

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-62299; File No. SR-FINRA-2010-029)

June 16, 2010

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of Proposed Rule Change to Adopt FINRA Rule 5141 (Sale of Securities in a Fixed Price Offering) 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 May 27, 2010, 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 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 adopt FINRA Rule 5141 (Sale of Securities in a Fixed Price Offering) in the consolidated FINRA rulebook and to delete NASD Rules 0120(h), 2730, 2740 and 2750, and NASD IM-2730, IM-2740 and IM-2750.

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 FINRA Rule 5141 (Sale of Securities in a Fixed Price Offering) in the consolidated FINRA rulebook and to delete NASD Rules 0120(h), 2730, 2740 and 2750, and NASD IM-2730, IM-2740 and IM-2750.

Proposed FINRA Rule 5141 is a new, consolidated rule intended to protect the integrity of fixed price offerings⁴ by ensuring that securities in such offerings are sold to the public at the

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).

⁴ NASD Rule 0120(h) defines the term “fixed price offering” to mean the offering of securities at a stated public offering price or prices, all or part of which securities are publicly offered in the United States or any territory thereof, whether or not registered under the Securities Act of 1933. The term does not include offerings of “exempted securities” or “municipal securities” as those terms are defined in Sections 3(a)(12) and 3(a)(29), respectively, of the Securities Exchange Act or offerings of redeemable

stated public offering price or prices, thereby preventing an undisclosed better price. The proposed rule is based in part on, and replaces, the current fixed price offering rules (NASD Rules 0120(h), 2730, 2740 and 2750 and associated Interpretive Materials (“IMs”) 2730, 2740 and 2750).⁵ Like the current fixed price offering rules, the proposed rule prohibits the grant of certain preferences (e.g., selling concessions, discounts, other allowances or various economic equivalents) in connection with fixed price offerings of securities.

(A) Proposed FINRA Rule 5141

Paragraph (a) of the proposed rule provides that no member or person associated with a member that participates in a selling syndicate or selling group⁶ or that acts as the

securities of investment companies registered pursuant to the Investment Company Act of 1940 which are offered at prices determined by the net asset value of the securities. The proposed rule change would incorporate the definition of “fixed price offering” into the proposed rule in substantially identical form. See proposed FINRA Rule 5141.04. See also Section (B) under this Item and Section (C) under Item II.C.

⁵ The current fixed price offering rules are also known as the Papilsky rules because of the court decision with which they are commonly associated. See Papilsky v. Berndt, et al., No. 71 Civ. 2534, 1976 U.S. Dist. LEXIS 14442 (S.D.N.Y., June 24, 1976). For more information regarding the background of NASD Rules 0120(h), 2730, 2740 and 2750 and the associated IMs, see Notice to Members 81-3 (February 1981) (Adoption of New Rules Concerning Securities Distribution Practices) (“Notice to Members 81-3”); see also Securities Exchange Act Release No. 17371 (December 12, 1980), 45 FR 83707 (December 19, 1980) (Order Approving Proposed Rule Change; File No. SR-NASD-78-3).

⁶ The terms “selling group” and “selling syndicate” are defined in NASD Rules 0120(p) and (q), respectively. (Other than to reflect the new conventions of the Consolidated FINRA Rulebook, FINRA does not propose to alter these two definitions, which will be addressed later in the rulebook consolidation process.)

single underwriter⁷ in connection with a fixed price offering may offer or grant, directly or indirectly, to any person⁸ or account that is not a member of the selling syndicate or selling group or that is a person or account other than the single underwriter⁹ any securities in the offering at a price below the stated public offering price (i.e., a “reduced price”).¹⁰

Proposed FINRA Rule 5141(a) further provides that, subject to the requirements of FINRA Rule 5130,¹¹ a member of a selling syndicate or selling group, or a member that acts as the single underwriter, is permitted to sell securities in the offering to an affiliated person, provided the member does not sell the securities to the affiliated person at a reduced price as set

⁷ In response to commenter suggestion, FINRA has revised the proposed rule to clarify that it applies to any member acting as the single underwriter in an offering. See Section (A) under Item II.C; see also proposed FINRA Rules 5141(a), 5141.02 and 5141.03.

⁸ NASD Rule 0120(n) defines “person” to include any natural person, partnership, corporation, association, or other legal entity. Other than to reflect the new conventions of the Consolidated FINRA Rulebook, FINRA does not propose to alter this definition, which will be addressed later in the rulebook consolidation process.

