SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–60645; File No. SR–FINRA–2009–039]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Order Approving Proposed Rule Change To Adopt FINRA Rule 3310 (Anti-Money Laundering Compliance Program) in the Consolidated FINRA Rulebook

September 10, 2009.

I. Introduction

On June 1, 2009, the Financial Industry Regulatory Authority, Inc. (''FINRA'') (f/k/a National Association of Securities Dealers, Inc. (''NASD'')) filed with the Securities and Exchange Commission (''SEC'' or ''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Exchange Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change to adopt FINRA Rule 3310 (Anti-Money Laundering (''AML'') Compliance Program). The Commission published the proposed rule change for comment in the **Federal Register** on June 22, 2009.[3] The comment period expired on July 13, 2009. The Commission received seven comments in response to the proposed rule change.[4] On July 29, 2009, FINRA responded to the comments.[5] This order approves the proposed rule change.

II. Description of the Proposed Rule Change

FINRA proposed to adopt: (1) NASD Rule 3011 (AML Compliance Program) as FINRA Rule 3310 (AML Compliance Program), without substantive change; (2) NASD IM–3011–1 (Independent Testing Requirements) as supplementary material to proposed FINRA Rule 3310, subject to certain amendments; and (3) NASD IM–3011–2 (Review of AML Compliance Person Information) as supplementary material to proposed FINRA Rule 3310, without substantive change. The proposed rule change would delete Incorporated NYSE Rule 445 (AML Compliance Program) in its entirety as duplicative.

A. Background

NASD Rule 3011 (AML Compliance Program) and Incorporated NYSE Rule 445 (AML Compliance Program) are substantially similar rules requiring members to develop and implement a written AML program reasonably designed to achieve and monitor compliance with the requirements of the Bank Secrecy Act (''BSA'') [6] and the implementing regulations promulgated by the Department of the Treasury. Each member's AML compliance program must be approved, in writing, by a member of senior management.

Both NASD 3011 and NYSE 445 require that each AML compliance program must, at a minimum: (1) Establish and implement policies and procedures that can be reasonably expected to detect and cause the reporting of suspicious transactions; (2) establish and implement policies, procedures, and internal controls reasonably designed to achieve compliance with the BSA and its implementing regulations; (3) provide for annual (on a calendar-year basis) independent testing for compliance to be conducted by member personnel or a qualified outside party; [7] (4) designate and identify to FINRA an individual or individuals (*i.e.,* AML compliance person(s)) who will be responsible for implementing and monitoring the day-to-day operations and internal controls of the AML compliance program and provide prompt notification to FINRA of any changes to the designation; and (5) provide on-going training for appropriate persons.

NASD IM–3011–1 (Independent Testing Requirements) and the supplementary material to Incorporated NYSE Rule 445 also contain substantially similar provisions clarifying that: (1) Members should undertake more frequent testing than required if circumstances warrant; (2) the person conducting the independent test must have a working knowledge of applicable requirements under the BSA and its implementing regulations; and (3) the testing cannot be conducted by the AML compliance person(s), by any person who performs the functions being tested, or by any person who reports to any of these persons.

NASD IM–3011–1, however, permits the AML compliance program testing to be conducted by persons who report to either the AML compliance person or persons performing the functions being tested if: (1) The member has no other qualified internal personnel to conduct the test; (2) the member establishes written policies and procedures to address conflicts that may arise from allowing the test to be conducted by a person who reports to the person(s) whose activities he or she is testing (*e.g.,* anti-retaliation procedures); (3) to the extent possible, the person conducting the test reports the results of the test to someone who is senior to the AML compliance person or persons performing the functions being tested; and (4) the member documents its rationale, which must be reasonable, for determining there is no other alternative than to comply in this manner. In addition, if the person does not report the results consistent with (3) above, the member must document a reasonable explanation for not doing so. This provision is referred to as the ''independent testing exception.'' Incorporated NYSE Rule 445 does not have a comparable provision.

