review letter finding that the material appears to be consistent with applicable standards.

The intermediary firm that relies on this exception could not materially alter the sales material or use it in a manner that is inconsistent with any conditions stated in the Department's review letter. For example, if the Department's review letter was based in part upon the representation by the filing firm that the sales material would be accompanied by a fund prospectus, the intermediary firm would be subject to a similar constraint.

Although FINRA anticipates that firms will utilize the exception primarily with respect to mutual fund and variable insurance product sales material, the exception is not limited to sales material for particular products. Thus, the exception also would apply to sales material for other products, such as real estate investment trusts or direct participation programs, provided the sales material meets the exception's requirements.

FINRA believes this exception would save intermediary firms' compliance personnel numerous hours that are currently spent reviewing sales material that has already been approved by a registered principal at the product underwriter, and that the Department staff also has reviewed and found to be consistent with applicable standards. Of course, some firms may want to continue to review this sales material, and the proposal would allow them to do so.[6]

The proposed rule change would also revise certain of the advertising record-keeping requirements. Today, Rule 2210(b)(2)(A) states that firms must maintain a copy of all sales material for a period of three years from the date of last use. Existing practice has been to assume that the recordkeeping requirement begins on the date of first use. The proposal would codify this position. For sales material subject to the principal approval exception, firms would have to keep a record of the name of the firm that filed the sales material and a copy of the related FINRA review letter.

III. Comment Letters

The Commission received three comment letters in response to the proposed rule change.[7] All of the commenters supported the proposed rule change. Two commenters stated that the proposed rule change would eliminate hours of unnecessary work.[8] One commenter expressed support for the proposal, stating it would be a less burdensome alternative for intermediary firms.[9] Moreover, two commenters indicated that the proposed rule change should not compromise investor protection.[10] Similarly, one commenter opined that the existing requirement serves no useful or beneficial purpose, in terms of additional investor protection concerns.[11]

IV. Discussion and 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 that are applicable to a national securities association. [12] In particular, the Commission believes that the proposed rule change is consistent with the provisions of section 15A(b)(6) of the Act,[13] 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 Commission believes that eliminating the requirement for firms to re-approve sales material in limited circumstances when a registered principal of a firm has previously approved the sales material and the Department has previously supplied a favorable review letter will eliminate a compliance redundancy while maintaining investor protections. Notably, the initial firm creating all sales material subject to this exception will continue to be required to obtain sales material approval from its registered principal, file the sales material for review with the Department, and obtain a favorable review letter from the Department.

V. Conclusions

It is therefore ordered, pursuant to section 19(b)(2) of the Act,[14] that the proposed rule change (SR–FINRA–2007–020) be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[15]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E8–2161 Filed 2–6–08; 8:45 am]

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[6] The proposed rule change would not affect the contractual obligations that exist between underwriters and intermediary firms. Some dealer agreements may, for example, restrict the ability of underwriters and product wholesalers to send their sales material directly to a retail firm's sales force. These restrictions can facilitate the intermediary firm's ability to supervise its sales force. The proposed rule change would not alter the underwriter's obligations to comply with these contractual restrictions.

[7] *Supra* note 4.

[8] FSI letter; NPB letter.

[9] ICI letter.

[10] FSI letter; ICI letter.

[11] NPB letter.

[12] 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).

[13] 15 U.S.C. 78o–3(b)(6).

[14] 15 U.S.C. 78s(b)(2).

[15] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–57259; File No. SR–FINRA–2008–001]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of Proposed Rule Change Relating to Amendments to FINRA's Gross Income Assessment and Technical Changes to Schedule A to FINRA's By-Laws

February 1, 2008.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on January 10, 2008, 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'') the proposed rule change as described in Items I, II, and III below, which Items have been substantially prepared by FINRA.[3] The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

FINRA is proposing to amend Schedule A to the FINRA By-Laws to amend the Gross Income Assessment (''GIA'') paid by each FINRA member and to update the references to NASD that appear in Schedule A to the FINRA By-Laws. The text of the proposed rule change is available at NASD, the Commission's Public Reference Room, and *http://www.finra.org.*

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

[2] 17 CFR 240.19b–4.

