

Register on April 16, 2008.<sup>5</sup> The Amex filed Amendment No. 4 to the proposed rule change on May 15, 2008.<sup>6</sup> The Commission received no comment letters regarding the proposed rule change. This order approves the proposed rule change, as modified.

Pursuant to section 31 of the Act<sup>7</sup> and Rule 31 thereunder,<sup>8</sup> national securities exchanges and associations (collectively "SROs") are required to pay a transaction fee to the Commission that is designed to recover the costs related to the government's supervision and regulation of the securities markets and securities professionals. To offset this obligation, the Amex assesses its clearing and self-clearing members a regulatory fee in accordance with Rule 393, which mirrors section 31 in both scope and amount. Clearing members may in turn seek to charge a fee to their customers or correspondent firms. Any allocation of the fee between a clearing member and its correspondent firm or customer is the responsibility of the clearing member.

Reconciling the amounts reported to the Amex and the amounts collected from the customers historically had been difficult for member firms, causing surpluses to accumulate at some member firms (referred to as "accumulated funds"). These accumulated funds were not remitted to the Amex by certain members, despite the fact that these charges may have been previously identified as "Section 31 Fees" or "SEC Fees" by the firms.<sup>9</sup> In addition, since the Amex uses a "self-reporting" methodology for its members to report and remit amounts payable pursuant to Rule 393, the Amex has and continues to accumulate amounts in excess of the amounts paid by the Amex to the Commission pursuant to section

31 and Rule 31 ("Exchange accumulated funds").

The Exchange is proposing a new Commentary to Rule 393 that will allow firms, on a one-time-only basis, voluntarily to remit historically accumulated funds to the Exchange. These funds then would be used to pay the Exchange's current Section 31 fees in conformity with prior representations made by member firms. In addition, a member or member organization may designate all or part of the Exchange-accumulated excess held by the Exchange and allocated to such member be used by the Exchange in accordance with the new Commentary to Rule 393. Finally, to the extent the payment of these historically accumulated funds or Exchange accumulated funds is in excess of the Section 31 fees due the Commission from the Amex, such surplus shall be used by the Exchange to offset regulatory costs.

The Amex proposes that the effective date of the proposed rule change would be the date the Commission Order approving the proposed rule filing is published in the **Federal Register** and the effectiveness of Commentary .01 to Rule 393, once approved, would be for a period of six months.

After carefully considering the proposal, 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 exchange.<sup>10</sup> The Commission previously found a similar proposal from another SRO to be consistent with the Act.<sup>11</sup> The Commission is not aware of any issue that should cause it to revisit that finding or preclude the Commission from approving the Amex proposal on the same basis. The Commission notes that, because the program is voluntary, it imposes no obligation on any Amex member that believes that accumulated funds should be retained or disposed of in another manner.

*It is therefore ordered*, pursuant to section 19(b)(2) of the Act,<sup>12</sup> that the proposed rule change (File No. SR-AMEX-2007-107), as modified by Amendment Nos. 3 and 4 thereto, be, and hereby is, approved.

<sup>10</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>11</sup> See Securities Exchange Act Release No. 55886 (June 8, 2007), 72 FR 32935 (SR-NASD-2007-027).

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

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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## SECURITIES AND EXCHANGE COMMISSION

Release No. 34-57820; File No. SR-FINRA-2008-017]

### Self-Regulatory Organizations: Financial Industry Regulatory Authority, Inc.; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change Relating to Section 1(a) of Article III of the FINRA By-Laws

May 15, 2008.

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 May 7, 2008, Financial Industry Regulatory Authority, Inc. ("FINRA") (f/k/a National Association of Securities Dealers, Inc. ("NASD")) filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have been substantially prepared by FINRA. This order provides notice of the proposed rule change and approves the proposed rule change on an accelerated basis.

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

FINRA is proposing to amend Section 1(a) of Article III of the FINRA By-Laws, to interpret the reference to a "registered broker" in Section 1(a) of Article III of the FINRA By-Laws to include any bank exempted from the definition of "broker" under Section 3(a)(4)(E) of the Act<sup>3</sup> as of the date of filing of the proposed rule change. The proposed rule change is submitted in furtherance of the consolidation of the member firm regulatory functions of NASD and NYSE Regulation, Inc. ("NYSE Regulation"). There are no changes to the text of FINRA rules as a result of the proposed rule change.

<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.

<sup>3</sup> 15 U.S.C. 78c(a)(4)(E).

<sup>5</sup> Securities Exchange Act Release No. 57641 (April 9, 2008), 73 FR 20724.

<sup>6</sup> Amendment No. 4 makes minor changes, discussed in Amendment No. 3, to the proposed rule text to reflect that the date of effectiveness of the proposed rule change would be the date the Commission order approving the proposed rule change is published in the **Federal Register** and that the effectiveness of Commentary .01 to Rule 393, once approved, would be for a period of six months. Amendment No. 4 is a technical amendment not subject to notice and comment.

