

## OMB APPROVAL

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SECURITIES AND EXCHANGE COMMISSION  
WASHINGTON, D.C. 20549  
Form 19b-4

File No. SR - 2009 - 042

Amendment No. 

Proposed Rule Change by Financial Industry Regulatory Authority

Pursuant to Rule 19b-4 under the Securities Exchange Act of 1934

Initial ☒ Amendment ☐ Withdrawal ☐

Section 19(b)(2) ☒Section 19(b)(3)(A) ☐Section 19(b)(3)(B) ☐

## Rule

☐ 19b-4(f)(1) ☐ 19b-4(f)(4)  
☐ 19b-4(f)(2) ☐ 19b-4(f)(5)  
☐ 19b-4(f)(3) ☐ 19b-4(f)(6)

Pilot ☐ Extension of Time Period  
for Commission Action ☐ Date Expires

Exhibit 2 Sent As Paper Document  
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Exhibit 3 Sent As Paper Document  
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**Description**

Provide a brief description of the proposed rule change (limit 250 characters).

Proposed Rule Change to Adopt FINRA Rule 3270 (Outside Business Activities of Registered Persons) in the Consolidated FINRA Rulebook.

**Contact Information**

Provide the name, telephone number and e-mail address of the person on the staff of the self-regulatory organization prepared to respond to questions and comments on the proposed rule change.

First Name  Last Name   
Title   
E-mail   
Telephone  Fax

**Signature**

Pursuant to the requirements of the Securities Exchange Act of 1934,

has duly caused this filing to be signed on its behalf by the undersigned thereunto duly authorized officer.

Date By   
(Name)  
(Title)

NOTE: Clicking the button at right will digitally sign and lock  
this form. A digital signature is as legally binding as a physical  
signature, and once signed, this form cannot be changed.

SECURITIES AND EXCHANGE COMMISSION  
WASHINGTON, D.C. 20549

For complete Form 19b-4 instructions please refer to the EDFS website.

**Form 19b-4 Information**

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The self-regulatory organization must provide all required information, presented in a clear and comprehensible manner, to enable the public to provide meaningful comment on the proposal and for the Commission to determine whether the proposal is consistent with the Act and applicable rules and regulations under the Act.

**Exhibit 1 - Notice of Proposed Rule Change**

Add Remove View

The Notice section of this Form 19b-4 must comply with the guidelines for publication in the Federal Register as well as any requirements for electronic filing as published by the Commission (if applicable). The Office of the Federal Register (OFR) offers guidance on Federal Register publication requirements in the Federal Register Document Drafting Handbook, October 1998 Revision. For example, all references to the federal securities laws must include the corresponding cite to the United States Code in a footnote. All references to SEC rules must include the corresponding cite to the Code of Federal Regulations in a footnote. All references to Securities Exchange Act Releases must include the release number, release date, Federal Register cite, Federal Register date, and corresponding file number (e.g., SR-[SRO]-xx-xx). A material failure to comply with these guidelines will result in the proposed rule change being deemed not properly filed. See also Rule 0-3 under the Act (17 CFR 240.0-3)

**Exhibit 2 - Notices, Written Comments, Transcripts, Other Communications**

Add Remove View

Exhibit Sent As Paper Document

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Copies of notices, written comments, transcripts, other communications. If such documents cannot be filed electronically in accordance with Instruction F, they shall be filed in accordance with Instruction G.

**Exhibit 3 - Form, Report, or Questionnaire**

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Exhibit Sent As Paper Document

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Copies of any form, report, or questionnaire that the self-regulatory organization proposes to use to help implement or operate the proposed rule change, or that is referred to by the proposed rule change.

**Exhibit 4 - Marked Copies**

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The full text shall be marked, in any convenient manner, to indicate additions to and deletions from the immediately preceding filing. The purpose of Exhibit 4 is to permit the staff to identify immediately the changes made from the text of the rule with which it has been working.

**Exhibit 5 - Proposed Rule Text**

Add Remove View

The self-regulatory organization may choose to attach as Exhibit 5 proposed changes to rule text in place of providing it in Item I and which may otherwise be more easily readable if provided separately from Form 19b-4. Exhibit 5 shall be considered part of the proposed rule change.

**Partial Amendment**

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If the self-regulatory organization is amending only part of the text of a lengthy proposed rule change, it may, with the Commission's permission, file only those portions of the text of the proposed rule change in which changes are being made if the filing (i.e. partial amendment) is clearly understandable on its face. Such partial amendment shall be clearly identified and marked to show deletions and additions.

