

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-56682; File No. SR-FINRA-2007-013)

October 22, 2007

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Amendments to NASD Rule 3210 in Light of Amendments to the SEC Regulation SHO Delivery Requirements

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 September 12, 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, II and III below, which Items have been prepared substantially 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,³ which renders the proposal effective upon receipt of this filing by the Commission. 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.

³ 17 CFR 240.19b-4(f)(6).

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

FINRA is proposing to amend NASD Rule 3210 (Short Sale Delivery Requirements) in light of the amendments to Rule 203 of Regulation SHO under the Act.⁴

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

* * * * *

3210. Short Sale Delivery Requirements

(a) If a participant of a registered clearing agency has a fail to deliver position at a registered clearing agency in a non-reporting threshold security for 13 consecutive settlement days, the participant shall immediately thereafter close out the fail to deliver position by purchasing securities of like kind and quantity.

(1) Provided, however, a participant of a registered clearing agency that has a fail to deliver position at a registered clearing agency in a non-reporting threshold security on October 15, 2007, and which, prior to October 15, 2007, had been previously grandfathered from the close-out requirement in paragraph (a) (i.e., because the participant of a registered clearing agency had the fail to deliver position at a registered clearing agency on the settlement day preceding the day that the security became a non-reporting threshold security), shall close out that fail to deliver position within thirty-five settlement days of October 15, 2007 by purchasing securities of like kind and quantity.

⁴ See Securities Exchange Act Release No. 56212 (August 7, 2007), 72 FR 45543 (August 14, 2007).

The requirements in paragraph (b) shall apply to all such fails to deliver that are not closed out in conformance with this paragraph (a)(1).

(2) Provided, however, if a participant of a registered clearing agency has a fail to deliver position at a registered clearing agency for thirty-five consecutive settlement days in a non-reporting threshold security that was sold pursuant to SEC Rule 144, the participant shall immediately thereafter close out the fail to deliver position in the security by purchasing securities of like kind and quantity. The requirements in paragraph (b) shall apply to all such fails to deliver that are not closed out in conformance with this paragraph (a)(2).

[(b) The provisions of this rule shall not apply to the amount of the fail to deliver position that the participant of a registered clearing agency had at a registered clearing agency on the settlement day immediately preceding the day that the security became a non-reporting threshold security; provided, however, that if the fail to deliver position at the clearing agency is subsequently reduced below the fail to deliver position on the settlement day immediately preceding the day that the security became a non-reporting threshold security, then the fail to deliver position excepted by this paragraph (b) shall be the lesser amount.]

(b)[(c)] If a participant of a registered clearing agency has a fail to deliver position at a registered clearing agency in a non-reporting threshold security for 13 consecutive settlement days (or 35 consecutive settlement days if entitled to rely on paragraphs (a)(1) or (a)(2) of this rule), the participant and any broker or dealer for which it clears transactions, including any market maker that would otherwise be entitled to rely on the exception provided in paragraph (b)(2)(iii) of SEC Rule 203 of Regulation SHO,

may not accept a short sale order in the non-reporting threshold security from another person, or effect a short sale in the non-reporting threshold security for its own account, without borrowing the security or entering into a bona-fide arrangement to borrow the security, until the participant closes out the fail to deliver position by purchasing securities of like kind and quantity.

(c)[(d)] If a participant of a registered clearing agency reasonably allocates a portion of a fail to deliver position to another registered broker or dealer for which it clears trades or for which it is responsible for settlement, based on such broker or dealer's short position, then the provisions of this rule relating to such fail to deliver position shall apply to the portion of such registered broker or dealer that was allocated the fail to deliver position, and not to the participant.

(d)[(e)] A participant of a registered clearing agency shall not be deemed to have fulfilled the requirements of this rule where the participant enters into an arrangement with another person to purchase securities as required by this rule, and the participant knows or has reason to know that the other person will not deliver securities in settlement of the purchase.

(e)[(f)] For the purposes of this rule, the following terms shall have the meanings below:

(1) the term “market maker” has the same meaning as in section 3(a)(38) of the Exchange Act.

(2) the term “non-reporting threshold security” means any equity security of an issuer that is not registered pursuant to section 12 of the Exchange Act and for which the issuer is not required to file reports pursuant to section 15(d) of the Exchange Act:

(A) for which there is an aggregate fail to deliver position for five consecutive settlement days at a registered clearing agency of 10,000 shares or more and for which on each settlement day during the five consecutive settlement day period, the reported last sale during normal market hours for the security on that settlement day that would value the aggregate fail to deliver position at \$50,000 or more, provided that if there is no reported last sale on a particular settlement day, then the price used to value the position on such settlement day would be the previously reported last sale; and

(B) is included on a list published by NASD.

