

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-59335; File No. SR-FINRA-2008-061)

February 2, 2009

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

On December 11, 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”)¹ and Rule 19b-4 thereunder,² a proposed rule change to adopt NASD IM-2110-5 as FINRA Rule 5240 in the consolidated FINRA rulebook (“Consolidated FINRA Rulebook”)³ without material change. The proposed rule change was published for comment in the Federal Register on December 29, 2008.⁴ The Commission received no comment letters in response to the proposed rule change. This order approves the proposed rule change.

NASD IM-2110-5 currently identifies three general types of conduct that are inconsistent with just and equitable principles of trade:⁵ (1) coordinating activities by members involving

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 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 must also comply with NASD Rules. For more information about the rulebook consolidation process, see FINRA Information Notice, March 12, 2008 (“Rulebook Consolidation Process”).

⁴ See Securities Exchange Act Release No. 59119 (December 18, 2008), 73 FR 79527.

⁵ 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

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 activity that is permitted (e.g., bona fide negotiations and unilateral decisions regarding spreads). The proposed rule change would renumber NASD IM-2110-5 as FINRA Rule 5240 in the Consolidated FINRA Rulebook.

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,⁶ and in particular, with Section 15A(b)(6) of the Act,⁷ which requires, among other things, that FINRA rules 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 FINRA originally adopted NASD IM-2110-5 to fulfill part of its 1996 settlement agreement⁸ with the SEC.⁹

Rule 2010 without substantive change. See Securities Exchange Act Release No. 58643 (September 25, 2008), 73 FR 57174 (October 1, 2008). That rule change took effect on December 15, 2008. See FINRA Regulatory Notice 08-57 (October 2008).

⁶ In approving this proposal, the Commission has considered the proposed rule’s impact on efficiency, competition and capital formation. See 15 U.S.C. 78c(f).

⁷ 15 U.S.C. 78o-3(b)(6).

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). Although FINRA is not making material changes to the rule, one of the minor changes made by FINRA 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 is covered by the rule.

FINRA's adoption of NASD IM-2110-5 as FINRA Rule 5240 in the Consolidated FINRA Rulebook provides notice to members of behavior that violates just and equitable principles of trade.

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,¹⁰ that the proposed rule change (SR-FINRA-2008-061) be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹¹

Florence E. Harmon
Deputy Secretary

¹⁰ 15 U.S.C. 78s(b)(2).

¹¹ 17 CFR 200.30-3(a)(12).