**1. Text of Proposed Rule Change**

(a) Pursuant to the provisions of Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),<sup>1</sup> Financial Industry Regulatory Authority, Inc. (“FINRA”) (f/k/a National Association of Securities Dealers, Inc. (“NASD”)) is filing with the Securities and Exchange Commission (“SEC” or “Commission”) a proposed rule change to adopt NASD Rule 3030 (Outside Business Activities of an Associated Person) as FINRA Rule 3270 (Outside Business Activities of Registered Persons) in the consolidated FINRA rulebook with moderate changes. The proposed rule change would delete Incorporated NYSE Rule 346 (Limitations – Employment and Association with Members and Member Organizations) and its interpretations.

The text of the proposed rule change is attached as Exhibit 5 to this rule filing.

(b) Upon Commission approval and implementation of the proposed rule change, the corresponding NASD and Incorporated NYSE rule and its interpretations will be eliminated from the current FINRA rulebook.

(c) Not applicable.

**2. Procedures of the Self-Regulatory Organization**

At its meeting on February 11, 2009, the FINRA Board of Governors authorized the filing of the proposed rule change with the SEC. No other action by FINRA is necessary for the filing of the proposed rule change.

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.

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

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

(a) Purpose

As part of the process of developing a new consolidated rulebook (“Consolidated FINRA Rulebook”),<sup>2</sup> FINRA is proposing to adopt NASD Rule 3030 (Outside Business Activities of an Associated Person) as FINRA Rule 3270 (Outside Business Activities of Registered Persons) in the Consolidated FINRA Rulebook with moderate changes. The proposed rule change would delete Incorporated NYSE Rule 346<sup>3</sup> (Limitations – Employment and Association with Members and Member Organizations) and its interpretations. However, as further described herein, the proposed rule change would incorporate certain provisions of NYSE Rule 346 into new FINRA Rule 3270.

(1) **Proposed FINRA Rule 3270 (Outside Business Activities of Registered Persons)**

Proposed FINRA Rule 3270 would prohibit any registered person from being an employee, independent contractor, sole proprietor, officer, director or partner of another person, or being compensated, or having the reasonable expectation of compensation,

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<sup>2</sup> 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 new 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).

<sup>3</sup> For convenience, the proposed rule change refers to Incorporated NYSE Rules as NYSE Rules.

from another person as a result of any business activity outside the scope of the relationship with his or her member firm, unless he or she has provided prior written notice to the member. The proposed rule change would expand the obligations imposed under NASD Rule 3030, which prohibits any registered person from being employed by or accepting any compensation from any person as a result of any outside business activity, other than passive investment, unless he has provided prompt written notice to his member firm. In contrast, NYSE Rule 346(b) generally prohibits any member (as defined in the NYSE rules) or employee of a member organization from being engaged in any other business, or being employed or compensated by any other person, or serving as an officer, director, partner or employee of another business organization or owning any stock or having any direct or indirect financial interest in any other organization engaged in any securities, financial or kindred business unless such person has made a written request to, and received prior written consent from, his or her member organization employer.

The primary difference between the existing NASD and NYSE rules is the timing of the required notice and the requirement in the NYSE rule for a member's prior written consent. With respect to timing, FINRA believes that registered persons should not be permitted to engage in outside business activities without the firm's prior knowledge. Potential investor harm could ensue in the interim period between the time the registered person commences an outside business activity and the time a firm receives "prompt" written notice. Also, because the term "prompt" is susceptible to differing interpretations, adopting a prior written notice standard in this context would promote consistency within the securities industry, though FINRA understands that, in practice,

many firms already require prior written notice. Further, a prior written notice standard would allow a firm an opportunity to determine whether the proposed outside business activity is properly being characterized by the registered representative as an outside business activity, or whether it is an outside securities activity, subject to NASD Rule 3040 (Private Securities Transactions of an Associated Person).<sup>4</sup>

For these reasons, FINRA proposes that FINRA Rule 3270 require prior written notice whenever a registered representative will be an employee, independent contractor, sole proprietor, officer, director or partner of another person, or will be compensated, or have the reasonable expectation of compensation, from any other person as a result of any outside business activity.

With respect to the requirement in NYSE Rule 346(b) for prior written consent, FINRA believes that requiring prior written consent for outside business activities is unnecessary. However, these activities may nevertheless raise investor protection concerns and adversely impact the individual's business within the firm. To address these concerns, the proposed rule change has supplementary material, drawn in part from procedures required in NYSE Rule 346(e), that sets forth the obligations of a member upon receipt of a written notice of a proposed outside business activity. FINRA believes that firms must review the registered person's participation in the outside activity to determine whether it raises investor protection concerns. Specifically, the supplementary material states that a member must make a determination as to whether the proposed

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<sup>4</sup> FINRA is proposing to replace NASD Rule 3040 with new provisions in proposed FINRA Rule 3110(b)(3), as part of the consolidated FINRA rules addressing supervision and supervisory controls. See FINRA Regulatory Notice 08-24 (May 2008).

