provisions of 5 U.S.C. 552, will be available for Web site viewing and printing 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 pm. Copies of such filing also will be available for inspection and copying at the principal office of the CBOE. 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–CBOE–2010–049 and should be submitted on or before June 29, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[10]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–13663 Filed 6–7–10; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–62211; File No. SR–FINRA–2010–014]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Order Approving Proposed Rule Change Relating to FINRA Rule 9554 To Eliminate Explicitly the Inability-To-Pay Defense in the Expedited Proceedings Context

June 2, 2010.

On March 31, 2010, Financial Industry Regulatory Authority, Inc. ("FINRA") filed with the Securities and Exchange Commission ("SEC" or "Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act" or "Exchange Act")[1] and Rule 19b–4 thereunder,[2] a proposed rule change to FINRA Rule 9554 to eliminate explicitly the inability-to-pay defense in the expedited proceedings context. The proposed rule change was published for comment in the **Federal Register** on April 26, 2010.[3] The Commission received three comments, all of which supported the proposed rule change.[4] This order approves the proposed rule change.

I. Description of the Proposed Rule Change

FINRA proposed to amend FINRA Rule 9554 to eliminate explicitly the inability-to-pay defense in the expedited proceedings context when a member or associated person fails to pay an arbitration award to a customer.

FINRA Rule 9554 allows FINRA to bring expedited actions to address failures to pay FINRA arbitration awards.[5] Once a monetary award has been issued in a FINRA arbitration proceeding, the party that must pay the award has thirty days to do so.[6] If the party that must pay the award is a respondent, (*i.e.,* a member or an associated person, FINRA coordinates between FINRA Dispute Resolution's arbitration forum and FINRA's enforcement program to verify whether such respondent has done so. If the respondent has not paid, FINRA initiates an expedited proceeding by sending a notice explaining that the respondent will be suspended unless the respondent pays the award or requests a hearing.

A respondent that requests a hearing may raise a number of defenses to the suspension. One of the current defenses is establishing a bona fide inability-to-pay. When a respondent successfully demonstrates a bona fide inability-to-pay, it is a complete defense to the suspension. Consequently, the inability-to-pay defense currently precludes a harmed customer from obtaining payment of a valid arbitration award.

FINRA's expedited proceedings for failure to pay an arbitration award use the leverage of a potential suspension to help ensure that a member or an associated person promptly pays a valid arbitration award. However, if a respondent demonstrates a financial inability to pay the award—regardless of the reason—the leverage is removed. When FINRA's efforts to suspend a respondent who has not paid an award have been defeated, a claimant is much less likely to be paid. FINRA believes that by eliminating the inability-to-pay defense, it will increase the probability of customers having their awards paid, or, at a minimum, it should prompt meaningful settlement discussions between claimants and respondents.

The ability to work in the securities industry carries with it, among other things, an obligation to comply with the federal securities laws, FINRA rules, and orders imposed by the disciplinary and arbitration processes. Allowing members or their associated persons that fail to pay arbitration awards to remain in the securities industry presents regulatory risks and is unfair to harmed customers.

Although FINRA proposes to eliminate the inability-to-pay defense, a respondent would still have available the following four defenses:

- The member or person paid the award in full or fully complied with the settlement agreement;
- The arbitration claimant has agreed to installment payments or has otherwise settled the matter;
- The member or person has filed a timely motion to vacate or modify the arbitration award and such motion has not been denied; and
- The member or person has filed a petition in bankruptcy and the bankruptcy proceeding is pending or the award or payment owed under the settlement agreement has been discharged by the bankruptcy court.[7]

Regarding the last defense, FINRA believes that a federal bankruptcy court is the best forum for adjudicating a financial condition defense. Bankruptcy judges are experts in evaluating whether a debtor's obligations should be legally discharged. The bankruptcy process and associated filings are designed to consider fully and evaluate the financial condition of bankruptcy debtors.[8] In addition, bankruptcy filings, which are subject to federal perjury charges, provide greater penalties for hiding assets.[9] FINRA's lack of subpoena power over banks and other third parties raises practical concerns regarding its ability to confirm accurately the assets of the firm or person asserting the defense.[10]

[10] 17 CFR 200.30–3(a)(12).

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

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 61938 (Apr. 19, 2010), 75 FR 21686 (Apr. 26, 2010).

[4] *See* letters from Michael T. Nommensen, dated May 14, 2010; William A Jacobson, Esq., Associate Clinical Professor of Law, Cornell Law School, and Director, Cornell Securities Law Clinic, and Lennie Sliwinski, Cornell Law School class of 2011, dated May 15, 2010; and Scott R. Shewan, President, Public Investors Arbitration Bar Association ("PIABA"), dated May 17, 2010.

[5] Expedited actions allow FINRA to address certain types of misconduct quicker than would be possible using the ordinary disciplinary process. In general, expedited actions are designed to encourage respondents to comply with the law or take corrective action rather than sanction them for past misconduct. Moreover, as discussed in detail below, the Act uses a different standard of review for expedited actions than it does for disciplinary cases.

[6] FINRA Rule 10330(h).

[7] In its order approving changes to the predecessor to Rule 9554, the SEC noted that the issues raised in cases in which at least one of the aforementioned defenses is raised are narrow and generally limited to determining whether the respondent has proven any of these four defenses or an inability-to-pay the award. *See* Securities Exchange Act Release No. 40026 (May 26, 1998), 63 FR 30789 (June 5, 1998).

[8] *See* 4 *Collier on Bankruptcy,* ¶¶ 521.01, 521.09 (15th ed. 2009).