A security shall cease to be a non-reporting threshold security if the aggregate fail to deliver position at a registered clearing agency does not meet or exceed either of the threshold tests specified in paragraph (e)[(f)](2)(A) of this rule for five consecutive settlement days.

(3) the term “participant” means a participant as defined in section 3(a)(24) of the Exchange Act, that is an NASD member.

(4) the term “registered clearing agency” means a clearing agency, as defined in section 3(a)(23)(A) of the Exchange Act, that is registered with the Commission pursuant to section 17A of the Exchange Act.

(5) the term “settlement day” means any business day on which deliveries of securities and payments of money may be made through the facilities of a registered clearing agency.

(f)[(g)] Pursuant to the Rule 9600 Series, the staff, for good cause shown after taking into consideration all relevant factors, may grant an exemption from the provisions of this rule, either unconditionally or on specified terms and conditions, to any

transaction or class of transactions, or to any security or class of securities, or to any person or class of persons, if such exemption is consistent with the protection of investors and the public interest.

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9610. Application

(a) Where to File

A member seeking exemptive relief as permitted under Rules 1021, 1050, 1070, 2210, 2315, 2320, 2340, 2520, 2710, 2720, 2790, 2810, 2850, 2851, 2860, Interpretive Material 2860-1, 3010(b)(2), 3020, 3150, 3210, 3230, 5150, 6958, 8211, 8213, 11870, or 11900, or Municipal Securities Rulemaking Board Rule G-37 shall file a written application with the appropriate department or staff of NASD and provide a copy of the application to the Office of General Counsel of NASD.

(b) through (c) No change.

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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 August 7, 2007, the SEC adopted certain amendments to Regulation SHO under the Act.⁵ The SEC amended, among other things, the close-out requirement contained in Rule 203 of Regulation SHO to eliminate the “grandfather”⁶ provision and extend the close-out requirement from 13 to 35 consecutive settlement days for fails to deliver resulting from sales of threshold securities pursuant to Rule 144 of the Securities Act of 1933.⁷ The amendments to the close-out requirement in Rule 203 of Regulation SHO became effective on October 15, 2007.

The purpose of this proposed rule change is to make conforming changes to NASD Rule 3210 to reflect the amendments to Rule 203 of Regulation SHO by eliminating the grandfather provision from Rule 3210 and extending the close-out requirement for fails to deliver resulting from sales of non-reporting threshold securities pursuant to SEC Rule 144.

⁵ See id.

⁶ The “grandfather” provision excluded from the Regulation SHO close-out requirement fail to deliver positions that were established prior to the security becoming a threshold security or prior to the Regulation SHO effective date. Specifically, the grandfather provision applied to two situations: (1) fail to deliver positions occurring before the January 3, 2005 Regulation SHO effective date; and (2) fail to deliver positions that were established on or after January 3, 2005, but prior to the security appearing on the Regulation SHO threshold securities list. See Securities Exchange Act Release No. 54154 (July 14, 2006), 71 FR 41710 (July 21, 2006). See also SEC Division of Market Regulation: Key Points About Regulation SHO, dated April 11, 2005.

⁷ The SEC also adopted amendments to update the market decline limitation in Rule 200(e)(3) of Regulation SHO.

Proposed Amendments to NASD Rule 3210

NASD Rule 3210 (Short Sale Delivery Requirements) applies delivery requirements to non-reporting threshold securities that are substantially similar to the Regulation SHO delivery requirements, which apply only to reporting securities.⁸ In the original rule change (SR-NASD-2004-044) proposing Rule 3210, FINRA indicated that it intended to apply and interpret the requirements of Rule 3210 consistent with the SEC's application and interpretation of Regulation SHO, and to the extent there were subsequent amendments to Regulation SHO, FINRA would consider amending its requirements accordingly.

