

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-60836; File No. SR-FINRA-2009-060]

### Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of Proposed Rule Change To Amend FINRA Rule 8210 (Provision of Information and Testimony and Inspection and Copying of Books)

October 16, 2009.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on September 10, 2009, Financial Industry Regulatory Authority, Inc. (“FINRA”) filed with the Securities and Exchange Commission (“SEC” or “Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by FINRA. 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 Rule 8210 to clarify the scope of the rule and to clarify certain issues with regard to service of requests made pursuant to the rule.

The text of the proposed rule change is below. Proposed new language is in *italics*; proposed deletions are in brackets.

\* \* \* \* \*

#### 8200. INVESTIGATIONS

##### 8210. Provision of Information and Testimony and Inspection and Copying of Books

###### (a) Authority of Adjudicator and FINRA Staff

For the purpose of an investigation, complaint, examination, or proceeding authorized by the FINRA By-Laws or rules, an Adjudicator or FINRA staff shall have the right to:

(1) Require a member, person associated with a member, or *any other* person subject to FINRA’s jurisdiction to provide information orally, in writing, or electronically (if the requested information is, or is required to be, maintained in electronic form) and to testify at a location specified by FINRA staff, under oath or affirmation administered by a court reporter or a notary public if requested, with respect

to any matter involved in the investigation, complaint, examination, or proceeding; and

(2) Inspect and copy the books, records, and accounts of such member or person with respect to any matter involved in the investigation, complaint, examination, or proceeding *that is in such member’s or person’s possession, custody or control.*

(b) through (c) No Change.

###### (d) Notice

A notice under this Rule shall be deemed received by the member or *currently or formerly registered* person to whom it is directed by mailing or otherwise transmitting the notice to the last known business address of the member or the last known residential address of the person as reflected in the Central Registration Depository. *With respect to a person who is currently associated with a member in an unregistered capacity, a notice under this Rule shall be deemed received by the person by mailing or otherwise transmitting the notice to the last known business address of the member as reflected in the Central Registration Depository. With respect to a person subject to FINRA’s jurisdiction who was formerly associated with a member in an unregistered capacity, a notice under this Rule shall be deemed received by the person upon personal service, as set forth in Rule 9134(a)(1).*

If the Adjudicator or FINRA staff responsible for mailing or otherwise transmitting the notice to the member or person has actual knowledge that the address in the Central Registration Depository is out of date or inaccurate, then a copy of the notice shall be mailed or otherwise transmitted to:

(1) The last known business address of the member or the last known residential address of the person as reflected in the Central Registration Depository; and

(2) Any other more current address of the member or the person known to the Adjudicator or FINRA staff who is responsible for mailing or otherwise transmitting the notice.

*If the Adjudicator or FINRA staff responsible for mailing or otherwise transmitting the notice to the member or person knows that the member or person is represented by counsel regarding the investigation, complaint, examination, or proceeding that is the subject of the notice, then the notice shall be served upon counsel by mailing or otherwise transmitting the notice to the counsel in lieu of the member or person, and any notice served upon counsel shall be deemed received by the member or person.*

(e) through (f) No Change.

\* \* \* \* \*

#### 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

FINRA Rule 8210 (Provision of Information and Testimony and Inspection and Copying of Books) confers on FINRA staff the authority to compel a member, person associated with a member, or other person over whom FINRA has jurisdiction, to produce documents, provide testimony, or supply written responses or electronic data in connection with an investigation, complaint, examination or adjudicatory proceeding. The proposed rule change would clarify the scope of FINRA’s authority in this regard, specify the method of service for certain unregistered persons under the rule, and authorize service on attorneys who are representing clients, as described more fully below.

The rule applies to all members, associated persons, and other persons over which FINRA has jurisdiction, including former associated persons subject to FINRA’s jurisdiction as described in the FINRA By-Laws.<sup>3</sup> FINRA Rule 8210(c) provides that a member’s or associated person’s failure to provide information or testimony or to permit an inspection and copying of books, records, or accounts is a violation of the rule.