⁹ Proposed FINRA Rule 5141(a) is based in part on NASD Rule 2740(a), which provides, among other things, that in connection with the sale of securities which are part of a fixed price offering a member may not grant or receive selling concessions, discounts, or other allowances except as consideration for services rendered in distribution and may not grant such concessions, discounts or other allowances to anyone other than a broker or dealer actually engaged in the investment banking or securities business. FINRA believes that it serves the interest of clarity for the new, consolidated rule to specify that its requirements apply to members of the selling syndicate or selling group, as those terms are defined under the FINRA rulebook, or the member acting as the single underwriter, as applicable.

¹⁰ As discussed below, proposed FINRA Rule 5141.01 defines the term “reduced price” for purposes of the proposed rule.

¹¹ FINRA Rule 5130 (former NASD Rule 2790) addresses restrictions on the purchase and sale of initial equity public offerings. The rule generally prohibits sales to and purchases by a broker-dealer and accounts in which a broker-dealer has a beneficial interest.

forth under proposed FINRA Rule 5141.01.¹² The requirements of the proposed rule would apply until the termination of the offering or until a member, having made a bona fide public offering of the securities, is unable to continue selling such securities at the stated public offering price.¹³

Proposed FINRA Rule 5141(b) provides that nothing in the proposed rule shall prohibit the purchase and sale of securities in a fixed price offering between members of the selling syndicate or selling group.¹⁴

Proposed FINRA Rule 5141.01 defines the term “reduced price.” The proposed rule provides that, for purposes of the rule, “reduced price” includes, without limitation, any offer or grant of any selling concession, discount or other allowance, credit, rebate, reduction of any fee

¹² The proposed rule change eliminates the general prohibition on transactions with related persons as set forth in current NASD Rule 2750 (subject, as already discussed, to the requirements of FINRA Rule 5130). FINRA believes that the new, consolidated rule serves the core purpose of the fixed price offering rules because it prohibits the conferring of a reduced price on a person or account that is not a member of the selling syndicate or selling group or that is a person or account other than the single underwriter, regardless of whether they are an affiliated person. Accordingly, the new rule would render Rule 2750’s general prohibition on related person transactions redundant. See Section (B) under this Item.

¹³ The proposed rule provides that, for purposes of the rule, securities in a fixed price offering shall be presumed salable if the securities immediately trade in the secondary market at a price or prices which are above the stated public offering price. This is based in part on NASD Rule 2750(d), which provides among other things that a member or a related person of a member is “presumed not to have made a bona fide public offering . . . if the securities being offered immediately trade in the secondary market at a price or prices which are at or above the public offering price.” FINRA believes that the standard set forth in the proposed rule is clear and easily applied. See Section (F) under Item II.C. FINRA notes that the proposed rule does not attempt to define “bona fide public offering” per se because the term “bona fide” speaks for itself and, as noted in current IM-2750, any such determination must rest on the basis of all relevant facts and circumstances.

¹⁴ FINRA believes that it serves the interest of regulatory clarity for the new, consolidated rule to provide that the rule does not prohibit this aspect of the underwriting process.

(including any advisory or service fee), any sale of products or services at prices below reasonable commercially available rates for similar products and services (except for research, which, as discussed below, is subject to proposed FINRA Rule 5141.02), or any purchase of or arrangement to purchase securities from the person or account at more than their fair market price in exchange for securities in the offering.¹⁵ FINRA notes that the proposed rule’s approach of setting forth a definition for the term “reduced price” is new and is designed, like the current fixed price offering rules, to prohibit in comprehensive terms the direct or indirect offering of various economic equivalents of a price below the stated public offering price. For example, under the proposed definition of “reduced price” the practice of overtrading – addressed under current NASD Rule 2730¹⁶ – is prohibited. Similarly, under the proposed definition improper underwriting recapture – addressed under current NASD Rule 2740¹⁷ – would also be prohibited.

¹⁵ The proposed rule defines “fair market price” to refer generally to a price or range of prices at which a buyer and a seller, each unrelated to the other, would purchase the securities in the ordinary course of business in transactions that are of similar size and similar characteristics and are independent of any other transaction. FINRA believes that this standard, based in part on current NASD Rule 2730(b)(2), is straightforward and easily applied. For further discussion, see Section (E) under Item II.C. Similarly, FINRA believes that the standard “reasonable commercially available rates for similar products and services” – new for purposes of the proposed rule – is clear and effective. Lastly, FINRA notes that the proposed definition of “fair market price” is solely for purposes of proposed FINRA Rule 5141 and is not intended to affect any other provisions with respect to pricing that are set forth in FINRA rules.