Given the SEC's recent amendments to the Regulation SHO close-out requirement, FINRA is proposing to amend Rule 3210 to make conforming amendments to its mandatory close-out requirement to eliminate the grandfathering provision and extend the close-out requirement for SEC Rule 144 restricted securities. Specifically, consistent with the SEC's amendments to Rule 203(b)(3)(i) of Regulation SHO, FINRA is proposing (1) to require that any previously grandfathered fail to deliver position in a non-reporting security that is on the Rule 3210 threshold list on the October 15, 2007 operative date of the proposed rule change be closed out within 35 settlement days of such date; (2) that if the fail to deliver position has persisted for 35 consecutive settlement days from the October 15, 2007 operative date of the proposed rule change, the proposal would prohibit a participant and any broker-dealer for which it clears transactions, including market makers, from accepting any short sale orders or effecting

⁸ The term "reporting security" means any equity security of an issuer that is registered under Section 12 of the Act or that is required to file reports under Section 15(d) of the Act.

further short sales in the particular non-reporting threshold security without borrowing, or entering into a bona-fide arrangement to borrow, the security until the participant closes out the entire fail to deliver position by purchasing securities of like kind and quantity; and (3) that if a security becomes a non-reporting threshold security after the October 15, 2007 operative date of the proposed rule change, any fails to deliver in that security that occurred prior to the security becoming a non-reporting threshold security would become subject to Rule 3210's mandatory 13 settlement day close-out requirement, similar to any other fail to deliver position in a non-reporting threshold security.

Likewise, in light of the SEC's recent amendments to provide additional time to close-out fails to deliver resulting from sales of threshold securities pursuant to SEC Rule 144, FINRA is proposing to amend Rule 3210 to make conforming amendments to its close-out requirement. Specifically, consistent with the SEC's amendments to Rule 203 of Regulation SHO, FINRA is proposing to amend Rule 3210 to extend the close-out requirement from 13 to 35 consecutive settlement days for fails to deliver resulting from sales of non-reporting threshold securities pursuant to SEC Rule 144. Also consistent with the SEC's amendments to the Regulation SHO close-out requirement, FINRA is proposing to apply the pre-borrow requirement in amended Rule 3210(b) to these fails to deliver. Therefore, if the fail to deliver position persists for 35 consecutive settlement days, a participant of a registered clearing agency and any broker-dealer for which it clears transactions, including market makers, would be prohibited from effecting further short sales in the particular non-reporting threshold security without borrowing, or entering into a bona-fide arrangement to borrow, the security until the participant closes out the entire fail to deliver position by purchasing securities of like kind and quantity.

FINRA believes that making conforming changes to Rule 3210 to maintain consistency with the Regulation SHO delivery requirements is appropriate. Further, as noted in the proposing and adopting releases relating to the amendments to Rule 203 of Regulation SHO, the SEC indicated that, if the proposed amendments to Regulation SHO were adopted, the SEC anticipated that Rule 3210 would be similarly amended.⁹

Lastly, as part of the rule change (SR-NASD-2004-044) proposing Rule 3210, the SEC approved paragraph (g) of Rule 3210, which permits FINRA to grant exemptive relief from the Rule 3210 short sale delivery requirements pursuant to the Rule 9600 Series. As part of another rule change, FINRA inadvertently deleted the reference to Rule 3210 in the list of rules in Rule 9610(a) for which exemptive relief may be available.¹⁰ Accordingly, as part of this rule filing, FINRA proposes to amend Rule 9610(a) to re-insert the reference to Rule 3210.

Implementation

As noted above, FINRA has filed the proposed rule change for immediate effectiveness. FINRA proposes to make the proposed rule change operative on October 15, 2007, to coincide with the operative date of the amendments to Rule 203 of Regulation SHO.

⁹ See Securities Exchange Act Release No. 54891 (December 7, 2006), 71 FR 75068 (December 13, 2006). See also Securities Exchange Act Release No. 56212 (August 7, 2007), 72 FR 45543 (August 14, 2007).

¹⁰ See File SR-NASD-2005-087.

2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,¹¹ 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 is necessary and appropriate to conform to the amendments to Rule 203 of Regulation SHO and to maintain consistent delivery requirements across securities.

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

Because the foregoing proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed,

¹¹ 15 U.S.C. 78o-3(b)(6).

or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act¹² and Rule 19b-4(f)(6) thereunder.¹³

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

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-2007-013 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-2007-013. This file number should be included on the subject line if e-mail is used. To help the Commission

¹² 15 U.S.C. 78s(b)(3)(A).

¹³ 17 CFR 240.19b-4(f)(6).

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 10:00 am and 3:00 pm. 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-2007-013 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹⁴

Florence E. Harmon
Deputy Secretary

¹⁴ 17 CFR 200.30-3(a)(12).