##### Information in a Member’s or Person’s Possession, Custody or Control

FINRA Rule 8210(a)(2) currently provides that FINRA staff shall have the right to inspect and copy the books, records and accounts of all applicable members and persons with respect to any matter involved in the investigation, complaint, examination or proceeding. The proposed rule change would clarify

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

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

<sup>3</sup> See FINRA By-Laws, Article V, Section 4(a) (Retention of Jurisdiction).

that the information must be in the member's or person's "possession, custody or control."<sup>4</sup> This language parallels the Federal Rules of Civil Procedure regarding document requests and subpoenas for documents.<sup>5</sup>

#### *Notice to Associated but Unregistered Persons*

FINRA Rule 8210 addresses the legal concept of service of a written request by using the term "notice" of a request. Currently, FINRA Rule 8210(d) states that notice shall be deemed received by the member or associated person when a copy of the notice is mailed or otherwise transmitted to the last known relevant address as reflected in the Central Registration Depository ("CRD®"). The CRD system contains information concerning registered members and persons,<sup>6</sup> but in most instances it does not contain information concerning unregistered persons who are or were associated with a member.<sup>7</sup>

Although not routine, some investigations require FINRA examiners or investigators to request information from persons currently or formerly associated with a member in an unregistered capacity.<sup>8</sup> The current rule

<sup>4</sup>In using the word "control," in addition to possession and custody, FINRA intends to require members or persons covered by the rule to provide, for example, records that they have the legal right, authority, or ability to obtain upon demand. See *Camden Iron & Metal v. Marubeni Am. Corp.*, 138 F.R.D. 438, 441 (D.N.J. 1991) ("Federal courts construe 'control' very broadly under [Federal] Rule [of Civil Procedure] 34."). Moreover, the proposed addition of "possession, custody or control" will address questions that have arisen in litigation regarding the scope of the rule. See, e.g., *In re: Jay Alan Ochanpaugh*, Securities Exchange Act Release No. 54363 (August 25, 2006).

<sup>5</sup> See Fed. R. Civ. P. 34 and 35.

<sup>6</sup>Indeed, members and registered persons have an affirmative duty to update CRD with their current address for at least two years after they have had their registration terminated. See *Notice to Members 99-77* (noting that FINRA requests for information and disciplinary complaints issued during the period of FINRA's retained jurisdiction will be mailed to a person's last address in FINRA's records).

<sup>7</sup>In some limited instances, CRD may contain information concerning unregistered associated persons who were required to submit information, including fingerprint information, to CRD in connection with their employment.

<sup>8</sup>Persons associated with a member who are unregistered may include persons exempt from registration, e.g., those whose functions are solely and exclusively clerical or ministerial; those whose functions are related solely and exclusively to the member's need for nominal corporate officers or for capital participation; and those whose functions are related solely and exclusively to transactions in municipal securities, transactions in commodities, or transactions in security futures (provided they are registered with a registered futures association). See, e.g., NASD Rule 1060(a). For purposes of FINRA Rule 8210, unregistered persons associated with a member may also include direct owners and executive officers listed in Schedule A of Form BD

is unclear as to what would constitute proper notice on such persons for whom information is not available in CRD. The proposed rule change would explicitly address the methods by which notice will be deemed received by persons currently or formerly associated with a member in an unregistered capacity.

With respect to unregistered persons currently associated with a member, the proposed rule change would provide that notice shall be deemed received by mailing or otherwise transmitting the notice to the last known business address of the member as reflected in CRD. In addition, the proposed rule change would retain the provision that, if FINRA staff responsible for transmitting the notice has actual knowledge that the member's address provided through CRD is out of date or inaccurate, then a copy of the notice must be transmitted to both the address provided through CRD, as well as any more current address known to FINRA staff.

With respect to unregistered persons formerly associated with a member, the proposed rule change would provide that notice shall be deemed received upon personal service, which is defined as set forth in FINRA Rule 9134(a)(1).<sup>9</sup> FINRA Rule 9134(a)(1) is based on traditional concepts for serving a summons under Rule 4 of the Federal Rules of Civil Procedure.

#### *Notice to Members and Persons Represented by Counsel*

The proposed rule change would amend FINRA Rule 8210 to explicitly address issues of service on members or persons that are known to be represented by counsel. Currently, the rule does not explicitly permit FINRA staff to serve notice on a member's or person's counsel in situations in which FINRA staff knows that the member or person is represented by counsel regarding the matter in question. The proposed rule change would allow FINRA staff to recognize that counsel can act as an authorized agent on behalf of a member or person. It would provide that, if FINRA staff knows that a member or person is represented by counsel regarding the matter in question, then notice shall be provided

of a member whose job functions do not otherwise require them to register with FINRA. See FINRA By-Laws, Article I(rr) (definition of "person associated with a member").

<sup>9</sup>FINRA Rule 9134(a)(1) provides as follows:

Personal service may be accomplished by handing a copy of the papers to the person required to be served; leaving a copy at the person's office with an employee or other person in charge thereof; or leaving a copy at the person's dwelling or usual place of abode with a person of suitable age and discretion then residing therein.

to counsel rather than to the member or person. The proposed rule change would harmonize FINRA's rule in this regard with Codes of Professional Conduct in many states regarding service on counsel.<sup>10</sup>

FINRA will announce the effective date of the proposed rule change in a *Regulatory Notice* to be published no later than 60 days following Commission approval. The effective date will be 30 days following publication of the *Regulatory Notice* announcing Commission approval.