activity raises investor protection concerns, and if so, the firm must implement procedures or restrictions on the activity to protect investors, or prohibit the activity. A member also must evaluate the proposed activity to determine whether the activity properly is characterized as an outside business activity or whether it should be treated as an outside securities activity subject to the requirements of NASD Rule 3040.<sup>5</sup>

The proposed rule change also harmonizes and simplifies the events that constitute an outside business activity. Currently, the NASD and NYSE rules have a number of overlapping provisions. NYSE Rule 346(b) generally requires, subject to certain exceptions, written notice whenever a member or employee of a member organization is employed or compensated by any other person; serves as an officer, director, partner or employee of another organization; or owns any stock or has, directly or indirectly, any financial interest in any other organization engaged in any securities, financial or kindred business. NASD Rule 3030 generally requires notice whenever a registered person is employed by or accepts any compensation from any person as a result of any outside business activity, other than passive investment. In reconciling these two standards, the proposed rule change requires prior written notice whenever a registered representative will be an employee, independent contractor, sole proprietor, officer, director or partner of another person, or will be compensated, or have the reasonable expectation of compensation, from any other person as a result of any outside business activity. The inclusion of the phrase “or have the reasonable expectation of

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<sup>5</sup> FINRA is proposing to replace NASD Rule 3040 with new provisions in proposed FINRA Rule 3110(b)(3), as part of the consolidated FINRA rules addressing supervision and supervisory controls. See FINRA Regulatory Notice 08-24 (May 2008).

compensation” addresses situations where an outside activity does not immediately yield compensation (e.g., where a registered person intends to work for a start-up business). FINRA believes that a registered person should not be able to engage in an activity in which he or she reasonably expects to be compensated without providing the firm with prior written notice. FINRA believes that a rule dependent on the prior receipt of compensation is too narrow and may be susceptible to abuse. Proposed Rule 3270 retains the exemptions in NASD Rule 3030 for “passive investments” and activities subject to the requirements of NASD Rule 3040.<sup>6</sup>

In addition, the proposed rule would streamline the text by substituting the phrase “person associated with a member in any registered capacity” with “registered person” and would re-title the rule “Outside Business Activities of Registered Persons” to better reflect its application to registered persons.

(2) Deleted Provisions of Incorporated NYSE Rule 346 and Its Supplementary Material and Interpretations

FINRA proposes to delete other provisions of NYSE Rule 346 that are unnecessary and/or duplicative of provisions in the federal securities laws or the FINRA manual and delete NYSE Rule Interpretations that are unnecessary or inconsistent with Proposed Rule 3270.

NYSE Rule 346(a) and related NYSE Interpretation 346/01 require that natural persons not associated with entities which are registered broker-dealers must themselves register as a broker or dealer with the SEC unless specifically exempted by the Exchange

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<sup>6</sup> FINRA is separately considering NASD Rule 3050 (Transactions for or by Associated Persons) as part of the rulebook consolidation process and will consider whether transactions subject to NASD Rule 3050, as proposed to be amended, also should be exempted from proposed FINRA Rule 3270.

Act. These provisions are redundant in light of Section 15(a) of the Exchange Act<sup>7</sup> and are proposed for deletion.

NYSE Rule 346(c) states that where a member organization approves an employee's participation in a private securities transaction in which regard the employee has or may receive selling compensation, the transaction shall be recorded on the books and records of the member organization, which shall supervise such participation as if the transaction were executed on its behalf. This provision is redundant of NASD Rule 3040 (Private Securities Transactions of an Associated Person) and is proposed for deletion.<sup>8</sup>

NYSE Rule 346(d) provides that no member shall qualify more than one member organization for membership. This provision is inconsistent with FINRA's approach to membership, which allows the same individual to qualify more than one firm for membership, as appropriate. FINRA examines separately the merits of each membership application and proposes that the prohibition in the NYSE rule be deleted.

NYSE Rule 346(e) requires that every employee of a member organization who is assigned or delegated any responsibility or authority pursuant to NYSE Rule 342 shall devote his entire time during business hours to the business of such member organization unless an alternative arrangement has been approved in writing by the member organization. FINRA believes that the existing and proposed rules on supervision and outside business activities adequately ensure that the member firm's business is not

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<sup>7</sup> 15 U.S.C. 78o-3.

<sup>8</sup> FINRA is proposing to replace NASD Rule 3040 with new provisions in proposed FINRA Rule 3110(b)(3), as part of the consolidated FINRA rules addressing supervision and supervisory controls. See FINRA Regulatory Notice 08-24 (May 2008).

adversely affected by outside activities. Moreover, associated persons in the independent broker-dealer channel at times devote substantial time to non-member business and this provision, if applied to such firms, would create unnecessary administrative burdens. Accordingly, this provision is proposed for deletion.