Finally, NASD IM–3011–2 (Review of AML Compliance Person Information) requires each member to identify, review, and if necessary, update the information regarding its AML compliance person in the manner prescribed in NASD Rule 1160.[8] This provision is comparable to SM .03 of NYSE Rule 445.

B. Proposed FINRA Rule 3310 and Related Supplementary Material

The proposed rule change would adopt NASD Rule 3011 without

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

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 60112 (June 15, 2009), 74 FR 29527 (June 22, 2009).

[4] *See* Letters from Deborah M. Castiglioni, CEO, Cutter & Company, Inc., dated July 9, 2009 (''Cutter''); Larry Dorn, Owner/President/AML Officer/Financial Principal, Dorn & Co., Inc., dated July 16, 2009 (''Dorn''); Joe Giordano, President, Joseph James Financial Services, Inc., dated July 14, 2009 (''Joseph James''); S. Lauren Heyne, Chief Compliance Officer, RW Smith & Associates, Inc., dated July 13, 2009 (''RW Smith''); Judy L. Loy, CEO, Nestlerode & Loy Inc., dated July 8, 2009 (''Nestlerode''); William R. Pictor, CEO, Trubee Collins Co., Inc., dated July 10, 2009 (''Trubee Collins''); Terri F. Rumans, Chief Compliance Officer, Sage Rutty Co., Inc., dated July 13, 2009 (''Sage Rutty''). Unless otherwise indicated, all letters cited in this order were addressed to either Florence Harmon, Deputy Secretary of the Commission or Elizabeth M. Murphy, Secretary of the Commission.

[5] *See* Letter from Patricia Albrecht, Assistant General Counsel, FINRA, dated July 29, 2009 (''FINRA's Response'').

[6] *See* Currency and Foreign Transactions Reporting Act of 1970 (commonly referred to as the Bank Secrecy Act), 12 U.S.C. 1829b, 12 U.S.C. 1951–1959, and 31 U.S.C. 5311–5330).

[7] NASD Rule 3011 permits a member to conduct the independent testing every two years (on a calendar-year basis) if it does not execute transactions for customers or otherwise hold customer accounts or act as an introducing broker with respect to customer accounts (*e.g.,* engages solely in proprietary trading, or conducts business only with other broker-dealers). Incorporated NYSE Rule 445 uses slightly different terminology to achieve the same result, specifically providing that a member may conduct independent testing every two years (on a calendar-year basis) if it ''does not engage in a public business (*e.g.,* engages solely in proprietary trading, or conducts business only with other broker-dealers).''

[8] FINRA is proposing to replace NASD Rule 1160 with FINRA Rule 4540 (Member Information and Data Reporting and Filing Requirements). *See Regulatory Notice* 09–02 (January 2009).

substantive change into the Consolidated FINRA Rulebook as FINRA Rule 3310 (AML Compliance Program). In addition, the proposed rule change would adopt NASD IM–3011–2, without substantive change, as supplementary material to proposed FINRA Rule 3310.

With respect to NASD IM–3011–1, the proposed rule change would adopt its provisions as supplementary material to proposed FINRA Rule 3310, but would eliminate the independent testing exception. The Financial Crimes Enforcement Network (''FinCEN''), a bureau within the Department of the Treasury that is responsible for administering the BSA and its implementing regulations, has stated that the independent testing provision of the BSA [9] precludes AML program testing by personnel with an interest in the outcome of the testing and that an independent testing exception, such as the one in NASD IM–3011–1, is inconsistent with the BSA's independent testing provision and FinCEN's interpretation of this provision.[10] Accordingly, consistent with FinCEN's guidance, FINRA is proposing to eliminate the independent testing exception in connection with its adoption of proposed FINRA Rule 3310.

Finally, as stated previously, the proposed rule change would delete Incorporated NYSE Rule 445 and its related supplementary material in their entirety as duplicative. 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.

