the loan agreement that would estop the lender from having that right.

C. Proposed FINRA Rule 4120 (Regulatory Notification and Business Curtailment)

1. Regulatory Notification

Proposed FINRA Rule 4120(a) is based on current NYSE Rule 325(b), but would apply only to carrying and clearing members. The proposed rule would require any such member promptly, but in any event within 24 hours, to notify FINRA when certain specified financial triggers are reached.[22] This would be a new notification requirement for non-NYSE members that are carrying or clearing members; it would not, however, apply to non-clearing firms. Accordingly, NYSE non-clearing firms would no longer be subject to these requirements.

2. Restrictions on Business Expansion

Proposed FINRA Rule 4120(b) is based on NASD Rule 3130(c) and NYSE Rule 326(a) and addresses circumstances under which a member would be prohibited from expanding its business.

Proposed FINRA Rule 4120(b)(1), which is self-operative, would apply only to carrying and clearing members, and requires any such member, unless otherwise permitted by FINRA, to refrain from expanding its business during any period in which any of the conditions described in Proposed FINRA Rule 4120(a)(1) continue to exist for the specified time period. While NASD Rule 3130(c) includes comparable provisions, the requirement would now be self-operative for non-NYSE members that are carrying or clearing members. Proposed FINRA Rule 4120(b) also provides that FINRA may issue a Rule 9557 notice directing any such member not to expand its business, in which case the member would have the right to request an expedited hearing. Neither the fact that FINRA may issue a Rule 9557 notice nor the right to an expedited hearing would be a defense in any subsequent disciplinary proceeding with respect to a member's non-compliance with Proposed FINRA Rule 4120(b)(1).

Unlike the self-operative nature of paragraph (b)(1), Proposed FINRA Rule 4120(b)(2) authorizes FINRA, for any financial or operational reason, to restrict any member's ability to expand its business by the issuance of a Rule 9557 notice. In all such cases, the member would have the right to request an expedited hearing. This same right currently applies to NASD Rule 3130(c)(2).

3. Reduction of Business

Proposed FINRA Rule 4120(c) is based on NASD Rule 3130(d) and NYSE

[18] *See supra* note 17.

[19] *See supra* note 17.

[20] *See supra* note 17.

[21] *See* SEA Rule 15c3–1d. Note that the proposed Supplementary Material would require that, for purposes of Proposed FINRA Rule 4110(e)(1), the member must assure itself that any applicable provisions of the Securities Act of 1933 and/or state Blue Sky laws have been satisfied, and may be required to submit evidence thereof to FINRA prior to approval of the subordinated loan agreement. *See* Proposed FINRA Rule 4110.01 (Compliance with Applicable Law).

[22] The determination of whether the financial triggers were reached must be based on the member's financial position as reported in its most recently filed Form X–17A–5. The member must assure itself that its financial position so reported has not materially changed since the time the form was filed.

Rule 326(b) and addresses circumstances under which a member would be required to reduce its business.

Proposed FINRA Rule 4120(c)(1), which is self-operative, would apply only to carrying and clearing members, requiring any such member, unless otherwise permitted by FINRA in writing, to reduce its business to a point enabling its available capital to exceed the standards set forth in Proposed FINRA Rule 4120(a)(1) when any of the enumerated conditions continue to exist for the specified time period. While NASD Rule 3130(d) includes comparable provisions, the requirement would now be self-operative for non-NYSE members that are carrying or clearing members. Proposed FINRA Rule 4120(c)(1) also provides that FINRA may issue a Rule 9557 notice directing any such member to reduce its business, in which case the member would have the right to an expedited hearing. Neither the fact that FINRA may issue a Rule 9557 notice nor the right to an expedited hearing would be a defense in any subsequent disciplinary proceeding with respect to a member's non-compliance with Proposed FINRA Rule 4120(c)(1).

Unlike the self-operative nature of paragraph (c)(1), proposed FINRA Rule 4120(c)(2) authorizes FINRA, for any financial or operational reason, to require any member firm to reduce its business by the issuance of a notice in accordance with Rule 9557. In all such cases, the member firm would have the right to request an expedited hearing. This same right currently applies to NASD Rule 3130(d)(2).