¹⁶ When Rule 2730 was adopted in its current form – then designated as Section 8 of Article III of the Rules of Fair Practice – FINRA explained: “An overtrade occurs when, as part of a swap, a dealer pays more for securities purchased from an institution than their fair market price. It also occurs if the member acting as agent charges less than a normal commission. In either event, the net effect of what the customer receives is a discount from the public offering price and is therefore prohibited.” See Notice to Members 81-3.

¹⁷ In Notice to Members 81-3, FINRA explained that Rule 2740, then designated as Section 24 of Article III of the Rules of Fair Practice, “serves the twofold function of promoting the securities distribution process and assuring that the selling concession, discount or other allowance offered to professional broker/dealers to facilitate the distribution of securities to investors is given, consistent with the representations made to the public in

Proposed FINRA Rule 5141.02 is based generally on NASD Rules 2740(a)(1) and (b) and IM-2740 and preserves the allowance permitted under those rules with respect to research services. Specifically, the proposed rule provides that nothing in the new rule prohibits a member or person associated with a member that participates in a selling syndicate or selling group, or that acts as the single underwriter, from selling securities in the offering to a person or account to which it has provided or will provide research, provided the person or account pays the stated public offering price for the securities and the research is provided pursuant to¹⁸ the requirements of Section 28(e) of the Act.¹⁹ The proposed rule provides, like current NASD Rule 2740(b) and IM-2740, that investment management or investment discretionary services are not research. The proposed rule further requires that any product or service provided by a member or person associated with a member that does not qualify as research must not confer a reduced price as set forth in proposed FINRA Rule 5141.01.

Proposed FINRA Rule 5141.03 is new and provides that transactions between a member of a selling syndicate or selling group, or between a single underwriter, and an affiliated person that are part of the normal and ordinary course of business and are unrelated to the sale or

prospectuses, only to persons who are entitled to it. Thus, the section prohibits the surreptitious and unfair discriminatory granting of a discount to select investors who are in a position to take advantage of various recapture devices.”

¹⁸ FINRA has made a minor revision to proposed FINRA Rule 5141.02 so as to clarify that research, in order to qualify under the proposed rule, must be provided pursuant to the cited Securities Exchange Act provision. See Regulatory Notice 09-45 (Fixed Price Offerings) (August 2009).

¹⁹ FINRA notes that proposed FINRA Rule 5141.02 serves the interest of regulatory clarity by articulating the allowance for research in straightforward and streamlined fashion.

purchase of securities in a fixed price offering shall not be deemed to confer a reduced price under the rule.²⁰

Proposed FINRA Rule 5141.04 incorporates the current definition of “fixed price offering” as set forth in current NASD Rule 0120(h) with only minor changes, primarily to reflect the new conventions of the Consolidated FINRA Rulebook.²¹

Lastly, proposed FINRA Rule 5141.05 is new and clarifies that a member that is an investment adviser may exempt securities that are purchased as part of a fixed price offering from the calculation of annual or periodic asset-based fees that the member charges a customer, provided the exemption is part of the member’s normal and ordinary course of business with the customer and is not in connection with an offering.

(B) Deletion of NASD Rules 2730, 2740, 2750 and 0120(h) and Associated IMs 2730, 2740 and 2750

As noted above, proposed FINRA Rule 5141 is a new, consolidated rule that is based in part on, and replaces, the current fixed price offering rules (NASD Rules 2730, 2740, 2750 and 0120(h) and associated IMs 2730, 2740 and 2750). Following are the specific requirements set

²⁰ FINRA believes that this provision is a useful clarification that would generally protect ordinary-course business transactions between members of a selling syndicate or selling group, or between a single underwriter, and affiliates from being deemed transactions that confer a reduced price (so long as such transactions are unrelated to the sale or purchase of securities in a fixed price offering). See Section (D) under Item II.C.