[3] On July 26, 2007, the Commission approved a proposed rule change filed by NASD to amend NASD's Certificate of Incorporation to reflect its name change to the Financial Industry Regulatory Authority, Inc., or FINRA, in connection with the consolidation of the member firm regulatory functions of NASD and NYSE Regulation, Inc. *See* Securities Exchange Act Release No. 56145 (July 26, 2007), 72 FR 42169 (August 1, 2007).

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

On July 30, 2007, NASD and the New York Stock Exchange (''NYSE'') consolidated their member firm regulation operations into a combined organization, FINRA. The proposed rule change seeks to consolidate certain regulatory fees imposed by NASD and NYSE Regulation, Inc. (''NYSE Regulation'') to develop a single fee structure for FINRA that avoids duplicating fees charged by the two organizations.

FINRA's member regulatory pricing structure currently consists primarily of the following fees: the GIA; the Trading Activity Fee (''TAF''); the Personnel Assessment (''PA''); and the Branch Office Assessment (''BOA''). As part of the consolidation, NYSE committed to transfer to FINRA certain regulatory revenues for the remainder of 2007.[4] NYSE fees subject to the transfer agreement include a gross FOCUS (Financial and Operational Combined Uniform Single Report) fee (''GFF'')[5] (comparable to NASD's GIA)[6] and registration fees for branch offices[7] (comparable to NASD's Branch Office System Processing Fee)[8] and registered representatives[9] (comparable to NASD's registration fees for the registration of representatives or principals).[10]

In anticipation of the termination of the agreement to remit fees collected by NYSE, FINRA evaluated whether to consolidate or eliminate any duplicative fees, as well as whether to maintain or increase any non-duplicative fees. FINRA undertook its regulatory pricing review with the objectives of maintaining a fair assessment level for firms and of preserving revenue levels necessary to fund FINRA's member regulatory activities, including the regulation of members through examination, policymaking, rulemaking and enforcement activities.

To achieve these objectives, FINRA determined that the most appropriate regulatory pricing structure would be to: (1) Eliminate NYSE Regulation's legacy registration fees for branch offices and registered representatives, which totals approximately $18.6 million in fee reductions;[11] (2) maintain NASD's fee structures and levels for the TAF, the BOA and the PA; and (3) consolidate, with certain adjustments, NASD's GIA rate structure with NYSE Regulation's GFF rate structure.[12]

The GIA is currently assessed through a three-tier rate structure with a minimum GIA of $1,200.00. Under the current GIA, members are required to pay an annual GIA equal to the greater of $1,200.00 or the total of:

(1) 0.125% of annual gross revenue less than or equal to $100 million;

(2) 0.029% of annual gross revenue greater than $100 million up to $1 billion; and

(3) 0.014% of annual gross revenue greater than $1 billion.[13]

In contrast, the legacy GFF was assessed at a flat rate of $0.42 per $1,000 of gross FOCUS revenue (or 0.042%).

To consolidate these two legacy fees, FINRA proposes that the minimum assessment under the GIA of $1,200.00 will remain, with the ceiling increased from $960,000.00 to $1 million of annual assessable revenue. Because FINRA has committed to reduce the GIA by $1,200.00 per year for five years, subject to annual Board approval, this will effectively reduce the GIA to $0 for the first $1 million of annual assessable revenue. FINRA proposes that for annual gross revenue over $1 million, the regressive rate structure of the legacy GIA and the flat rate structure of the legacy GFF be combined into a new rate structure. Specifically, FINRA proposes to create a seven-tiered rate structure that balances the legacy GIA tiered rate structure with the legacy GFF flat rate structure.