D. Proposed FINRA Rule 4130 (Regulation of Activities of Section 15C Members Experiencing Financial and/or Operational Difficulties)

Proposed FINRA Rule 4130 would be substantially identical to NASD Rule 3131 except that the proposed rule would reflect FINRA as the designated examining authority and make other conforming revisions. The proposed rule would apply only to certain firms that are subject to the Treasury Department's liquid capital requirements.

E. Proposed FINRA Rule 4140 (Audit)

Proposed FINRA Rule 4140 would incorporate FINRA's existing authority under NASD Rule 3130 and NASD IM–3130 and NYSE Rule 418 to request an audit or an agreed-upon procedures review under certain circumstances. The proposed rule would impose a late fee of $100 for each day that a requested report is not timely filed, up to a maximum of 10 business days.

F. Proposed FINRA Rule 4521 (Notifications, Questionnaires and Reports)

Drawing in part on NASD IM–3130 and Rule 3150 and NYSE Rules 325(b)(2), 416[23] and 421(2),[24] Proposed FINRA Rule 4521 would address FINRA's authority to request certain information from members to carry out its surveillance and examination responsibilities. As further described below, many of the provisions would apply only to carrying and clearing members.

Proposed FINRA Rule 4521(a) would provide that each carrying or clearing member must submit to FINRA such financial and operational information regarding the member or any of its correspondents as FINRA deems essential for the protection of investors and the public interest. The provisions would be new for certain non-NYSE members that are carrying or clearing members.[25]

Proposed FINRA Rule 4521(b) would require every member approved by the SEC pursuant to SEA Rule 15c3–1 to use the alternative method of computing net capital contained in Appendix E to that Rule to file such supplemental and alternative reports as may be prescribed by FINRA.

Proposed FINRA Rule 4521(c) would require each carrying or clearing member to notify FINRA in writing no more than 48 hours after its tentative net capital, as computed pursuant to SEA Rule 15c3–1, has declined 20 percent or more from the amount reported in its most recent FOCUS Report or, if later, the most recent such notification filed with FINRA. This would be a new requirement for non-NYSE members that are carrying or clearing members.

Proposed FINRA Rule 4521(d) would require that, unless otherwise permitted by FINRA in writing, member firms carrying margin accounts for customers must submit, on a settlement date basis: (1) The total of all debit balances in securities margin accounts; and (2) the total of all free credit balances contained in cash or margin accounts. This would be a new requirement for non-NYSE member firms that carry margin accounts.

In response to commenter suggestion, Proposed FINRA Rule 4521(e) has been revised to provide that a late fee of $100 would be imposed for each day that any report, notification or information a member is required to file pursuant to Rule 4521 is not timely filed, up to a maximum of 10 business days.

G. Proposed FINRA Rules 9557 (Procedures for Regulating Activities Under Rules 4110, 4120 and 4130 Regarding a Member Experiencing Financial or Operational Difficulties) and 9559 (Hearing Procedures for Expedited Proceedings Under the Rule 9550 Series)

FINRA Rules 9557 and 9559 address service of notice to member firms that are experiencing financial or operational difficulties and the related hearing procedures. The proposed rule change would make a number of conforming revisions to FINRA Rules 9557 and 9559 in light of several of the proposed financial responsibility rules (Proposed FINRA Rules 4110, 4120 and 4130). In response to commenter concerns, FINRA re-iterates that the proposed rule change also would include new provisions to afford members with an appeals process that is both more expedited than that currently provided under FINRA Rules 9557 and 9559 and provides members with adequate safeguards.[26] For example:

- Proposed FINRA Rule 9557(d) would provide that the requirements referenced in a Rule 9557 notice served upon a member are immediately effective. Under the proposed rule change, a timely request for a hearing would stay the effective date for 10 business days after the service of the notice or until a written order is issued pursuant to Proposed FINRA Rule 9559(o)(4)(A) (whichever period is less), unless it is determined that such a stay cannot be permitted with safety to investors, creditors or other member firms;

[23] NYSE Rules 416(a), 416(c) and 416.10 will remain in the Transitional Rulebook to be addressed later in the rulebook consolidation process. On July 11, 2008, the SEC approved FINRA's proposal to delete NYSE Rule 416(b). *See* Securities Exchange Act Release No. 58149 (July 11, 2008), 73 FR 42385 (July 21, 2008) (Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change; File No. SR–FINRA–2008–034).

