

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-58461; File No. SR-FINRA-2008-033)

September 4, 2008

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Order Approving Proposed Rule Change and Amendment No. 1 Thereto to Adopt FINRA Rule 4560 (Short-Interest Reporting) in the Consolidated FINRA Rulebook

I. Introduction

On June 23, 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 (“Commission” or “SEC”) 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> a proposed rule change to adopt the short interest reporting requirements (NASD Rule 3360 and Incorporated NYSE Rules 421(1) and 421.10) as FINRA Rule 4560 in the consolidated FINRA rulebook. On July 16, 2008, FINRA submitted Amendment No. 1 to the proposed rule change. The proposed rule change, as amended, was published for comment in the Federal Register on July 31, 2008.<sup>3</sup> The Commission received no comment letters on the proposed rule change. This order approves the proposed rule change, as amended.

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

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

<sup>3</sup> Securities Exchange Act Release No. 58227 (July 25, 2008), 43 FR 44793 (July 31, 2008).

## II. Description of the Proposed Rule Change

As part of the process of developing the new consolidated rulebook (“Consolidated FINRA Rulebook”),<sup>4</sup> FINRA proposed to adopt the short interest reporting requirements in NASD Rule 3360 and Incorporated NYSE Rules 421(1) and 421.10 as FINRA Rule 4560 in the Consolidated FINRA Rulebook.

NASD Rule 3360 and Incorporated NYSE Rules 421(1) and 421.10 set forth FINRA’s short interest reporting requirements.<sup>5</sup> NASD Rule 3360 requires members to report short positions<sup>6</sup> in OTC Equity Securities<sup>7</sup> and exchange-listed securities not otherwise reported to another self-regulatory organization (“SRO”),<sup>8</sup> and Incorporated NYSE Rules 421(1) and 421.10 require members to report short positions in NYSE-listed securities. Members must report total short positions in all customer and proprietary

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<sup>4</sup> The current FINRA rulebook consists of two sets of rules: (1) NASD Rules and (2) rules incorporated from NYSE (“Incorporated NYSE Rules”) (together referred to as the “Transitional Rulebook”). The Incorporated NYSE Rules apply only to those members of FINRA that are also members of the NYSE (“Dual Members”). Dual Members also must comply with NASD Rules. For more information about the rulebook consolidation process, see FINRA Information Notice, March 12, 2008 (“Rulebook Consolidation Process”).

<sup>5</sup> Incorporated NYSE Rules 421(2) and 421.40 require members carrying margin accounts for customers to report certain aggregate debit and free credit balances.

<sup>6</sup> Short positions required to be reported under the rules are those resulting from “short sales” as the term is defined in Rule 200(a) of Regulation SHO, subject to certain limited exceptions. See NASD Rule 3360(b)(1).

<sup>7</sup> The term “OTC Equity Securities” refers to any equity security that is not listed on a national securities exchange. See NASD Rule 3360(b)(3).

<sup>8</sup> It is the responsibility of each member firm to ensure that it is reporting accurate short interest data, including confirming that issue symbols are active and valid as of the designated settlement date. See Notice to Members 06-20 (April 2006).

accounts as of the designated settlement dates and in the manner so prescribed.<sup>9</sup>

Currently, the rules require such information to be reported twice a month, which in turn, is then made publicly available on an aggregate basis twice a month.<sup>10</sup>

As of June 30, 2008, FINRA consolidated the collection of short interest data, so that firms report short interest positions in all securities to FINRA using the Regulation Filing Applications system; consequently, firms will no longer be able to report any of their short interest positions using the NYSE's Electronic Filing Platform ("EFP") or the Securities Industry Automation Corporation ("SIAC").<sup>11</sup>

Given that the short interest requirements in each of the rules are substantially similar, FINRA proposed to adopt these requirements as part of the Consolidated FINRA Rulebook, subject only to certain non-substantive changes. Most notably, because FINRA will now be the primary collector of consolidated short interest data for its members in all securities (rather than only if such positions in exchange-listed securities are not reported to another SRO), FINRA is not retaining the text in NASD Rule 3360 that limits short interest reportable to FINRA to those positions in exchange-listed securities "not otherwise reported to another self-regulatory organization."

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<sup>9</sup> Non-self-clearing broker-dealers generally are considered to have satisfied their reporting requirement by making appropriate arrangements with their respective clearing organizations. See Notice to Members 03-08 (February 2003).

<sup>10</sup> A schedule of FINRA's designated settlement dates can be found on its Web site at [www.finra.org](http://www.finra.org). See also Notice to Members 07-24 (May 2007).

<sup>11</sup> See Regulatory Notice 08-13 (March 2008). Prior to June 30, firms reported short interest positions in NYSE-listed securities through the EFP and all other securities through FINRA's Regulation Filing Applications ("RFA") system or the SIAC.

### III. 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.<sup>12</sup> In particular, the Commission believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,<sup>13</sup> 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 notes that it has previously approved the short interest reporting requirements of NASD Rule 3360<sup>14</sup> and NYSE Rules 421(1) and 421.10<sup>15</sup>, and the proposed rule change moves these requirements to the Consolidated FINRA Rulebook, subject only to certain non-substantive changes. The short interest reporting requirements previously have been found to meet the statutory requirements, and the Commission believes such requirements have since proven effective in achieving the statutory mandates.

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<sup>12</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. 78(c)(f).

<sup>13</sup> 15 U.S.C. 78o-3(b)(6).

<sup>14</sup> Securities Exchange Act Release No. 56279 (Aug. 17, 2007), 72 FR 48713 (Aug. 24, 2007).

<sup>15</sup> Securities Exchange Act Release No. 57252 (Feb. 1, 2008), 73 FR 7343 (Feb. 7, 2008).

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act<sup>16</sup>, that the proposed rule change (SR-FINRA-2008-033), as modified by Amendment No. 1 thereto, be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>17</sup>

Florence E. Harmon  
Acting Secretary

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<sup>16</sup> 15 U.S.C. 78s(b)(2).

<sup>17</sup> 17 CFR 200.30-3(a)(12).