Under the proposed rule change, members will be assessed a GIA of:

(1) $1,200 on annual gross revenue up to $1 million;

(2) 0.1215% of annual gross revenue greater than $1 million up to $25 million;

(3) 0.2599% of annual gross revenue greater than $25 million up to $50 million;

(4) 0.0518% of annual gross revenue greater than $50 million up to $100 million;

(5) 0.0365% of annual gross revenue greater than $100 million up to $5 billion;

(6) 0.0397% of annual gross revenue greater than $5 billion up to $25 billion; and

(7) 0.0855% of annual gross revenue greater than $25 billion.

FINRA estimates that the proposed rule change will result in aggregate fee reductions of approximately $25 million dollars in 2008 and forward, approximately $18.6 million of which relates to the elimination of NYSE Regulation's legacy registration fees and approximately $6.4 million for GIA rebates given to all FINRA member firms. FINRA estimates that, under the proposed rate structure described above, 93 percent of member firms will have either no change to their GIA or a reduced GIA due to this new rate structure. Certain firms with annual gross revenue exceeding $35 million dollars, however, will have an increase to their GIA under the proposed rate structure.

To minimize the impact on members, the new rate structure will be implemented over a three-year period beginning in 2008. During this period, the change in the GIA paid to FINRA by each member will be subject to a cap based on the fees that the member would have paid under the prior NASD and NYSE rate structures. In 2008, a member's GIA will not be impacted by the new rate structure. In 2009, any increase or decrease to the member's GIA resulting from the new rate structure will be capped at a five percent increase or decrease. In 2010, any increase or decrease to the member's GIA resulting from the new rate structure will be capped at a ten percent increase or decrease. During this implementation period, a firm's GIA

[4] *See* Securities Exchange Act Release No. 56145 (July 26, 2007); 72 FR 42169 (August 1, 2007) (Order Approving SR–NASD–2007–023).

[5] *See* Securities Exchange Act Release No. 56181 (August 1, 2007), 72 FR 44206 (August 7, 2007) (Notice of Filing and Immediate Effectiveness of SR–NYSE–2007–70).

[6] *See* Section 1(c) of Schedule A.

[7] *See* NYSE Rule 342, Supplementary Material .11.

[8] *See* Section 4(a) of Schedule A.

[9] *See* NYSE Rule 345, Supplementary Material .14.

[10] *See* Section 4(b) of Schedule A.

[11] *See* Securities Exchange Act Release No. 57093 (January 3, 2008), 73 FR 1654 (January 9, 2008) (Notice of Filing and Immediate Effectiveness of SR–NYSE–2007–127).

[12] The NYSE will continue to charge its member organizations an annual gross FOCUS fee; however, the fee was reduced by 75 percent beginning in 2008. *See* Securities Exchange Act Release No. 56181 (August 1, 2007), 72 FR 44206 (August 7, 2007) (Notice of Filing and Immediate Effectiveness of SR–NYSE–2007–70). The reduced gross FOCUS fee charged by NYSE will be retained by NYSE and will not be forwarded to FINRA.

[13] Gross revenue for assessment purposes is set out in Section 2 of Schedule A, which defines gross revenue as total income as reported on FOCUS form Part II or IIA excluding commodities income.

may increase or decrease due to a change in the member's assessable revenue from year to year; however, any changes to the firm's GIA that result from the change in rate structure will be subject to the cap.

For firms that were members of NASD only (not NYSE) as of July 30, 2007, the cap will be calculated based upon the GIA that the member firm would have paid under the prior NASD GIA rate structure. For firms that became, or become, FINRA members on or after July 30, 2007 (excluding those firms that were members of NYSE only as of July 30, 2007 and were subsequently required to become FINRA members pursuant to NYSE Rule 2), the cap will be calculated based upon the GIA that the member firm would have paid under the prior NASD GIA rate structure. For firms that were members of the NYSE only (not NASD) as of July 30, 2007, the cap will be calculated based upon the NYSE GFF that the member would have paid under the prior NYSE GFF rate structure.[14] For firms that were members of both NASD and the NYSE as of July 30, 2007 (''Dual Members''), the cap will be calculated based upon the GIA and the GFF that the member would have paid under the prior NASD GIA rate structure and the prior NYSE GFF rate structure.[15]

Despite the reduction in revenue that will result from the new rate structure, FINRA believes that the revenue collected under the pricing proposal will fund its member regulatory programs. The integration of the member firm regulation operations of NASD and NYSE into FINRA should take up to three years, given FINRA's need to establish a new examination and enforcement program under a consolidated rule book. A new cost structure and revised pricing structure will be evaluated once the integration is complete.