NYSE 346(f) states that unless otherwise permitted by the Exchange, no member, member organization, approved person, employee or any person directly or indirectly controlling, controlled by or under common control with a member or member organization shall have associated with him or it any person who is known, or in the exercise of reasonable care should be known, to be subject to any “statutory disqualification” defined in Section 3(a)(39) of the Exchange Act.<sup>9</sup> In connection with FINRA’s consolidation transaction, FINRA amended its definition of disqualification in its By-Laws to align with the Exchange Act definition, thereby incorporating additional categories of statutory disqualification, including certain affiliated relationships.<sup>10</sup> Accordingly, FINRA proposes to delete NYSE Rule 346(f).

Finally, FINRA proposes to delete NYSE Rule Interpretations 346/02 and /03 addressing personal business expenses and factors to consider when approving outside activities as they are unnecessary or inconsistent with the proposed rule. The provisions in NYSE Rule Interpretation 346/02 requiring a firm to assume responsibility for all activities effected on its behalf and under its name are addressed by other FINRA rules, including supervision rules. In addition, FINRA has chosen not to impose a requirement

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<sup>9</sup> 15 U.S.C. 78c(a)(39).

<sup>10</sup> For further discussion, see Securities Exchange Act Release No. 59586 (March 17, 2009), 74 FR 12166 (March 23, 2009) (Order Approving SR-FINRA-2008-045).

for firms to approve all advertisements of an outside business, though a firm may impose such restrictions as part of its obligations under supplementary material .01. FINRA requires firms to approve all advertisements for member firm business, even if an advertisement relates to the firm's non-securities business; however, FINRA does not believe that approval should be required for outside business activities permitted under the proposed rule change.

For the reasons noted above, FINRA proposes to transfer NASD Rule 3030 into the Consolidated FINRA Rulebook with the changes described herein. In addition, FINRA proposes to delete NYSE Rule 346 and its interpretations from the Transitional Rulebook also as described herein.

As noted in Item 2 of this filing, 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.

(b) 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. The proposed rule change will clarify and streamline NASD Rule 3030 for adoption as a FINRA rule in the new Consolidated FINRA Rulebook, while also implementing additional protections such as the need for registered persons to provide

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

prior written notice to its member firms of proposed outside business activities and for firms to determine whether the proposed activities raise investor protection concerns.

**4. 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.

**5. 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.

**6. Extension of Time Period for Commission Action**

FINRA does not consent at this time to an extension of the time period for Commission action specified in Section 19(b)(2) of the Act.<sup>12</sup>

**7. Basis for Summary Effectiveness Pursuant to Section 19(b)(3) or for Accelerated Effectiveness Pursuant to Section 19(b)(2)**

Not applicable.

**8. Proposed Rule Change Based on Rules of Another Self-Regulatory Organization or of the Commission**

Not applicable.

**9. Exhibits**

Exhibit 1. Completed notice of proposed rule change for publication in the Federal Register.

Exhibit 5. Text of proposed rule change.

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<sup>12</sup> 15 U.S.C. 78s(b)(2).

EXHIBIT 1

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34- ; File No. SR-FINRA-2009-042)

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of Proposed Rule Change Relating to Outside Business Activities of Registered Persons

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 , 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 3030 (Outside Business Activities of an Associated Person) as FINRA Rule 3270 (Outside Business Activities of Registered Persons) in the consolidated FINRA rulebook with moderate changes. The proposed rule change would delete Incorporated NYSE Rule 346 (Limitations – Employment and Association with Members and Member Organizations) and its interpretations. The proposed rule change would require registered persons to give notice to member firms prior to engaging in an outside business activity (as definite therein).

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

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

The text of the proposed rule change is available on FINRA's Web site at <http://www.finra.org>, at the principal office of FINRA and at the Commission's Public Reference Room.

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

In its filing with the Commission, FINRA included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. FINRA has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

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

1. Purpose

As part of the process of developing a new consolidated rulebook ("Consolidated FINRA Rulebook"),<sup>3</sup> FINRA is proposing to adopt NASD Rule 3030 (Outside Business Activities of an Associated Person) as FINRA Rule 3270 (Outside Business Activities of Registered Persons) in the Consolidated FINRA Rulebook with moderate changes. The proposed rule change would delete Incorporated NYSE Rule 346<sup>4</sup> (Limitations –

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<sup>3</sup> 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 new 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).

<sup>4</sup> For convenience, the proposed rule change refers to Incorporated NYSE Rules as NYSE Rules.