[24] Because FINRA proposes to delete NYSE Rule 421(2) and its related provision Rule 421.40, the proposed rule change would, in combination with rule change SR–FINRA–2008–033 (which was approved by the SEC on September 4, 2008 and took effect on December 15, 2008), delete NYSE Rule 421 in its entirety. *See* Securities Exchange Act Release No. 58461 (September 4, 2008), 73 FR 52710 (September 10, 2008) (Order Approving Proposed Rule Change; File No. SR–FINRA–2008–033); *see also* FINRA *Regulatory Notice* 08–57 (SEC Approves New Consolidated FINRA Rules) (October 2008).

[25] FINRA notes that NASD Rule 3150 (Reporting Requirements for Clearing Firms) currently requires most carrying and clearing members to submit such data to FINRA. Rule 3150 will be addressed later in the rulebook consolidation process.

[26] *See* Section 7 under Item II.C.

• To ensure an expedited process, Proposed FINRA Rule 9557(e) would require a member to file with the Office of Hearing Officers any written request for a hearing within two business days after service of the Rule 9557 notice;

• Proposed FINRA Rule 9559(f)(1) would provide that, after a respondent subject to a Rule 9557 notice files a written request for a hearing with the Office of Hearing Officers, the hearing must be held within five business days of such filing;

• Proposed FINRA Rule 9559(o)(4)(A) would provide that, within two business days of the date of the close of the hearing, the Office of Hearing Officers must issue the Hearing Panel's written order. The Hearing Panel order would be effective when issued. (The proposed rule change provides that, pursuant to Proposed FINRA Rules 9559(o)(4)(B) and 9559(p), the written decision explaining the reasons for the Hearing Panel's determinations must be issued within seven days of the issuance of the written order.)

Proposed FINRA Rules 9557 and 9559 set forth a number of other enhancements and clarifications of procedure. For example, Proposed FINRA Rule 9557(e)(1) provides that a member served with a Rule 9557 notice may request from FINRA staff a letter of withdrawal of the notice. The member may make this request either in lieu of or in addition to filing with the Office of Hearing Officers the written request for a hearing. The proposed rule change would enable FINRA staff, in response to the member's request, either to withdraw the Rule 9557 notice or to reduce its requirements and/or restrictions.[27] The member may submit a request for a letter of withdrawal to FINRA staff at any time after the notice is served. If such request is denied by FINRA staff, the proposed rule change provides that the member shall not be precluded from making a subsequent request or requests.[28]

If a member requests a hearing within two business days after service of a 9557 notice, the member may seek to contest (1) the validity of the requirements and/or restrictions imposed by the notice (as the same may have been reduced by a letter of withdrawal issued by FINRA staff pursuant to Rule 9557(g)(2), where applicable) and/or (2) FINRA staff's determination not to issue a letter of withdrawal of all requirements and/or restrictions imposed by the notice, if such was requested by the member. The Hearing Panel may then either approve or withdraw the requirements and/or restrictions imposed by the notice. If the Hearing Panel approves the requirements and/or restrictions and finds the member has not complied with all of them, the Hearing Panel shall impose an immediate suspension on the respondent that shall remain in effect unless FINRA staff issues a letter of withdrawal of all requirements and/or restrictions.

FINRA intends to announce the effective date of the proposed rule change in a *Regulatory Notice* to be published no later than 90 days following Commission approval.

III. Comment Letters

The proposed rule change was published for comment in the **Federal Register** on January 28, 2009 and the comment period closed on February 18, 2009. The Commission received two comment letters in response to the proposing release; the CAI Letter and the B&G Letter.[29] While neither commented generally on FINRA's rule proposal, both raised specific, discreet issues relating to those rules.