FINRA is proposing that the effective date of the proposed rule change will be retroactive to January 1, 2008. FINRA will announce the proposed rule change and subsequent approval in a *Regulatory Notice.*

2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of section 15A(b)(5) of the Act,[16] which requires, among other things, that FINRA rules provide for the equitable allocation of reasonable dues, fees, and other charges among members and issuers and other persons using any facility or system that FINRA operates or controls. FINRA believes that the proposed rule change balances NASD and NYSE Regulation legacy fees in a manner that is consistent with FINRA's statutory obligation under section 15A(b)(5) of the Act[17] to ensure that its fees are reasonable and equitably allocated. FINRA believes that the modified rates and the introduction of additional tiers appropriately balance the legacy fees. Moreover, FINRA has sought to minimize the impact that the proposed rule change will have on its members by phasing-in the proposed changes so that the changes will have minimal impact on members for the first three years.

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 NASD 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*. Please include File Number SR–FINRA–2008–001 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–2008–001. 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.

[14] In calculating the cap based upon the GFF that a member would have paid under the prior NYSE GFF rate structure, FINRA will use only that portion of the GFF that would have been transferred by the NYSE to FINRA (*i.e.,* 75 percent of the GFF paid by the member firm).

[15] For example, assume that a Dual Member has gross revenue of $5 billion and assessable revenue (based on the prior year) of $4.95 billion for each of the first three years of the new fee rate structure. Under the legacy rate structures, the firm would have paid income assessments to FINRA of $2,512,800 each year (a legacy GFF of $1,575,000 transferred to FINRA (*i.e.,* 75 percent of the firm's GFF); a legacy GIA to FINRA of $939,000; and net of a $1,200 rebate). Under the new rate structure in the proposed rule filing, the total income assessment charged by FINRA to the firm, without the cap, would be $1,892,224 (a GIA of $1,893,424 net of a $1,200 rebate). This would represent a decrease of $620,576. However, because the change is capped at zero percent in 2008, the firm would be assessed a GIA under the new rate structure of $2,512,800 (*i.e.,* the same amount as what the firm would have paid under the two legacy rate structures). In 2009, the firm would pay a GIA of $2,387,160 (reflecting the maximum five percent change), and in 2010, the firm would pay a GIA of $2,261,520 (reflecting the maximum ten percent change). As discussed in footnote 12 above, Dual Members will also be subject to a reduced GFF charged by NYSE. Telephone conference between Kathleen O'Mara, Associate General Counsel, FINRA; Carrie DiValerio, Senior Director, FINRA; Nancy Burke-Sanow, Assistant Director, Division of Trading and Markets (''Division''), Commission; and Jan Woo, Special Counsel, Division, Commission, on January 31, 2008.

[16] 15 U.S.C. 78o–3(b)(5).

[17] 15 U.S.C. 78o–3(b)(5).

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–2008–001 and should be submitted on or before February 28, 2008.

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

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E8–2182 Filed 2–6–08; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–57252; File No. SR–FINRA–2007–025]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Amendments to FINRA's NYSE Rules 421, 440F, and 440G

February 1, 2008.

Pursuant to Section 19(b)(1)[1] of the Securities Exchange Act of 1934 (''Act'')[2] and Rule 19b–4 thereunder,[3] notice is hereby given that on December 4, 2007, 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 and II below, which Items have been substantially prepared by FINRA. FINRA has designated the proposed rule change as constituting a ''non-controversial'' rule change under paragraph (f)(6) of Rule 19b–4 under the Act,[4] 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

FINRA is proposing to amend FINRA's NYSE Rules 421 (Periodic Reports), 440F (Public Short Sale Transactions Effected on the Exchange) and 440G (Transactions in Stock and Warrants for the Accounts of Members, Allied Members and Member Organizations)[5] to conform such rules with the SEC's amendments to Rule 10a–1[6] (''SEC Rule 10a–1'') and Regulation SHO[7] under the Act.[8] The proposed rule change makes conforming changes to FINRA's NYSE Rules 421, 440F and 440G, consistent with the proposed rule change by the New York Stock Exchange, LLC (''NYSE'') to its versions of Rules 421, 440F and 440G.[9]

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

* * * * *

Rule 421. Periodic Reports

No Change.