[9] *See* 18 U.S.C. 151–58 (2010). Bankruptcy fraud is punishable by a fine, or by up to five years in prison, or both. *Id.*

[10] The ability to legally discharge debts, the more thorough and accurate verification of a bankruptcy

Continued

The inability-to-pay defense emerged from a series of SEC decisions that require FINRA to consider the defense in disciplinary cases (as opposed to expedited actions), including disciplinary cases involving failures to pay arbitration awards and restitution.[11] The legal underpinnings that support the inability-to-pay defense in disciplinary cases are not, however, present in the expedited proceedings context. The aforementioned SEC decisions largely rely on the "excessive and oppressive" language in Section 19(e) of the Exchange Act in requiring FINRA to consider inability-to-pay. Section 19(e) of the Exchange Act provides authority to the SEC to review and affirm, modify or set aside any final disciplinary sanctions imposed by FINRA on its members. Section 19(e), however, does not apply to expedited proceedings. Expedited proceedings are reviewed under Exchange Act Section 19(f), which requires that "the specific grounds" on which FINRA based its action "exist in fact," that FINRA followed its rules, and that those rules are consistent with the Act. The different focus of these two standards and the more limited review for expedited actions are understandable and support eliminating the inability-to-pay defense in expedited actions.[12]

Unlike in disciplinary cases, FINRA is not imposing a monetary sanction in these expedited actions; it is suspending a respondent for failing to pay a previously imposed arbitration award. There also is an explicit procedural mechanism built into these expedited actions that allows a suspension to be lifted once respondents satisfy any of the four defenses listed above. The main goal is to encourage respondents to comply with the law or previously imposed orders, not to sanction them for past misconduct.

In sum, members and associated persons that fail to pay arbitration awards to customers should not be allowed to remain in the securities industry by relying on the inability-to-pay defense in expedited actions. This is especially true because they can avoid regulatory action by paying the award, reaching a settlement with the customers (which can include payment plans), moving to vacate the award, or filing for bankruptcy. Three commenters addressed the proposed rule change and all three urged the Commission to approve it.[13]

II. Discussion and Commission Findings

After careful review, the Commission finds the proposed rule change to be consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities association.[14] In particular, the Commission finds that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,[15] 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; to remove impediments to and perfect the mechanism of a free and open market and a national market system; and, in general, to protect investors and the public interest. The proposal also is consistent with Section 15A(b)(7) of the Act,[16] which provides that FINRA must take appropriate action when members and associated persons violate provisions of the Act or FINRA rules.

The Commission believes that the proposed rule change will further FINRA's investor protection mandate by promoting a fair and efficient process for taking action to encourage members and associated persons to pay arbitration awards to customers. The Commission also believes that the proposed rule change will further FINRA's statutory obligation to take appropriate action when members and associated persons violate provisions of the Act or FINRA rules.

III. Conclusion

For the foregoing reasons, the Commission finds that the proposed rule change is consistent with the Act and the rules and regulations thereunder applicable to a national securities association.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[17] that the proposed rule change (SR–FINRA–2010–0014) be and hereby is approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[18]

Florence E. Harmon,

Deputy Secretary.

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debtor's financial condition, and possible criminal prosecution for intentionally inaccurate disclosures, among other aspects, distinguish bankruptcy from inability-to-pay.

[11] *See Toney L. Reed,* 52 S.E.C. 944 (1996), *recons. denied,* Securities Exchange Act Release No. 39354 (Nov. 25, 1997); *Bruce M. Zipper,* 51 S.E.C. 928 (1993). In addition, the SEC had previously recognized that a bona fide inability-to-pay an arbitration award is an important consideration in determining whether any sanction for failing to pay an arbitration award is "excessive or oppressive." *See* Securities Exchange Act Release No. 40026 (May 26, 1998), 63 FR 30789 (June 5, 1998). (Without further discussion, the order cited the SEC's decision in *Zipper,* which was a disciplinary case, not an expedited action.)

[12] In *William J. Gallagher,* Securities Exchange Act Release No. 47501 (March 14, 2003), the SEC emphasized that expedited actions are reviewed under Section 19(f) of the Act not Section 19(e). The SEC stated, "Gallagher misconstrues the applicable review standard when he argues that [FINRA's] sanction is 'excessive and oppressive' and that [FINRA's] indefinite suspension order is inconsistent with the [FINRA] Sanction Guidelines, standards relevant in the Commission's review of [FINRA] disciplinary proceedings under Section 19(e) of the Exchange Act." *Id.* at *6. The SEC explained that its review is limited to analyzing whether "the specific ground on which [FINRA] based its suspension—failure to pay in full an arbitration award—'exists in fact[,]'" the "SRO's determination was in accordance with its rules, and * * * those rules are, and were applied in a manner, consistent with the purposes of the Exchange Act." *Id.* at *5 & *7. In *Gallagher,* FINRA and the SEC rejected the respondent's claim of inability-to-pay on factual grounds. The issue of whether a respondent was permitted to raise the defense as a matter of law was neither raised nor decided.

[13] In its comment, PIABA also recommended that FINRA eliminate or restrict the bankruptcy defense in expedited proceedings. Those suggestions are outside the scope of the current proposed rule change.

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

[15] 15 U.S.C. 78o–3(b)(6).

[16] 15 U.S.C. 78o–3(b)(7).

[17] 15 U.S.C. 78s(b)(2).

[18] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–62207; File No. SR–ISE–2010–55]

Self-Regulatory Organizations; International Securities Exchange, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Amending the Direct Edge ECN Fee Schedule

June 2, 2010.

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 May 28, 2010, the International Securities Exchange, LLC (the "Exchange" or the "ISE") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

[2] 17 CFR 240.19b–4.