²¹ See note 4.

forth in the current fixed price offering rules that would be deleted as rendered redundant or obsolete by the new, consolidated rule:

NASD Rule 2730 and IM-2730

- NASD Rule 2730(a) generally prohibits overtrading by providing that a member engaged in a fixed price offering, who purchases or arranges the purchase of securities taken in trade, must purchase the securities at a fair market price at the time of purchase or act as agent in the sale of such securities and charge a normal commission. NASD Rule 2730(b) defines the terms “taken in trade,” “fair market price” and “normal commission.” NASD Rule 2730(c) sets forth certain criteria as to what constitutes the fair market price of securities taken in trade.²² FINRA proposes to delete NASD Rules 2730(a) through (c) and the corresponding provisions under IM-2730 because proposed FINRA Rule 5141(a) and the definitions of “reduced price” and “fair market price” set forth in proposed FINRA Rule 5141.01 serve the purposes of the NASD provisions in more straightforward and streamlined fashion and accordingly render them obsolete.²³
- NASD Rule 2730(d) addresses how bid and offer quotations for transactions subject to Rule 2730 must be obtained.²⁴ FINRA proposes to delete NASD Rule 2730(d) and the

²² Corresponding interpretive material in the first paragraph of IM-2730 addresses in detail, for compliance purposes, a “safe harbor” for certain transactions in securities with respect to the fair market price requirements. Corresponding interpretive materials under “Presumption of Noncompliance,” “No Presumptions” and “Fair Market Price at the Time of Purchase,” all under IM-2730, address additional fair market price-related criteria.

²³ See notes 15 and 16 and accompanying text.

²⁴ The quotations requirements set forth in NASD Rule 2730(d) are further elaborated by corresponding interpretive material under “Quotations” under IM-2730.

corresponding provisions under IM-2730 because they are rendered obsolete in view of FINRA's proposed deletion of the other portions of NASD Rule 2730.

- NASD Rule 2730(e) imposes certain recordkeeping requirements. Among other things, the rule requires a member who purchases a security taken in trade to keep adequate records to demonstrate compliance with the rule and to preserve the records for at least 24 months after the transaction.²⁵ FINRA proposes to delete NASD Rule 2730(e) and the corresponding provisions under IM-2730 because they are rendered obsolete in light of FINRA's proposed deletion of the other portions of Rule 2730 and in light of members' supervisory and transactional recordkeeping obligations under FINRA and SEC rules.²⁶
- NASD Rule 2740 and IM-2740

- NASD Rule 2740(a) generally provides that in connection with a fixed price offering, selling concessions, discounts or other allowances may only be paid to brokers or dealers actually engaged in the investment banking or securities business and only as consideration for services rendered in distribution.²⁷ Rule 2740(a)(1) provides that nothing in the rule prohibits a member from selling securities in a fixed price offering to any person or account to whom the member has provided, or will provide, bona fide research, if the purchaser pays the stated public offering price for the securities. Rule 2740(a)(2) provides that nothing in the rule prohibits a member from selling securities in a fixed price offering that the member owns to any person at any net price which may be

²⁵ Corresponding interpretive material under "Adequate Records" under IM-2730 sets forth additional requirements with respect to recordkeeping.

²⁶ The Commission staff remind FINRA members of their recordkeeping obligations under Rules 17a-3 and 17a-4 under the Act.

²⁷ Corresponding interpretive material in the first four paragraphs of IM-2740 provide further elaboration of requirements with respect to the term "services in distribution" and related issues.

fixed by the member unless prevented by agreement. FINRA proposes to delete NASD Rules 2740(a), (a)(1) and (a)(2) and the corresponding provisions under IM-2740 because proposed FINRA Rules 5141(a), 5141.01 and 5141.02, in combination, achieve the purpose of the NASD provisions and accordingly render them obsolete.²⁸

- NASD Rule 2740(b) defines “bona fide research” to mean advice, rendered either directly or through publications or writings, as to the value of securities, the advisability of investing in, purchasing, or selling securities, and the availability of securities or purchasers or sellers of securities, or analyses and reports concerning issuers, industries, securities, economic factors and trends, portfolio strategy, and performance of accounts.²⁹ Rule 2740(b) and the interpretive material under “Bona Fide Research Exclusion” under IM-2740 further provide that investment management or investment discretionary services are not bona fide research. FINRA proposes to delete NASD Rule 2740(b) and the corresponding provisions under IM-2740 because proposed FINRA Rule 5141.02 serves the purpose of the NASD provisions in more straightforward and streamlined fashion and accordingly renders them obsolete.³⁰

²⁸ See notes 9 and 17 and accompanying text.