A. Members Operating Pursuant to SEA Rule 15c3–3(k)(2)(i) Exemption

FINRA stated in its filing with the Commission that ''the requirements set forth in the proposed rules that would apply to carrying and clearing members would also apply to members that operate pursuant to the exemptive provisions of SEA Rule 15c3–3(k)(2)(i).[30]'' One commenter stated that it believes the definition of ''carrying or clearing'' firm should be revised in two respects: first, it believes that FINRA should include firms distributing variable annuities or life insurance within the types of firms FINRA has described as having ''limited business models;'' and second, it believes FINRA should take into consideration the extremely different profile of firms that use the exemption provided in SEC Rule 15c3–3(k)(2)(i) versus the profile of traditional carrying and clearing firms.[31]

With respect to the commenter's first point, FINRA, in its response letter, stated that the commenter may have misinterpreted the purpose of FINRA's reference to limited business models, and ''it is not FINRA's intention to create business model or other exemptions from the proposed rules.''[32] To clarify further, FINRA stated, ''[i]f a firm engages in any carrying or clearing activity, including operating pursuant to the exemptive provisions of 15c3–3(k)(2)(i), then such firm would be expected to comply with all requirements set forth in the proposed rules that apply to carrying and clearing firms. A firm that does not engage in any such activity would not be subject to those requirements.''[33]

With respect to the commenter's second point, FINRA noted that firms that operate pursuant to the Rule 15c3–3(k)(2)(i) exemption receive customer funds for the purpose of settling customer transactions and perform a clearing function, irrespective of how short the period they may hold customer funds.[34] Accordingly, FINRA stated that it believes that firms operating pursuant to the Rule 15c3–3(k)(2)(i) exemption should, as a matter of investor protection, be subject to all requirements set forth in the proposed rules that apply to carrying and clearing firms.[35]

B. Ability to Increase Capital Requirements

One commenter argued that FINRA should build objective standards into Proposed Rule 4110(a) to ensure that firms have some predictability in their cash management functions and so the standards are applied equitably to all FINRA members. In response to similar comments it received in response to its Notice to Members 08–23, FINRA stated that it ''does not agree that it is in the public interest to limit the rule's application by listing specific circumstances under which FINRA would exercise its authority'' because ''Proposed Rule 4110(a) is intended to enable FINRA to respond promptly to extraordinary, unanticipated or emergency circumstances.''[36] FINRA also stated that Proposed FINRA Rule 4110(a) does not lend itself to prescribed parameters.[37]

C. Suspension of Business Operations

One commenter requested clarification on the interplay between FINRA's Proposed Rule 4110(b) and Exchange Act Rule 17a–11. Proposed Rule 4110(b) states, ''[u]nless otherwise permitted by FINRA, a member shall suspend business operations during any period in which it is not in compliance with applicable net capital requirements set forth in SEA Rule 15c3–1.'' In

[27] *See* Proposed FINRA Rule 9557(g)(2).

[28] *See* Proposed FINRA Rule 9557(e)(1).

[29] *See supra,* note 5.

[30] The Notice explained that ''operating'' pursuant to the exemptive provisions of SEA Rule 15c3–3(k)(2)(i) is not meant to include firms that have elected the exemption but do not operate as such.

[31] *See* the CAI Letter.

[32] *See* the FINRA Letter

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *See* the Proposing Release, at 22 (74 FR at 4997). These comments are also reiterated by FINRA in the FINRA Letter, at page 3.

[37] *Id.*

response, FINRA reiterated that ''the requirements set forth in the Proposed Rule are consistent with current law.'' FINRA also highlighted that the Commission, in the Proposing Release, stated ''the net capital rule requires that 'every broker or dealer shall at all times have and maintain' certain specified levels of net capital,'' and further, ''to the extent a broker-dealer fails to maintain at least the amount of net capital specified in that rule, it must cease doing a securities business.'' [38]

D. Withdrawals of Equity Capital

Both commenters raised issues with respect to FINRA's Proposed Rule 4110(c), arguing that it should be amended or that the Commission should reject it because it goes further than Exchange Act Rule 15c3–1(e). In response to this comment, FINRA noted that ''its mandate is to design in enforce rules to ensure investor protection.'' [39] Further, as FINRA explained in the FINRA Letter ''regulation of withdrawal of equity capital serves to promote the financial stability of member firms and, accordingly, is an important element of investor protection.'' [40]

One commenter also asserted that, ''if FINRA believes it must establish a pre-approval requirement, then it needs to give member firms certainty regarding how long firms will have to wait for FINRA's approval.'' [41] In response, FINRA, in the FINRA Letter, reiterated the explanation it provided in its original filing with the Commission that ''requests for withdrawal can be handled in a routine manner and [..] decisions typically would be issued in approximately three business days.'' [42]