<sup>7</sup> 15 U.S.C. 78ee.

<sup>8</sup> 17 CFR 240.31.

<sup>9</sup> The Commission stated in its release adopting new Rule 31 and Rule 31T that "it is misleading to suggest that a customer or [SRO] member incurs an obligation to the Commission under section 31." Securities Exchange Act Release No. 49928 (June 28, 2004), 69 FR 41060, 41072 (July 7, 2004). In response to this statement, the Exchange issued a notice to members regarding its Rule 393 Fee and the Commission's "Section 31 Fee," and provided guidance for members and member organizations that choose to charge their customers fees. See Amex Notice REG 2004-42 Finance (October 29, 2004).

## 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 III below. FINRA has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

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

#### 1. Purpose

On July 30, 2007, NASD and NYSE Regulation consolidated their member firm regulation operations into a combined organization, FINRA.<sup>4</sup> To achieve the consolidation's goal to eliminate duplicative member firm regulation and enable FINRA to meet its new regulatory responsibilities, the NYSE amended NYSE Rule 2(b) to require FINRA membership as a condition of being an NYSE member organization ("Mandatory FINRA Membership filing").<sup>5</sup> Moreover, in furtherance of the consolidation, FINRA adopted NASD IM-1013-1 to enable eligible NYSE member organizations to become FINRA members through an expedited process.<sup>6</sup>

NYSE Rule 2(b) expressly permits entities that are exempt from registration as brokers or dealers pursuant to the Act to become NYSE member organizations.<sup>7</sup> In contrast, Section 1(a) of Article III of the FINRA

By-Laws addresses those "registered" brokers, dealers, municipal securities brokers or dealers, or government securities brokers or dealers that are eligible to become members of FINRA. Accordingly, in furtherance of the consolidation, the proposed rule change would allow FINRA to treat any NYSE member organization that, as of the date of filing of the proposed rule change, is a bank exempt from the definition of broker under Section 3(a)(4)(E) of the Act as a registered broker for purposes of the FINRA By-Laws, thereby allowing any such bank to be eligible to become a FINRA member.<sup>8</sup>

FINRA believes this interpretation is necessary notwithstanding the prohibitions of Section 15A(g)(1) of the Act,<sup>9</sup> which requires a registered securities association to deny membership to any person who is not a registered broker or dealer. The Commission has already recognized the important benefits of eliminating duplicative member firm regulation through the consolidation of the member firm regulatory operations of NASD and NYSE Regulation. Interpreting the reference to registered broker in Section 1(a) of Article III of the FINRA By-Laws to include any bank exempted from the definition of "broker" under Section 3(a)(4)(E) of the Act for the narrow purposes of FINRA membership will allow FINRA to consider all NYSE members for membership and to assume responsibility for member firm regulation of such entities.

Any bank becoming a FINRA member pursuant to this interpretation, and its associated persons, would be required to comply with the FINRA By-Laws, Schedules to the By-Laws, and all applicable FINRA rules,<sup>10</sup> excluding the following: (a) The bank would not be required to be a registered broker-dealer; and (b) as long as the bank remains subject to bank capital adequacy requirements, FINRA would not require it to comply with capital requirements of either the NASD or the consolidated FINRA rules. FINRA would provide any such bank 180 days following approval of its membership application in which to achieve compliance with the NASD rules governing member conduct. FINRA also would require the bank to

file a Form BD for FINRA purposes only<sup>11</sup> and the information provided on the form would be available via BrokerCheck pursuant to NASD IM-8310-2.<sup>12</sup> The bank, as part of the application process, also would be required to submit an amended Form U4 for each associated person denoting any registration categories that are recognized jointly by FINRA and NYSE (e.g., General Securities Representative (Series 7)).

Any bank applying for FINRA membership pursuant to this interpretation would not be eligible to rely on the waive-in process set forth in NASD IM-1013-1, since that process was primarily designed for those NYSE member organizations whose business activities are limited to "permitted floor activities" as defined in NASD IM-1013-1. Rather, a bank applying for FINRA membership pursuant to this interpretation would be required to apply for and receive approval pursuant to the application process described in NASD Rule 1013 (New Membership Application and Interview). FINRA recognizes that NYSE has a comprehensive membership application and review process based on similar principles and standards to that of FINRA, and thus would work expeditiously to consider for approval any application pursuant to this interpretation.

In addition, similar to those NYSE member organizations that become FINRA members pursuant to the waive-in process, any bank relying on this interpretation would not be assessed the fee set forth in Section 4(b)(1) to Schedule A of the FINRA By-Laws for any initial Form U4 filed by the applicant with FINRA for the registration of any representative or principal associated with the firm at the time it submits its application for FINRA membership. Also, the bank would not be assessed the membership application fee set forth in Section 4(e) to Schedule A of the FINRA By-Laws. FINRA believes these fee waivers are appropriate, since NYSE mandated FINRA membership in furtherance of the consolidation and because the application review process will not require the same resources as when a new applicant that is not already a member of NYSE seeks membership.