* * * Supplementary Material:

.10 Short positions.—Member organizations for which the Exchange is the designated examining authority are required to report ''short'' positions, including odd lots, in each stock or warrant listed on the Exchange, and in each other stock or warrant not listed on the Exchange which is not otherwise reported to another United States securities exchange or securities association, using such automated format and methods as prescribed by the Exchange. Such reports must include customer and proprietary positions and must be made at such times and covering such time period as may be designated by the Exchange.

Member organizations for which the Exchange is not the designated examining authority must report ''short'' positions to the self-regulatory organization which is its designated examining authority (''DEA'') if such DEA has a requirement for such reports. If the DEA does not have such a reporting requirement, then such member organization must comply with the provisions of Rule 421.

The term ''designated examining authority'' means the self-regulatory organization which has been assigned responsibility for examining a member organization for compliance with applicable financial responsibility rules. (See Rule 17d–1 under the Securities Exchange Act of 1934 (the ''Exchange Act'').)

''Short'' positions to be reported are those resulting from ''short'' sales as defined in Rule 200(a) of the Securities and Exchange Commission's Regulation SHO, but excluding positions *that meet the following requirements:*

(1) any sale by any person, for an account in which he has an interest, if such person owns the security sold and intends to deliver such security as soon as is possible without undue inconvenience or expense;

(2) any sale of a security covered by a short sale rule on a national securities exchange (except a sale to a stabilizing bid complying with Rule 104 of Regulation M) effected with the approval of such exchange which is necessary to equalize the price of such security thereon with the current price of such security on another national securities exchange which is the principal exchange market for such security;

(3) any sale of a security for a special arbitrage account by a person who then owns another security by virtue of which he is, or presently will be, entitled to acquire an equivalent number of securities of the same class as the securities sold; provided such sale, or the purchase which such sale offsets, is effected for the bona fide purpose of profiting from a current difference between the price of security sold and the security owned and that such right of acquisition was originally attached to or represented by another security or was issued to all the holders of any such class of securities of the issuer;

(4) any sale of a security registered on, or admitted to unlisted trading privileges on, a national securities exchange effected for a special international arbitrage account for the bona fide purpose of profiting from a current difference between the price of such security on a securities market not within or subject to the jurisdiction of the United States and on a securities market subject to the jurisdiction of the United States; provided the seller at the time of such sale knows or, by virtue of information currently received, has

[18] 17 CFR 200.30–3(a)(12).

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

[2] 15 U.S.C. 78a *et seq.*

[3] 17 CFR 240.19b–4.

[4] 17 CFR 240.19b–4(f)(6).

[5] FINRA has incorporated into its rulebook certain rules of NYSE, including NYSE Rules 421, 440F and 440G. These incorporated NYSE rules apply solely to those members of FINRA that also are members of NYSE on or after July 30, 2007 (''Dual Members''), until such time as FINRA adopts a consolidated rulebook applicable to all of its members. The incorporated NYSE rules apply to the same categories of persons to which they applied as of July 30, 2007. In applying the incorporated NYSE rules to Dual Members, FINRA also has incorporated the related interpretive positions set forth in the NYSE Rule Interpretations Handbook and NYSE Information Memos.

[6] 17 CFR 240.10a–1.

[7] 17 CFR 240.200–203.

[8] *See* Securities Exchange Act Release No. 55970 (June 28, 2007), 72 FR 36348 (July 3, 2007).

[9] *See* File No. SR–NYSE–2007–62 (''NYSE's filing'').