

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-60824; File No. SR-FINRA-2009-066)

October 14, 2009

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of Proposed Rule Change to Adopt FINRA Rule 2251 (Forwarding of Proxy and Other Issuer-Related Materials) in the Consolidated FINRA Rulebook

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act” or “SEA”)¹ and Rule 19b-4 thereunder,² notice is hereby given that on October 2, 2009, 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 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 adopt without material change NASD Rule 2260 (Forwarding of Proxy and Other Materials) and NASD IM-2260 (Approved Rates of Reimbursement) in the consolidated FINRA rulebook. The proposed rule change would combine NASD Rule 2260 and NASD IM-2260 into a single rule that would be renumbered as FINRA Rule 2251 in the consolidated FINRA rulebook.

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.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

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

As part of the process of developing a new consolidated rulebook (“Consolidated FINRA Rulebook”),³ FINRA is proposing to adopt without material change NASD Rule 2260 (Forwarding of Proxy and Other Materials) and NASD Interpretive Material (“IM”) 2260 (Approved Rates of Reimbursement) in the Consolidated FINRA Rulebook. The proposed rule change would combine NASD Rule 2260 and NASD IM-2260 into a single rule that would be renumbered as FINRA Rule 2251 in the Consolidated FINRA Rulebook.

³ The current FINRA rulebook consists of: (1) FINRA Rules; (2) NASD Rules; and (3) rules incorporated from NYSE (“Incorporated NYSE Rules”) (together, the NASD Rules and Incorporated NYSE Rules are referred to as the “Transitional Rulebook”). While the NASD Rules generally apply to all FINRA members, the Incorporated NYSE Rules apply only to those members of FINRA that are also members of the NYSE (“Dual Members”). The FINRA Rules apply to all FINRA members, unless such rules have a more limited application by their terms. For more information about the rulebook consolidation process, see Information Notice, March 12, 2008 (Rulebook Consolidation Process).

(A) Background

NASD Rule 2260 sets forth certain requirements with respect to the transmission of proxy materials and other communications to beneficial owners of securities and the limited circumstances in which members are permitted to vote proxies without instructions from those beneficial owners. NASD IM-2260 regulates the reimbursement that members are entitled to receive in connection with forwarding proxy materials and other communications.

(1) NASD Rule 2260

NASD Rule 2260(a) sets forth the general obligation of members to transmit proxy and related materials. The rule provides that members must, in connection with an equity security, forward promptly⁴ or, in connection with a debt security, make reasonable efforts to forward promptly certain information to the beneficial owner,⁵ or the beneficial owner's designated investment adviser,⁶ if the member carries the account in which the security is held for the beneficial owner and the security is registered in a

⁴ SEA Rule 14b-1(b)(2) requires that broker-dealers must forward proxy and other specified materials no later than five business days after receipt.

⁵ Under paragraph (e) of the rule, a member's duty under Rule 2260(a) applies provided the member: is furnished with sufficient copies of the material (e.g., annual reports, information statements or other material sent to security holders) by the issuer, stockholder or trustee; is requested by the issuer, stockholder or trustee to forward the material to security holders; and receives satisfactory assurance that it will be reimbursed by the issuer, stockholder or trustee for all out-of-pocket expenses, including reasonable clerical expenses. Rule 2260(e)(2) provides that paragraph (e) does not apply to beneficial owners residing outside the U.S. The rule states that members may voluntarily comply with the rule's provisions with respect to such persons if they wish.

⁶ The term "designated investment adviser" is defined in paragraph (f) of the rule.

name other than the name of the beneficial owner (i.e., the member holds the security in “street name”).

With respect to proxy materials, NASD Rule 2260(c)(1) generally requires that whenever an issuer or stockholder of the issuer soliciting proxies timely furnishes to a member sufficient copies of all soliciting material, as well as satisfactory assurance that it will reimburse the member for all out-of-pocket expenses, the member must transmit promptly to each beneficial owner of stock of the issuer that is in its possession or control all the material furnished. The rule addresses what must be included with the proxy materials and incorporates by reference certain recordkeeping requirements under SEA Rule 17a-4.

NASD Rule 2260(b) generally prohibits a member from giving a proxy to vote stock that is registered in its name unless the member is the beneficial owner of the stock (i.e., the rule generally bars members from giving proxies to vote without instructions from the beneficial owner). However, the rule sets forth certain exceptions. Rule 2260(c)(2) provides that a member may give a proxy to vote any stock pursuant to the rules of any national securities exchange to which the member is also responsible⁷ provided that the records of the member clearly indicate the procedure it is following.⁸

⁷ The phrase “national securities exchange to which the member is also responsible” refers to a national securities exchange to which the member belongs. See Securities Exchange Act Release No. 35681 (May 5, 1995), 60 FR 25749 (May 12, 1995) (Order Approving Proposed Rule Change; File No. SR-NASD-95-06); see also Notice to Members 95-45 (June 1995).

⁸ FINRA notes that, with respect to compliance by Dual Members, the SEC recently approved amendments to non-Incorporated NYSE Rules (i.e., NYSE Rules that were not incorporated by FINRA into its rulebook) that eliminate discretionary voting by brokers under certain circumstances. See Securities Exchange Act Release No. 60215 (July 1, 2009), 74 FR 33293 (July 10, 2009) (Order Approving Proposed Rule Change; File No. SR-NYSE-2006-92).