Employment and Association with Members and Member Organizations) and its interpretations. However, as further described herein, the proposed rule change would incorporate certain provisions of NYSE Rule 346 into new FINRA Rule 3270.

(1) Proposed FINRA Rule 3270 (Outside Business Activities of Registered Persons)

Proposed FINRA Rule 3270 would prohibit any registered person from being an employee, independent contractor, sole proprietor, officer, director or partner of another person, or being compensated, or having the reasonable expectation of compensation, from another person as a result of any business activity outside the scope of the relationship with his or her member firm, unless he or she has provided prior written notice to the member. The proposed rule change would expand the obligations imposed under NASD Rule 3030, which prohibits any registered person from being employed by or accepting any compensation from any person as a result of any outside business activity, other than passive investment, unless he has provided prompt written notice to his member firm. In contrast, NYSE Rule 346(b) generally prohibits any member (as defined in the NYSE rules) or employee of a member organization from being engaged in any other business, or being employed or compensated by any other person, or serving as an officer, director, partner or employee of another business organization or owning any stock or having any direct or indirect financial interest in any other organization engaged in any securities, financial or kindred business unless such person has made a written request to, and received prior written consent from, his or her member organization employer.

The primary difference between the existing NASD and NYSE rules is the timing of the required notice and the requirement in the NYSE rule for a member's prior written

consent. With respect to timing, FINRA believes that registered persons should not be permitted to engage in outside business activities without the firm's prior knowledge. Potential investor harm could ensue in the interim period between the time the registered person commences an outside business activity and the time a firm receives "prompt" written notice. Also, because the term "prompt" is susceptible to differing interpretations, adopting a prior written notice standard in this context would promote consistency within the securities industry, though FINRA understands that, in practice, many firms already require prior written notice. Further, a prior written notice standard would allow a firm an opportunity to determine whether the proposed outside business activity is properly being characterized by the registered representative as an outside business activity, or whether it is an outside securities activity, subject to NASD Rule 3040 (Private Securities Transactions of an Associated Person).<sup>5</sup>

For these reasons, FINRA proposes that FINRA Rule 3270 require prior written notice whenever a registered representative will be an employee, independent contractor, sole proprietor, officer, director or partner of another person, or will be compensated, or have the reasonable expectation of compensation, from any other person as a result of any outside business activity.

With respect to the requirement in NYSE Rule 346(b) for prior written consent, FINRA believes that requiring prior written consent for outside business activities is unnecessary. However, these activities may nevertheless raise investor protection concerns and adversely impact the individual's business within the firm. To address

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<sup>5</sup> FINRA is proposing to replace NASD Rule 3040 with new provisions in proposed FINRA Rule 3110(b)(3), as part of the consolidated FINRA rules addressing supervision and supervisory controls. See FINRA Regulatory Notice 08-24 (May 2008).

these concerns, the proposed rule change has supplementary material, drawn in part from procedures required in NYSE Rule 346(e), that sets forth the obligations of a member upon receipt of a written notice of a proposed outside business activity. FINRA believes that firms must review the registered person's participation in the outside activity to determine whether it raises investor protection concerns. Specifically, the supplementary material states that a member must make a determination as to whether the proposed activity raises investor protection concerns, and if so, the firm must implement procedures or restrictions on the activity to protect investors, or prohibit the activity. A member also must evaluate the proposed activity to determine whether the activity properly is characterized as an outside business activity or whether it should be treated as an outside securities activity subject to the requirements of NASD Rule 3040.<sup>6</sup>

The proposed rule change also harmonizes and simplifies the events that constitute an outside business activity. Currently, the NASD and NYSE rules have a number of overlapping provisions. NYSE Rule 346(b) generally requires, subject to certain exceptions, written notice whenever a member or employee of a member organization is employed or compensated by any other person; serves as an officer, director, partner or employee of another organization; or owns any stock or has, directly or indirectly, any financial interest in any other organization engaged in any securities, financial or kindred business. NASD Rule 3030 generally requires notice whenever a registered person is employed by or accepts any compensation from any person as a result of any outside business activity, other than passive investment. In reconciling

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<sup>6</sup> FINRA is proposing to replace NASD Rule 3040 with new provisions in proposed FINRA Rule 3110(b)(3), as part of the consolidated FINRA rules addressing supervision and supervisory controls. See FINRA Regulatory Notice 08-24 (May 2008).

these two standards, the proposed rule change requires prior written notice whenever a registered representative will be an employee, independent contractor, sole proprietor, officer, director or partner of another person, or will be compensated, or have the reasonable expectation of compensation, from any other person as a result of any outside business activity. The inclusion of the phrase “or have the reasonable expectation of compensation” addresses situations where an outside activity does not immediately yield compensation (e.g., where a registered person intends to work for a start-up business). FINRA believes that a registered person should not be able to engage in an activity in which he or she reasonably expects to be compensated without providing the firm with prior written notice. FINRA believes that a rule dependent on the prior receipt of compensation is too narrow and may be susceptible to abuse. Proposed Rule 3270 retains the exemptions in NASD Rule 3030 for “passive investments” and activities subject to the requirements of NASD Rule 3040.<sup>7</sup>

In addition, the proposed rule would streamline the text by substituting the phrase “person associated with a member in any registered capacity” with “registered person” and would re-title the rule “Outside Business Activities of Registered Persons” to better reflect its application to registered persons.