III. Comment Letters

Seven commenters raised objections to the elimination of the independent testing exception.[11] Three commenters expressed their view that the exception was being eliminated to address a problem that has not been shown to exist.[12] These commenters also took exception with FinCEN's view that the independent testing exception was inconsistent with the requirements of the BSA.[13] Commenters also expressed concern that elimination of the independent testing exception would require small firms to incur additional expenses.[14] Some commenters also suggested that FINRA should seek additional member comment on the proposed elimination of the independent testing exception.[15] In responding to the comments, FINRA stated that it was proposing to eliminate the independent testing exception to be consistent with FinCEN's views regarding the BSA's independent testing requirements.[16]

IV. Discussion and Findings

After a careful review of the proposal, the comments received, and FINRA's Response, the Commission finds that the proposed rule change is consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to FINRA.[17] In particular, the Commission finds that the proposed rule change is consistent with Section 15A(b)(6) of the Exchange Act,[18] which requires, among other things, that FINRA's rules be designed to prevent fraudulent and manipulative practices and to promote just and equitable principles of trade.

The Commission finds that the proposed rule change is reasonably designed to accomplish these ends by aligning the independent testing requirements of proposed FINRA Rule 3310 with FinCEN's interpretation of the BSA's independent testing requirement. The Commission notes in particular that FinCEN is responsible for administering the BSA and its implementing regulations. In light of FinCEN's view that the independent testing provisions of the BSA preclude AML program testing by persons with an interest in the outcome of the test, the independent testing exception in NASD IM–3011–1, is not consistent with the BSA.[19]

V. Conclusion

It is therefore concluded, pursuant to Section 19(b)(2) of the Exchange Act,[20] that the proposed rule change (SR–FINRA–2009–039) be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[21]

Florence E. Harmon,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–60642; File No. SR–ISE–2009–61]

Self-Regulatory Organizations; International Securities Exchange, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Regarding Exposure of Reserve Orders

September 9, 2009.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on August 27, 2009, the International Securities Exchange, LLC (the ''Exchange'' or the ''ISE'') filed with the Securities and Exchange Commission the proposed rule change as described in Items I, II, and III below, which items have been prepared by the self-regulatory organization. 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

The Exchange is proposing to amend its rules to adopt an interpretation to its rules related to the exposure of reserve orders. The text of the proposed rule change is as follows, with additions in *italics:*

Rule 717. Limitations on Orders

(a) through (g) no change.

Supplementary Material to Rule 717

.01–.04 no change.

.05 With respect to the non-displayed reserve portion of a reserve order, the exposure requirement of paragraphs (d) and (e) are satisfied if the displayable

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[9] *See* 31 U.S.C. 5318(h)(1)(D). *See also* 31 CFR 103.120 (AML programs requirements for financial institutions regulated by, among others, self-regulatory organizations).

[10] *See* Letter from Jamal El-Hindi, Associate Director, Regulatory Policy & Programs Division, FinCEN, to Nancy M. Morris, Secretary, SEC (August 22, 2007) (''FinCEN Comment Letter''). FinCEN submitted the letter to the SEC in response to the NYSE's ''omnibus filing,'' which sought to achieve greater harmonization between the NYSE and NASD rules, including the AML compliance program rules (SR–NYSE–2007–22). *See* Securities Exchange Act Release No. 56142 (July 16, 2007), 72 FR 42195 (August 1, 2007).

[11] *See supra* note 4.

[12] Cutter, Dorn, and Nestlerode.

[13] *Id.* The commenters asserted that employees of a small broker-dealer have an interest in bringing problems to light, not ignoring them.

[14] Cutter, Dorn, Joseph James, RW Smith, Sage Rutty, and Trubee Collins.

[15] Nestlerode, Cutter, RW Smith, and Dorn.

[16] *See* FINRA's Response, *supra* note 5. *See also* FinCEN Comment Letter, *supra* note 10 and accompanying text.

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

[18] 15 U.S.C. 78*o*–3(b)(6).

[19] *See* FinCEN Comment Letter, *supra* note 10 and accompanying text.

[20] 15 U.S.C. 78s(b)(2).

[21] 17 CFR 200.30–3(a)(12).

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

[2] 17 CFR 240.19b–4.