(Similar to Rule 2260(e)(2), Rule 2260(c)(3) provides that the rule’s proxy transmission requirements do not apply to beneficial owners residing outside the U.S. The rule states that members may voluntarily comply with the rule’s provisions with respect to such persons if they wish.) Rule 2260(d)(1) provides that a member may give a proxy to vote any stock registered in its name if the member holds the stock as executor, administrator, guardian, trustee, or in a similar representative or fiduciary capacity with authority to vote. Rule 2260(d)(3) generally permits any member designated by a named Employee Retirement Income Security Act of 1974 (as amended) (“ERISA”) Plan fiduciary as the investment manager of stock held as assets of the ERISA Plan to vote the proxies in accordance with the ERISA Plan fiduciary responsibilities, subject to certain conditions. Further, the rule permits designated investment advisers to vote the proxies.

(2) NASD IM-2260

IM-2260 addresses the rates of reimbursement that are considered reasonable for purposes of Rule 2260 in connection with the rule’s forwarding obligations. The IM has been amended a number of times, most recently in 2003 for the purpose of aligning the IM’s requirements with the fee structures adopted by the NYSE and Amex.⁹

Broadly, the IM addresses three areas:

- IM-2260(a) provides that members, in addition to charges specified in IM-2260(a)(1) through (5),¹⁰ also are entitled to receive

⁹ See Securities Exchange Act Release No. 47392 (February 21, 2003), 68 FR 9730 (February 28, 2003) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change; File No. SR-NASD-2003-019).

¹⁰ IM-2260(a)(1) through (5) specify the charges for: (1) initial proxy and/or annual report mailings; (2) proxy follow-up mailings; (3) providing beneficial

reimbursement for certain postage and stationery costs, as well as certain communication expenses incurred in receiving voting returns either telephonically or electronically;

- IM-2260(b) reminds members that NASD Rule 2430 requires that any charges must be reasonable.¹¹ The IM provides that members may request reimbursement of expenses at less than the approved rates; however, no member may seek reimbursement at rates higher than the approved rates or for items or services not specifically listed in the IM without the prior notification to and consent of the person soliciting proxies or the company;
- IM-2260(c) generally permits members to avoid transmitting multiple copies of materials to beneficial owners having more than one account or sharing the same address, provided members comply with applicable SEC rules.

(B) Proposal

FINRA believes that NASD Rule 2260 and IM-2260 provide effective protection to investors. Accordingly, FINRA proposes to combine the two rules, without material change, into a single rule that would be renumbered as FINRA Rule

ownership information; (4) interim report, post meeting report and other material mailings; and (5) incentive fees (fees with respect to each account where the member has eliminated the need to send materials in paper format through the mails).

¹¹ NASD Rule 2430 provides, among other things, that charges for services performed must be “reasonable” and “not unfairly discriminatory between customers.” (FINRA will address Rule 2430 at a later phase in the rulebook consolidation process.)

2251 in the Consolidated FINRA Rulebook.¹² The proposed rule change would make minor clarifying changes and other changes primarily to reflect the new formatting and terminology conventions of the Consolidated FINRA Rulebook.¹³ In addition, because a number of requirements set forth by the rule also are addressed by the SEC’s proxy rules, the proposed rule change would add language where appropriate to remind members that they are obligated to comply both with the FINRA rule and applicable SEC rules and/or guidance. With respect to the requirement set forth in NASD Rule 2260(a) that members forward those materials that are properly furnished to the member, the proposed rule change would clarify that firms are required to forward the materials subject to paragraphs (c) and (e) of the rule, as applicable. With respect to NASD Rule 2260(c)(2)’s provisions allowing a member to give a proxy to vote any stock pursuant to the rules of “any national securities exchange to which the member is also responsible,” proposed FINRA Rule 2251 would read “any national securities exchange of which it is a member.” FINRA believes the latter expression is clearer and reflects FINRA’s longstanding interpretation of the rule language.¹⁴

¹² NASD IM-2260 would be redesignated as Supplementary Material within proposed FINRA Rule 2251.

¹³ For example, the language in NASD Rule 2260(a) stating that a member “has an inherent duty” to forward materials would be revised to state that a member “shall” forward such materials. Further, the proposed rule change would move the footnoted provisions defining the terms “ERISA” and “state” to the rule text, and the footnoted provision regarding verification of investment advisers would be redesignated as Supplementary Material.

¹⁴ See note 7 supra.

FINRA will announce the implementation date of the proposed rule change in a Regulatory Notice to be published no later than 90 days following Commission approval.

2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,¹⁵ 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 would further the purposes of the Act because, as part of the Consolidated FINRA Rulebook, the proposed rule change will protect investors and the public interest by addressing the forwarding of proxy and other issuer-related materials.

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

¹⁵ 15 U.S.C. 78o-3(b)(6).

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-2009-066 on the subject line.

Paper Comments:

- Send paper comments in triplicate to Florence E. Harmon, Deputy Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-FINRA-2009-066. 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-2009-066 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁶

Florence E. Harmon
Deputy Secretary

¹⁶ 17 CFR 200.30-3(a)(12).