Finally, one commenter requested clarification with respect to whether the staff's review and decision will be based on an intra-month net capital computation.[43] FINRA, in the FINRA letter reiterated the explanation it provided in its original filing with the Commission, stating that, for purposes of Proposed FINRA Rule 4110(c)(2), ''the calculation of 10 percent of excess net capital must be based on the member's excess net capital position as reported in its most recently filed Form X–17A–5.'' [44] Further, FINRA stated that, ''the member must assure itself that the excess net capital so reported has not materially changed since the time the form was filed.'' [45]

This commenter further suggests that ''it would be appropriate to revise [Proposed FINRA Rule 4110(b)] to take into account whether the Net Capital Rule violation actually results in the broker-dealer currently being under-capitalized and is a continuing condition.'' [46] In response FINRA, in the FINRA Letter, notes that ''the firm's obligations, both under the current regulatory framework and under the proposed rules, are clear—the firm must maintain the required net capital at all times.'' [47] Further, ''[t]he firm may resume its business when it returns to net capital compliance.'' [48]

E. Service of Notice and Hearing Procedures

Finally, one commenter raised two issues relating to Proposed FINRA Rules 9557 and 9559. First, this commenter argues that FINRA should provide member firms with any or all of the documents on which FINRA relied in imposing restrictions on the member as soon as a hearing is requested to provide member firms with a fair opportunity to present their cases. First, FINRA highlights the fact that, pursuant to Proposed Rule 9559, it is the member firm that requests a hearing and that the hearing must take place within five business days after the member firm files the written hearing request. Further, FINRA states that ''irrespective of document deliver, the proposed rule ensures that a respondent would be fully informed of the factual basis of the action'' pursuant to Proposed FINRA Rule 9557(c).[49]

The second issue raised by this commenter is that the Proposed Rule, which would allow the Hearing Panel to approve or withdraw the requirements and/or restrictions imposed by the notice, ''would have no authority to modify any of the restrictions or limitations FINRA imposed.'' FINRA, in the FINRA letter, disagrees with the commenter's assertion that the Hearing Panel should have the authority to modify the restrictions or limitations imposed by FINRA and states that ''FINRA believes that authorizing the Hearing Panel, apart from action by FINRA staff, to modify the requirements and/or restrictions imposed by a Rule 9557 notice would not be conducive to the efficient and expedited resolution of the action.''

IV. Discussion and Findings

Generally, the Commission agrees with FINRA's responses to the commenters' issues. More specifically, with respect to the inclusion of (k)(2)(i) firms in the definition of carrying and clearing firms, the Commission believes that firms that operate pursuant to the Rule 15c3–3(k)(2)(i) exemption and that receive customer funds and/or securities for the purpose of settling customer transactions perform a clearing function and should be subject to additional scrutiny designed to protect investors. Further, with respect to FINRA's ability to increase capital requirements for its members, the Commission believes that in extraordinary, unanticipated, or emergency situations it is important for FINRA to have flexibility to quickly impose restrictions on its members to protect investors as the situation warrants. With respect to FINRA's requirement that a broker-dealer cease business operations if it is not in compliance with Exchange Act Rule 15c3–1, the Commission notes that this is a restatement of the requirements of the Exchange Act, which states that ''no broker or dealer [..] shall make use of the mails or any means or instrumentality of interstate commerce to effect any transaction in, or to induce or attempt to induce the purchase or sale of, any security [..] in contravention of such rules and regulations as the Commission shall prescribe as necessary or appropriate in the public interest or for the protection of investors to provide safeguards with respect to the financial responsibility.'' Rule 15c3–1 is considered to be a financial responsibility rule.[50] Consequently, to the extent that a broker-dealer fails to ''have and maintain net capital no less than the greater of the highest minimum requirement applicable'' under Rule 15c3–1, the Act would prohibit the broker-dealer from effecting securities transactions. With respect to FINRA's proposed limitations on withdrawals of equity capital set forth in FINRA

[38] *See* the FINRA Letter at page 4. *See also,* note 10 to the Proposing Release, at page 6 (74 FR at 4994). *See also, Amendments to Financial Responsibility Rules for Broker-Dealers,* Securities Exchange Act Release No. 55431 (March 9, 2007) (72 FR 12862, at 12872 (March 19, 2007)), wherein the Commission states, ''section 15(c)(3) of the Exchange Act generally prohibits a broker-dealer from effecting any transaction in, or inducing or attempting to induce the purchase or sale of, any security in contravention of the Commission's financial responsibility rules (which include Rule 15c3–1).'' (15 U.S.C. 78o)

[39] *See* the FINRA Letter, at page 3.