## 2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,<sup>11</sup> which requires, among other things, that FINRA rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. Vigorous enforcement of the rule has been described as "help[ing to] ensure the continued strength of the self-regulatory system—and thereby enhanc[ing] the integrity of the securities markets and protect[ing] investors."<sup>12</sup> FINRA believes that the proposed rule change will clarify the scope of its authority regarding requests pursuant to FINRA Rule 8210, and explicitly provide FINRA staff with a method to effectively serve notice on persons currently or formerly associated with a member in an unregistered capacity, as well as to members and persons represented by counsel. Thus, FINRA believes the proposed rule change will benefit its enforcement program by providing clarity regarding both scope of requests and service of requests pursuant to FINRA Rule 8210, consistent with the statutory provisions noted above.

### *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

<sup>10</sup> See, e.g., American Bar Association model Rule of Professional Conduct 4.2 ("ABA Rule 4.2"). ABA Rule 4.2 provides as follows:

[i]n representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

Many states have rules regarding communication with a person represented by counsel that are based on ABA Rule 4.2.

<sup>11</sup> 15 U.S.C. 78o-3(b)(6).

<sup>12</sup> *In re: Charles C. Fawcett, IV*, Securities Exchange Act Release No. 56770 (November 8, 2007).

necessary or appropriate in furtherance of the purposes of the Act.

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

Written comments were neither solicited nor received.

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

Within 35 days of the date of publication of this notice in the *Federal Register* or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve such proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved

**IV. Solicitation of Comments**

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-FINRA-2009-060 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-2009-060. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the

proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of FINRA. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-FINRA-2009-060 and should be submitted on or before November 12, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>13</sup>

**Florence E. Harmon,**  
*Deputy Secretary.*

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**BILLING CODE 8011-01-P**

**SECURITIES AND EXCHANGE COMMISSION**

**[Release No. 34-60835; File No. SR-FINRA-2009-055]**

**Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Order Approving Proposed Rule Change To Adopt FINRA Rules 5210 (Publication of Transactions and Quotations) and 5220 (Offers at Stated Prices) Into the Consolidated Rulebook**

October 16, 2009.

On August 18, 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 ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to adopt NASD Rule 3310 (Publication of Transactions and Quotations), NASD Rule 3320 (Offers at Stated Prices), IM-3310 (Manipulative and Deceptive Quotations) and IM-3320 (firmness of Quotations) as FINRA rules in the consolidated FINRA rulebook without material changes. The proposed rule change would combine NASD Rule

3310 and IM-3310 into FINRA Rule 5210 and would combine NASD Rule 3320 and IM-3320 into FINRA Rule 5220 in the consolidated FINRA rulebook. The proposed rule change was published for comment in the **Federal Register** on September 11, 2009.<sup>3</sup> The Commission received no comments on the proposal. This order approves the proposed rule change.

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.<sup>4</sup> In particular, the Commission finds that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,<sup>5</sup> which requires, among other things, that FINRA rules be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest.

The Commission believes that the proposed rule change is designed to protect investors and promote the maintenance of fair, orderly and efficient markets by prohibiting a member from publishing a report of any transaction unless the member believes that it was a bona fide purchase or sale of the security and from "backing away" from its quotations. In approving the proposed rule change, the Commission notes that FINRA is adopting NASD Rule 3310 (Publication of Transactions and Quotations), NASD Rule 3320 (Offers at Stated Prices), IM-3310 (Manipulative and Deceptive Quotations) and IM-3320 (firmness of Quotations) as FINRA rules in the consolidated FINRA rulebook without material changes. The Commission also notes FINRA's representation that it will remind its members of their obligation to have in place a supervisory system and written procedures reasonably designed to ensure the accuracy and integrity of information entered into order-routing execution systems, as further addressed in its Notice to Members 04-66, in a regulatory notice announcing the approval of the proposed rule change.<sup>6</sup>

<sup>3</sup> See Securities Exchange Act Release No. 60613 (September 2, 2009), 74 FR 46814.

<sup>4</sup> 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).

<sup>5</sup> 15 U.S.C. 78o-3(b)(6).

<sup>6</sup> See e-mail from Racquel L. Russell, Assistant General Counsel, FINRA, to Mia Zur, Special Counsel, and Steve Varholik, Special Counsel, Division of Trading and Markets, Commission, October 13, 2009.

<sup>13</sup> 17 CFR 200.30-3(a)(12).

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

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