

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. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. 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-NYSEAmex-2009-59* and should be submitted on or before October 2, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁸

Florence E. Harmon,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-60624; File No. SR-FINRA-2009-057]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of Proposed Rule Change Relating to Section 1(c) of Schedule A to the FINRA By-Laws To Amend the Personnel Assessment and Gross Income Assessment

September 3, 2009.

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 August 20, 2009, Financial Industry Regulatory Authority, Inc. ("FINRA") 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 by FINRA. 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 change Section 1(c) of Schedule A to the FINRA By-Laws ("Schedule A") to amend the Personnel Assessment and Gross Income Assessment paid by each FINRA member.

The text of the proposed rule change is available on FINRA's Web site at <http://www.finra.org>, at the principal office of FINRA and at the Commission's Public Reference Room.

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

FINRA's primary member regulatory pricing structure consists of the following fees: the Personnel Assessment ("PA"); the Gross Income Assessment ("GIA"); the Trading Activity Fee; and the Branch Office Assessment. These fees are used to fund FINRA's regulatory activities, including rulemaking and FINRA's examination and enforcement programs.

The proposed rule change would amend the PA and GIA to achieve a more consistent and predictable funding stream to carry out FINRA's regulatory mandate. The economic and industry downturns experienced in 2008 and 2009 have strained FINRA's resources, yet its regulatory responsibilities remain constant and its programs robust. FINRA believes the proposed rule change is needed to stabilize its revenues and provide protection against future industry downturns.

To those ends, the proposed rule change first would increase the PA for all members. The PA is currently assessed on a three-tiered rate structure: members with one to five registered representatives and principals are

assessed \$75 for each such registered person; 6–25 registered persons, \$70 each; and 26 or more registered persons, \$65 each. The proposed rule change would increase those rates to \$150, \$140 and \$130, respectively, based on the same tiered structure. This proposal would represent the first PA rate increase in over five years. Moreover, given the correlation between the cost of FINRA's regulatory programs and the number of registered persons within a firm, FINRA notes that the population of registered persons has remained fairly stable, even throughout the recent economic downturn.³ Accordingly, FINRA believes an increase of the PA is both a fair and appropriate means to achieve a more consistent and reliable foundation to fund its regulatory operations.

Even with the proposed increase of the PA, the GIA remains the most important component of FINRA's regulatory funding. The GIA is currently assessed through a seven-tier rate structure with a minimum GIA of \$1,200.00. Under the existing GIA rate structure, members are required to pay an annual GIA as follows:

- (1) \$1,200.00 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.

For 2010, the current year GIA would be subject to the cap set forth in *Regulatory Notice 08-07* (February 2008), which describes the new funding structure that resulted from the consolidation of NASD's and the New York Stock Exchange's member regulation operations. FINRA states in the *Notice* that it will apply a ten-percent cap on any increase or decrease to a firm's 2010 current year GIA resulting from the new pricing structure implemented in January 2008.

³ For example, FINRA records show that since 2000, the average number of registered persons per year has been approximately 667,680 and that for each of the past three years the population has been 669,626 (2009), 676,927 (2008) and 662,742 (2007) (based on numbers at the end of the preceding calendar year).

⁸ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

Since the GIA is assessed based on a member's annual gross revenue for the preceding calendar year,⁴ FINRA's revenues derived from the GIA are subject to the year-to-year volatility of member revenues. In years where industry revenues are significantly down, FINRA's operating revenues can drop precipitously: in 2009, for example, GIA revenues are down approximately 37 percent due to 2008 fourth quarter write-offs taken by members, particularly the largest securities firms.

The proposed rule change thus seeks to ameliorate this vulnerability by not only shifting some of FINRA's revenue generation to the more consistent PA stream, but also by smoothing out the volatility inherent in the GIA. To that end, the proposed rule change would further amend Schedule A to assess a GIA of the greater of (1) the amount that would be the GIA based on the existing rate structure ("current year GIA") or (2) a three-year average of the GIA to be calculated by adding the current year GIA plus the GIA assessed on the member over the previous two calendar years, divided by three. For a newer firm that has only been assessed in the prior year, FINRA would compare the current year GIA to the two-year average and assess the greater amount. The existing GIA rate structure and phase-in implementation through 2010 would remain the same.⁵ Accordingly, the proposed rule change would preserve the current rate structure, while building a buffer against industry downturns. FINRA notes that it has a long history of providing rebates to members when revenues exceed the expenditures necessary to discharge its regulatory obligations and is committed to continuing that practice in the future.

FINRA believes the proposed rule change will stabilize its operating cash flows by augmenting revenues based on the registered person population, where FINRA's costs are more closely aligned, and reducing dependency on, and exposure to, less predictable industry revenues. FINRA estimates that if the proposed rule change had been in effect for 2009, it would have replaced about 90% of the revenue shortfall that resulted primarily from the significant drop in GIA revenues. In general, those replacement revenues would come from

several larger firms whose steep income declines in 2008 primarily account for FINRA's current revenue deficit.

As noted in Item 2 of this filing, FINRA will announce the proposed rule change and subsequent approval in a *Regulatory Notice*. The proposed rule change will become effective January 1, 2010.

2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(5) of the Act,⁶ 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.

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 self-regulatory organization 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-2009-057 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549-1090.

All submissions should refer to File Number SR-FINRA-2009-057. 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. 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-2009-057 and should be submitted on or before October 2, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁷

Florence E. Harmon,
Deputy Secretary.
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⁴ 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.

⁵ The actual amount of GIA assessed in any given year—e.g., the current year GIA (including a cap, if applicable) or the three-year average—will be used to calculate subsequent three-year average determinations.

⁶ 15 U.S.C. 78o-3(b)(5).

⁷ 17 CFR 200.30-3(a)(12).