[40] *Id.* In its original filing with the Commission, FINRA stated that financial stability was one of the goals that Proposed FINRA Rule 4110(c) was designed to address (*see* Proposing Release, at page 6 (74 FR at 4994)).

[41] *See* the CAI Letter, at page 5.

[42] *See* the FINRA Letter, at page 3.

[43] *See* the CAI Letter, at page 5.

[44] *See* the FINRA Letter, at page 3. *See also,* note 13 in the Proposing Release, at page 7 (74 FR at 4994).

[45] *Id.*

[46] *See* the CAI Letter, at page 6.

[47] *See* the FINRA Letter, at page 4. See also NTM 07–16, Q&A #1 (April, 2007). *See also,* FINRA's *Interpretations of Financial and Operational Rules,* pages 1 and 13.

[48] *See* the FINRA Letter, at page 4.

[49] *See* the FINRA Letter, at page 4.

[50] *See* 17 CFR 240.3a40–1.

Proposed Rule 4110(c), the Commission believes that each SRO should closely monitor significant withdrawals of capital by its members which could have a material affect on the firm's financial position in order to fulfill its requirement to enforce its members' compliance with the Exchange Act, the rules promulgated thereunder and its own rules.[51]

After careful review of the proposed rule change, the comments, and FINRA's response to the comments, the Commission finds that the proposed rule change is consistent with the requirements of the Act, and the rules and regulations thereunder that are applicable to a national securities association.[52] In particular, the Commission believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act[53] (which requires, among other things, that FINRA rules must be designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, and, in general, to protect investors and the public interest), because the proposed rule change is designed to, among other things, protect investors and the public interest by requiring that each broker-dealer maintain sufficient net capital to allow it to self-liquidate if it experiences financial difficulty. Further, as the proposed rule change consolidates the NYSE and NASD financial responsibility rules into one rule in the consolidated FINRA rulebook, it should provide greater clarity with respect to financial responsibility requirements for broker-dealers.

V. Accelerated Approval

The Commission finds good cause, pursuant to Section 19(b)(2) of the Act,[54] for approving the proposed rule change, as amended by Amendment No. 2 thereto, prior to the 30th day after the date of publication in the **Federal Register**. Accordingly, the Commission finds that good cause exists to approve the proposal, as modified by Amendment No. 2, on an accelerated basis.

[51] *See* Exchange Act section 19(g).

[52] In approving this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 17c(f).

[53] 15 U.S.C. 78o–3(b)(6).

[54] 15 U.S.C. 78o–3(b)(2)

VI. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning Amendment No. 2, 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–2008–067 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–2008–067. 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–2008–067 and should be submitted on or before December 3, 2009.

VII. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act, that the proposed rule change (SR–FINRA–2008–067) be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[55]

Florence E. Harmon,

Deputy Secretary.

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[55] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–60938; File No. SR–CBOE–2009–081]

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend the Marketing Fee Program

November 4, 2009.

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 October 30, 2009, the Chicago Board Options Exchange, Incorporated (''CBOE'' or the ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the CBOE. CBOE has designated this proposal as one establishing or changing a due, fee, or other charge applicable only to a member under Section 19(b)(3)(A)(ii) of the Act[3] and Rule 19b–4(f)(2) thereunder,[4] which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested parties.

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

CBOE proposes to amend its Marketing Fee Program. The text of the proposed rule change is available on the Exchange's Web site (*http://www.cboe.org/Legal/*), at the Exchange's Office of the Secretary, and at the Commission.

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

In its filing with the Commission, CBOE included statements concerning

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(ii).

[4] 17 CFR 240.19b–4(f)(2).