(2) Deleted Provisions of Incorporated NYSE Rule 346 and Its Supplementary Material and Interpretations

FINRA proposes to delete other provisions of NYSE Rule 346 that are unnecessary and/or duplicative of provisions in the federal securities laws or the FINRA

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<sup>7</sup> FINRA is separately considering NASD Rule 3050 (Transactions for or by Associated Persons) as part of the rulebook consolidation process and will consider whether transactions subject to NASD Rule 3050, as proposed to be amended, also should be exempted from proposed FINRA Rule 3270.

manual and delete NYSE Rule Interpretations that are unnecessary or inconsistent with Proposed Rule 3270.

NYSE Rule 346(a) and related NYSE Interpretation 346/01 require that natural persons not associated with entities which are registered broker-dealers must themselves register as a broker or dealer with the SEC unless specifically exempted by the Exchange Act. These provisions are redundant in light of Section 15(a) of the Exchange Act<sup>8</sup> and are proposed for deletion.

NYSE Rule 346(c) states that where a member organization approves an employee's participation in a private securities transaction in which regard the employee has or may receive selling compensation, the transaction shall be recorded on the books and records of the member organization, which shall supervise such participation as if the transaction were executed on its behalf. This provision is redundant of NASD Rule 3040 (Private Securities Transactions of an Associated Person) and is proposed for deletion.<sup>9</sup>

NYSE Rule 346(d) provides that no member shall qualify more than one member organization for membership. This provision is inconsistent with FINRA's approach to membership, which allows the same individual to qualify more than one firm for membership, as appropriate. FINRA examines separately the merits of each membership application and proposes that the prohibition in the NYSE rule be deleted.

NYSE Rule 346(e) requires that every employee of a member organization who is assigned or delegated any responsibility or authority pursuant to NYSE Rule 342 shall

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<sup>8</sup> 15 U.S.C. 78o-3.

<sup>9</sup> FINRA is proposing to replace NASD Rule 3040 with new provisions in proposed FINRA Rule 3110(b)(3), as part of the consolidated FINRA rules addressing supervision and supervisory controls. See FINRA Regulatory Notice 08-24 (May 2008).

devote his entire time during business hours to the business of such member organization unless an alternative arrangement has been approved in writing by the member organization. FINRA believes that the existing and proposed rules on supervision and outside business activities adequately ensure that the member firm's business is not adversely affected by outside activities. Moreover, associated persons in the independent broker-dealer channel at times devote substantial time to non-member business and this provision, if applied to such firms, would create unnecessary administrative burdens. Accordingly, this provision is proposed for deletion.

NYSE 346(f) states that unless otherwise permitted by the Exchange, no member, member organization, approved person, employee or any person directly or indirectly controlling, controlled by or under common control with a member or member organization shall have associated with him or it any person who is known, or in the exercise of reasonable care should be known, to be subject to any "statutory disqualification" defined in Section 3(a)(39) of the Exchange Act.<sup>10</sup> In connection with FINRA's consolidation transaction, FINRA amended its definition of disqualification in its By-Laws to align with the Exchange Act definition, thereby incorporating additional categories of statutory disqualification, including certain affiliated relationships.<sup>11</sup>

Accordingly, FINRA proposes to delete NYSE Rule 346(f).

Finally, FINRA proposes to delete NYSE Rule Interpretations 346/02 and /03 addressing personal business expenses and factors to consider when approving outside

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<sup>10</sup> 15 U.S.C. 78c(a)(39).

<sup>11</sup> For further discussion, see Securities Exchange Act Release No. 59586 (March 17, 2009), 74 FR 12166 (March 23, 2009) (Order Approving SR-FINRA-2008-045).

activities as they are unnecessary or inconsistent with the proposed rule. The provisions in NYSE Rule Interpretation 346/02 requiring a firm to assume responsibility for all activities effected on its behalf and under its name are addressed by other FINRA rules, including supervision rules. In addition, FINRA has chosen not to impose a requirement for firms to approve all advertisements of an outside business, though a firm may impose such restrictions as part of its obligations under supplementary material .01. FINRA requires firms to approve all advertisements for member firm business, even if an advertisement relates to the firm's non-securities business; however, FINRA does not believe that approval should be required for outside business activities permitted under the proposed rule change.

