

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-59119; File No. SR-FINRA-2008-061)

December 18, 2008

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of Proposed Rule Change to Adopt FINRA Rule 5240 (Anti Intimidation / Coordination) in the Consolidated FINRA Rulebook

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 December 11, 2008, 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 Interpretive Material (“IM”) 2110-5 (Anti-Intimidation/Coordination) as a FINRA rule in the consolidated FINRA rulebook without material change. The proposed rule change would renumber IM-2110-5 as FINRA Rule 5240 in the consolidated FINRA rulebook.

The text of the proposed rule change is attached as Exhibit 5.³

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ The Commission notes that while provided in Exhibit 5, the text of the proposed rule change is also available at FINRA, the Commission’s Public Reference Room, and www.finra.org.

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"),⁴ FINRA is proposing to adopt IM-2110-5 as FINRA Rule 5240 without material change.

In 1996, the SEC issued a report pursuant to Section 21(a) of the Act⁵ regarding NASD, the Nasdaq market, and the activities of certain Nasdaq market makers that impeded price competition in the Nasdaq market.⁶ In conjunction with the report, the SEC also issued

⁴ 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 FINRA Information Notice, March 12, 2008 (Rulebook Consolidation Process).

⁵ 15 U.S.C. 78u(a).

⁶ See Report pursuant to Section 21(a) of the Exchange Act regarding NASD and The Nasdaq Stock Market, Inc., Securities Exchange Act Release No. 37542 (August 8, 1996).

an order pursuant to Section 19(h)(1) of the Act⁷ that made findings regarding the activities and imposed remedial sanctions on FINRA (then NASD).⁸ As part of that order, FINRA agreed to certain undertakings, including an undertaking to “propose a rule or rule interpretation for Commission approval which expressly makes unlawful the coordination by or among market makers of their quotes, trades and trade reports, and which prohibits retribution or retaliatory conduct for competitive actions of another market maker or other market participant.” To comply with this undertaking, FINRA proposed IM-2110-5, which was approved by the SEC on July 17, 1997.⁹

IM-2110-5 identifies three general types of conduct that are inconsistent with just and equitable principles of trade:¹⁰ (1) coordinating activities by members involving quotations, prices, trades, and trade reporting (e.g., agreements to report trades inaccurately or maintain certain minimum spreads); (2) “directing or requesting” another member to alter prices or quotations; and (3) engaging in conduct that threatens, harasses, coerces, intimidates, or otherwise attempts improperly to influence another member or person associated with a member. The IM also sets forth seven specific exclusions that identify bona fide commercial

⁷ 15 U.S.C. 78s(h)(1).

⁸ See In the Matter of National Association of Securities Dealers, Inc., Administrative Proceeding File No. 3-9056, Securities Exchange Act Release No. 37538 (August 8, 1996).

⁹ See Securities Exchange Act Release No. 38845 (July 17, 1997), 62 FR 39564 (July 23, 1997).

¹⁰ NASD Rule 2110 requires members to “observe high standards of commercial honor and just and equitable principles of trade.” On September 25, 2008, the Commission approved adopting NASD Rule 2110 into the Consolidated FINRA Rulebook as FINRA Rule 2010 without substantive change. See Securities Exchange Act Release No. 58643 (September 25, 2008), 73 FR 57174 (October 1, 2008). That rule change will take effect on December 15, 2008. See FINRA Regulatory Notice 08-57 (October 2008). The Commission notes that this rule change became effective on December 15, 2008.

activity that is permitted (e.g., bona fide negotiations and unilateral decisions regarding spreads).

Because FINRA adopted IM-2110-5 to fulfill part of its 1996 settlement agreement with the SEC, the proposed rule change would transfer IM-2110-5 into the Consolidated FINRA Rulebook as FINRA Rule 5240. Although FINRA is not proposing material changes to the rule, one of the minor changes FINRA is proposing is to add the phrase “or other person” to paragraphs (a)(1) and (a)(3) of the rule to clarify that coordination with or intimidation of a non-FINRA member would be covered by the rule.

FINRA will announce the effective 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,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. In addition, FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(11) of the Act,¹² which requires, among other things, that FINRA rules must be designed to produce fair and informative quotations, to prevent fictitious or misleading quotations, and to promote orderly procedures for collecting, distributing, and publishing quotations. FINRA believes that the rule properly emphasizes certain types of misconduct that can impair the fair and orderly functioning of the market and thus serves as an important provision to help ensure the integrity of information placed into the market. The rule being

¹¹ 15 U.S.C. 78o-3(b)(6).

¹² 15 U.S.C. 78o-3(b)(11).

adopted as part of the Consolidated FINRA Rulebook previously has been found to meet the statutory requirements, and FINRA believes the rule has since proven effective in achieving the statutory mandates.

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-2008-061 on the subject line.

Paper Comments:

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

All submissions should refer to File Number SR-FINRA-2008-061. 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 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-2008-061 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.¹³

Florence E. Harmon
Acting Secretary

¹³ 17 CFR 200.30-3(a)(12).