<sup>4</sup> On July 26, 2007, the Commission approved amendments to the NASD By-Laws to implement governance and related changes to accommodate the consolidation of the member firm regulatory functions of NASD and NYSE Regulation. See Securities Exchange Act Release No. 56145 (July 26, 2007), 72 FR 42169 (Aug. 1, 2007) (File No. SR-NASD-2007-023). The Commission also approved a plan by FINRA and NYSE Regulation to allocate regulatory responsibility relating to the NYSE member firm regulation rules to FINRA. See Securities Exchange Act Release No. 56148 (July 26, 2007), 72 FR 42146 (Aug. 1, 2007) (File No. 4-544).

<sup>5</sup> See Securities Exchange Act Release No. 56654 (Oct. 12, 2007), 72 FR 59129 (Oct. 18, 2007) (File No. SR-NYSE-2007-67); Securities Exchange Act Release No. 56953 (Dec. 12, 2007), 72 FR 71990 (Dec. 19, 2007) (extending grace period for NYSE-only member organizations to apply for and be approved as FINRA members to June 30, 2008). See also Securities Exchange Act Release No. 56751 (Nov. 6, 2007), 72 FR 64098 (Nov. 14, 2007) (File No. SR-FINRA-2007-19).

<sup>6</sup> See Securities Exchange Act Release No. 56653 (Oct. 12, 2007), 72 FR 59127 (Oct. 18, 2007) (File No. SR-NASD-2007-056).

<sup>7</sup> See also NYSE Rule 346(a).

<sup>8</sup> This category of NYSE member organizations is limited to one entity.

<sup>9</sup> 15 U.S.C. 78o-3(g)(1).

<sup>10</sup> The FINRA rulebook currently consists of the NASD rules and certain incorporated NYSE rules. The incorporated NYSE rules apply solely to those members of FINRA that are also members of NYSE on or after July 30, 2007, until such time as FINRA adopts a consolidated rulebook applicable to all of its members.

<sup>11</sup> FINRA understands that a bank relying on Section 3(a)(4)(E) of the Act is not required to file Form BD with the Commission.

<sup>12</sup> FINRA will need to implement certain systems changes to accommodate the filing of a Form BD by any bank that becomes a member of FINRA pursuant to this interpretation.

The effective date of the proposed rule change would be the date of Commission approval.

## 2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b) of the Act, including Section 15A(b)(6), which requires, among other things, that FINRA rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. FINRA believes that the proposed rule change will further facilitate the consolidation of the member firm regulation functions of FINRA and NYSE Regulation, resulting in more effective and efficient regulation of all brokers, thereby enhancing investor protection.

### *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. 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-2008-017 on the subject line.

### *Paper Comments*

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549-1090.

All submissions should refer to File Number SR-FINRA-2008-017. 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, NW., 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-2008-017 and should be submitted on or before June 13, 2008.

## IV. Commission Findings

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder.<sup>13</sup> As such, the Commission finds the proposal to be consistent with the objectives of Section 15A of the Act,<sup>14</sup> in that it is designed to promote just and equitable principles of trade, to prevent fraudulent and manipulative acts and practices, and in general, to protect investors and the public interest. The proposed rule change furthers the purposes of the consolidation by recognizing the unique status of any NYSE member organization that is exempt from the definition of broker under Section 3(a)(4)(E) of the Act. Moreover, the proposed rule change does not propose any substantive amendments to existing rules.

The Commission also finds good cause for approving the proposed rule change prior to the 30th day after its publication in the **Federal Register**. Accordingly, the Commission believes good cause exists, consistent with Sections 15A(b)(5) and 19(b) of the Act to approve the proposed rule change on an accelerated basis.

<sup>13</sup> In approving this rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>14</sup> 15 U.S.C. 78o-3(b)(6).

## V. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,<sup>15</sup> that the proposed rule change (SR-FINRA-2008-017) be, and hereby is, approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>16</sup>

**Florence E. Harmon**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-57831; File No. SR-ISE-2008-39]

### Self-Regulatory Organizations; International Securities Exchange, LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend its Schedule of Fees To Establish Fees for Transactions in Options on Five Premium Products

May 16, 2008.

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 May 9, 2008, International Securities Exchange, LLC ("ISE" 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 ISE. The Exchange has designated this proposal as one establishing or changing a member due, fee, or other charge imposed by ISE under section 19(b)(3)(A)(ii) of the Act<sup>3</sup> and Rule 19b-4(f)(2) thereunder,<sup>4</sup> 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 persons.

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

ISE is proposing to amend its Schedule of Fees to establish fees for transactions in options on five Premium Products.<sup>5</sup> The text of the proposed rule

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

<sup>16</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.

<sup>3</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

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

<sup>5</sup> Premium Products is defined in the Schedule of Fees as the products enumerated therein.