For the reasons noted above, FINRA proposes to transfer NASD Rule 3030 into the Consolidated FINRA Rulebook with the changes described herein. In addition, FINRA proposes to delete NYSE Rule 346 and its interpretations from the Transitional Rulebook also as described herein.

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,<sup>12</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. The proposed rule change will clarify and streamline NASD Rule 3030 for

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<sup>12</sup> 15 U.S.C. 78o-3(b)(6).

adoption as a FINRA rule in the new Consolidated FINRA Rulebook, while also implementing additional protections such as the need for registered persons to provide prior written notice to its member firms of proposed outside business activities and for firms to determine whether the proposed activities raise investor protection concerns.

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](mailto:rule-comments@sec.gov). Please include File Number SR-FINRA-2009-042 on the subject line.

Paper Comments:

- Send paper comments in triplicate to Florence E. Harmon, Deputy Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-FINRA-2009-042. 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-2009-042 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

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

## EXHIBIT 5

Below is the text of the proposed rule change. Proposed new language is underlined; proposed deletions are in brackets.

\* \* \* \* \*

**Text of Proposed New FINRA Rule  
(Marked to Show Changes from NASD Rule 3030; NASD Rule 3030 to be Deleted in  
its Entirety from the Transitional Rulebook)**

\* \* \* \* \*

### **3000. SUPERVISION AND RESPONSIBILITIES RELATING TO ASSOCIATED PERSONS**

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### **3200. RESPONSIBILITIES RELATING TO ASSOCIATED PERSONS**

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#### **[3030]3270. Outside Business Activities of [an Associated Person] Registered Persons**

No registered person [associated with a member in any registered capacity shall] may be an employee[d by], independent contractor, sole proprietor, officer, director or partner of another person, or be compensated, or have the reasonable expectation of compensation, [or accept compensation] from[,] any other person as a result of any business activity[, other than a passive investment,] outside the scope of [his] the relationship with his or her member [employer] firm, unless he or she has provided [prompt] prior written notice to the member[.], in [S]such [notice shall be in the] form as specified [required] by the member. Passive investments and [A]activities subject to the requirements of NASD Rule 3040 shall be exempted from this requirement.

**• • • Supplementary Material: -----**

**.01 Obligations of Member Receiving Notice.** Upon receipt of a written notice under Rule 3270, a member must make a determination whether the proposed activity raises investor protection concerns, and if so, the firm must implement procedures or restrictions on the activity to protect investors, or prohibit the activity. A member also must evaluate the proposed activity to determine whether the activity properly is characterized as an outside business activity or whether it should be treated as an outside securities activity subject to the requirements of Rule 3110(b)(3). A member must keep a record of its compliance with these obligations with respect to each written notice received and must preserve this record for the period of time and accessibility specified in SEA Rule 17a-4(e)(1).

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**Text of Incorporated NYSE Rule and Rule Interpretations to be Deleted in their Entirety from the Transitional Rulebook**

**Incorporated NYSE Rules**

\* \* \* \* \*

**[Rule 346. Limitations—Employment and Association with Members and Member Organizations]**

[(a) Every member not associated with a member organization must be a registered broker or dealer unless exempted by the Securities Exchange Act of 1934.]

[(b) Without making a written request and receiving the prior written consent of his member or member organization employer, no member or employee of a member or member organization shall at any time be engaged in any other business; or be employed or compensated by any other person; or serve as an officer, director, partner or employee

of another business organization; or own any stock or have, directly or indirectly, any financial interest in any other organization engaged in any securities, financial or kindred business; provided however, that such written request and consent shall not be required with regard to stock ownership or other financial interest in any securities, financial or kindred business which is publicly owned unless a control relationship exists.]

[(c) Where a member organization approves an employee's participation in private securities transactions in which regard the employee has or may receive selling compensation, the transaction shall be recorded on the books and records of the member organization, which shall supervise such participation as if the transaction were executed on its behalf.]

[(d) No member shall qualify more than one member organization for membership.]

[(e) Every employee of a member organization who is assigned or delegated any responsibility or authority pursuant to Rule 342 shall devote his entire time during business hours to the business of such member organization unless an alternate arrangement has been approved in writing by the member organization.]

[The written approval of such arrangements must identify any entity for which the supervisory person will be performing services during business hours and must specifically describe the nature of such services. The approval must also set forth the approximate amount of time the supervisory person is expected to devote to each entity, with particular attention paid to the approximate time expected to be required for the person, based upon such person's qualifications and experience, to effectively discharge his or her supervisory responsibilities on behalf of any associated person of a member organization.]

