

**SECURITIES AND EXCHANGE COMMISSION**  
(Release No. 34-57050; File No. SR-FINRA-2007-040)

December 27, 2007

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of Proposed Rule Change to Delay Implementation of Certain FINRA Rule Changes Approved in SR-NASD-2004-183

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> notice is hereby given that on December 21, 2007, Financial Industry Regulatory Authority, Inc. (“FINRA”) (f/k/a National Association of Securities Dealers, Inc. (“NASD”)) 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 substantially 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 delay the effective date of certain FINRA rule changes approved in SR-NASD-2004-183 until August 4, 2008.

There are no new changes proposed to the text of the FINRA rules. Paragraphs (a), (b), (d), and (e) of Rule 2821, approved pursuant to SR-NASD-2004-183, will become effective on May 5, 2008.<sup>3</sup> FINRA is proposing to delay the effective date of paragraph (c)

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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> See Order Approving FINRA’s NASD Rule 2821 Regarding Members’ Responsibilities for Deferred Variable Annuities (Approval Order), Securities Exchange Act Release No. 56375 (September 7, 2007), 72 FR 52403 (September 13, 2007) (SR-NASD-2004-183); Corrective Order, Securities Exchange Act Release No. 56375A (September 14, 2007), 72 FR 53612 (September 19, 2007) (SR-NASD-2004-183) (correcting the rule’s effective date).

of Rule 2821, also approved pursuant to SR-NASD-2004-183,<sup>4</sup> until August 4, 2008.

**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 September 7, 2007, the Commission noticed the filing of Amendment Nos. 3 and 4 and granted accelerated approval of SR-NASD-2004-183, FINRA's new NASD Rule 2821, regarding broker-dealers' compliance and supervisory responsibilities for deferred variable annuities.<sup>5</sup> On November 6, 2007, FINRA published Regulatory Notice 07-53, which announced the Commission's approval of Rule 2821 (SR-NASD-2004-183) and established May 5, 2008 as the rule's effective date. Following Commission approval of the rule and publication of the Regulatory Notice, several firms requested that the effective date of the approved rule be delayed to allow firms additional time to make necessary systems changes. In addition, some firms raised various concerns regarding paragraph (c) of Rule 2821 (Principal Review and Approval), which had been substantially changed by Amendment No. 4.

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<sup>4</sup> Id.

<sup>5</sup> Id.

Rule 2821(c), in part, requires principal review and approval “[p]rior to transmitting a customer’s application for a deferred variable annuity to the issuing insurance company for processing, but no later than seven business days after the customer signs the application.” A number of firms asserted that seven business days beginning from the time when the customer signs the application may not allow for a thorough principal review in all cases. These firms have asked that a different timing mechanism be used.

Rule 2821(c) also states that a principal must treat “all transactions as if they have been recommended for purposes of this principal review,” and may only approve the transaction if he or she determines “that there is a reasonable basis to believe that the transaction would be suitable based on the factors delineated in paragraph (b) of this Rule.” A principal who determines that the transaction is unsuitable nonetheless may authorize the processing of the transaction if the principal determines that the transaction was not recommended and that the customer, after being informed of the reason why the principal found it to be unsuitable, affirms that he or she wants to proceed with the purchase or exchange of the deferred variable annuity. Some firms questioned whether broker-dealers that do not make any recommendations to customers (and generally do not employ principals to perform suitability reviews) should be subject to this provision.

Finally, in Regulatory Notice 07-53, FINRA stated that Rule 2821(c) does not permit the depositing of a customer’s funds in an account at the insurance company prior to completion of principal review. In response to the Regulatory Notice, a number of firms explained that insurers’ financial controls regarding the receipt of money from customers often include holding such funds in a general “suspense” account at the insurer. According

to these firms, insurers use an identifier to track money held in the suspense account and, if a contract is not issued, the funds are promptly returned to the customers. The firms further stated that this process has been used for many years without complications, makes processing much more efficient and effective, and receives significant scrutiny by examiners from the Commission and state insurance departments. Accordingly, these firms asked that insurers be allowed to deposit customer funds in suspense accounts under certain circumstances.

In light of these concerns, among others, FINRA staff believes it is prudent to give further consideration to paragraph (c) of Rule 2821 and the interpretation addressed in the Regulatory Notice to determine whether certain unintended and harmful consequences might ensue upon the currently scheduled effective date of May 5, 2008. If, based on this review, FINRA concludes that further rulemaking is warranted, FINRA will file a separate rule change with the Commission.

To provide adequate time for firms to make systems changes and for FINRA to consider and potentially act upon the concerns discussed above, FINRA is proposing that the effective date of paragraph (c) of Rule 2821, approved in SR-NASD-2004-183, be delayed until August 4, 2008. All other parts of Rule 2821 approved in SR-NASD-2004-183 will become effective as scheduled on May 5, 2008.

## 2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,<sup>6</sup> which requires, among other things, that FINRA rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and

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

equitable principles of trade, and, in general, to protect investors and the public interest. The rule change will promote investor protection because it will allow firms to better prepare procedures and systems to implement Rule 2821(c) and will allow FINRA to more fully consider the new comments discussed above.

**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](mailto:rule-comments@sec.gov). Please include File Number SR-FINRA-2007-040 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-2007-040. 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 10:00 a.m. and 3:00 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-2007-040 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.<sup>7</sup>

Nancy M. Morris

Secretary

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<sup>7</sup> 17 CFR 200.30-3(a)(12).