[In addition, the approval letter must document that the member organization has made a good faith determination that the arrangement will in no way compromise the protection of investors or the public interest; compromise the supervisor's duties at the member organization; or give rise to a material conflict of interest.]

[(f) Except as otherwise permitted by the Exchange, no member, member organization, approved person, employee or any person directly or indirectly controlling, controlled by or under common control with a member or member organization shall have associated with him or it any person who is known, or in the exercise of reasonable care should be known, to be subject to any “statutory disqualification” defined in Section 3(a)(39) of the Securities Exchange Act of 1934.]

[• • • **Supplementary Material:** -----]

[.11 For the purpose of this rule, control is defined in Rule 2.]

[.12 For the purposes of this rule, the term associated with a member or member organization shall have the same meaning as the term “associated with a member” is defined in Section 3(a)(21) of the Securities Exchange Act of 1934.]

[.20 Under the appropriate circumstances the Exchange may, in determining control, treat as a single holding stock which is nominally held by different persons or organizations.]

[.30 For the purposes of this rule, the term “private securities transaction” shall mean any securities transaction outside the regular course or scope of an associated person's employment with a member organization, including, though not limited to, new offerings of securities which are not registered with the Commission, provided however that transactions subject to the notification requirements of Rule 407, transactions among

immediate family members for which no associated person receives any selling compensation, and personal transactions in investment company and variable annuity securities, shall be excluded. The term “immediate family members” means a person's parents, mother-in-law or father-in-law, spouse, brother or sister, brother-in-law or sister-in-law, son-in-law or daughter-in-law, and children, and any other individual to whom the person provides material support.]

[.40 For the purposes of this rule, the term “selling compensation” shall mean any compensation paid directly or indirectly from any source in connection with or as a result of the purchase or sale of a security, including, though not limited to, commissions; finder's fees; securities or rights to acquire securities; rights of participation in profits, tax benefits, or dissolution proceeds, as a general partner or otherwise; or expense reimbursements.]

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### **Incorporated NYSE Rule Interpretations**

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### **[Rule 346 Limitations — Employment and Association with Member Organizations]**

#### **[/01 Registration of Unassociated Natural Persons]**

[NYSE Rule 346(a) and Section 15(a) of the Securities Exchange Act of 1934 (the “Exchange Act”) require that natural persons not associated with entities which are registered broker/dealers must themselves register as a broker or dealer with the SEC unless specifically exempted by the Exchange Act.]

#### **[/02 Personal Business Expenses]**

[Registered representatives are permitted to absorb the cost of any advertising or outside

activities. However, a member organization must establish controls to ensure that the contents of all such advertising and all outside activities receive its approval, and otherwise assume responsibility for all activities effected on its behalf and under its name.]

[/03 Outside Connections — Legal Limitations]

[Rule 346 affords member organizations discretion to permit their associated persons to engage in outside activities — without Exchange approval — to the extent compatible with Rule 342. In the exercise of this discretion, member organizations and their associated persons would be advised to consult with counsel as to possible limitations arising under specific provisions of Federal Law. (See, for example, Section B of the Clayton Act, 15 USC 19 governing common directors of competing corporations).]

[Before approving an outside connection for an associated person, member organizations should consider any possible conflict of interest and potential liability that may accrue as a result of the outside activity. Particularly sensitive situations arise when the outside connection is an unrelated securities business since it may be perceived that any business done with such associated person is done with his member organization. Even in the unique circumstance where approval is granted, the member organization should consider whether such person is associated with another registered entity (broker/dealer or investment adviser) or should be individually registered with the Securities and Exchange Commission as a broker/dealer or investment advisor.]

[(e) STATUTORY DISQUALIFICATIONS]

[/01 Definitions]

[Statutory disqualifications relate basically to acts involving expulsion or suspension by

any regulatory or self-regulatory agency or other acts of dishonesty, acts or conduct constituting a statutory disqualification as set forth in Section 3(a)(39) of the Exchange Act as well as convictions within the past ten years for felonies or misdemeanors specified in Section 15(b)(4)(B) of the Exchange Act.]

[/02 Reporting Requirements — Non-Registered Employees]

[Member organizations are required to submit to the Exchange (for filing with the SEC) details concerning any prospective employee subject to a statutory disqualification.

Member organizations should exert reasonable care to determine the existence of a statutory disqualification prior to employing any prospective employee.]

[For those persons already employed by a member organization who thereafter become subject to a statutory disqualification, notice should be sent to the Exchange immediately.]

[/03 Reporting Requirements — Form U4 Applications]

[A candidate for registration who is subject to a statutory disqualification may not engage in any activity on behalf of his or her employer until such time as approval has been obtained by the Exchange and the SEC.]

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