²⁹ Corresponding interpretive material under “Bona Fide Research Exclusion” under IM-2740 provides that the definition of “bona fide research” is “substantially the same” as the definition of research that is set forth under Securities Exchange Act Section 28(e)(3), and incorporates by reference Commission guidance as to the circumstances when the exclusion for bona fide research is available. The “Bona Fide Research Exclusion” interpretive material further reiterates that investment management or investment discretionary services are not bona fide research. Additional corresponding interpretive material under “Indirect Discounts” under IM-2740 addresses products or services that fail to qualify as bona fide research.

³⁰ See notes 18 and 19 and accompanying text.

- NASD Rule 2740(c) requires a member who grants a selling concession, discount or other allowance to another person to obtain a written agreement from that person that he or she will comply with Rule 2740. If a member grants a selling concession, discount or other allowance to a non-member broker or dealer in a foreign country, the rule requires that the member must obtain from that non-member an agreement that it will comply with NASD Rules 2730 and 2750 (in addition to Rule 2740) as if the non-member were a member, and that the non-member will comply with NASD Rule 2420 as that rule applies to a non-member broker-dealer in a foreign country. FINRA proposes to delete NASD Rule 2740(c) because it is sufficient to apply the requirements of the new, consolidated rule to FINRA members. The relationships between foreign non-members and their customers are beyond the scope of the proposed rule change.³¹ FINRA notes that the requirements of proposed FINRA Rule 5141 would apply to members – and would reach any reduced prices that members offer or grant to non-members – regardless of whether agreements to comply with rules are obtained.³²
- NASD Rule 2740(d) requires a member that receives an order from any person designating another broker or dealer to receive credit for the sale to file reports with FINRA within thirty days after the end of each calendar quarter with respect to each fixed price offering that terminated during the quarter. The rule further specifies certain information the reports must contain. NASD Rule 2740(e) requires a member that is

³¹ Underwriting terms in foreign jurisdictions vary considerably, as do applicable regulatory requirements.

³² For further discussion see Section (G) under Item II.C. FINRA notes that NASD Rule 2420 is being addressed separately as part of the rulebook consolidation process. See Regulatory Notice 09-69 (FINRA Requests Comment on Proposed Consolidated FINRA Rule Governing Payments to Unregistered Persons) (December 2009).

designated by its customer for the sale of securities to keep and maintain for twenty-four months records of information similar to that set forth in NASD Rule 2740(d). FINRA proposes to delete NASD Rules 2740(d) and (e) because they are rendered obsolete in light of the proposed deletion of the other portions of NASD Rule 2740 and in light of members' supervisory and transactional recordkeeping obligations under FINRA and SEC rules.³³ Further, FINRA notes that its regulatory programs in connection with the proposed rule change will not require specific quarterly filings such as those currently required pursuant to NASD Rule 2740(d).

NASD Rule 2750 and IM-2750

- NASD Rule 2750(a) provides that no member engaged in a fixed price offering of securities is permitted to sell the securities to, or place the securities with, any person or account which is a related person of the member, unless the related person is itself subject to the rule or is a non-member broker-dealer that has entered into the agreements required under Rule 2740(c). NASD Rules 2750(b) and (c) address criteria pertaining to the term "related person." As discussed earlier, the proposed rule change would eliminate the prohibitions under Rule 2750(a), which FINRA believes would be redundant in light of the proposed rule's overall protections against the conferring of a reduced price.³⁴ Accordingly, FINRA proposes to delete NASD Rule 2750(a), as well as Rules 2750(b) and (c), as the criteria pertaining to the term "related person" would be rendered obsolete.
- NASD Rule 2750(d) provides that the rule's prohibitions do not apply to the sale or placement of securities in a trading or investment account of a member or a related

³³ The Commission staff again remind FINRA members of their recordkeeping obligations under Rules 17a-3 and 17a-4 under the Act.

³⁴ See note 12 and accompanying text.

person of a member after the termination of the fixed price offering if the member or related person has made a bona fide public offering of the securities.³⁵ FINRA proposes to delete NASD Rule 2750(d) and the corresponding provisions under IM-2750 because the provisions are obsolete in light of the proposed deletion of the other portions of Rule 2750.

- The first paragraph of IM-2750 addresses certain conditions under which a member that acts or plans to act as a sponsor of a unit investment trust is deemed not to violate Rule 2750. FINRA proposes to delete the IM provisions because, again, they are obsolete in light of the proposed deletion of the other portions of NASD Rule 2750.

Lastly, as noted earlier in this filing, the proposed rule change would incorporate the definition of “fixed price offering” set forth in current NASD Rule 0120(h) into the proposed rule in substantially identical form.³⁶ Accordingly, NASD Rule 0120(h) would be deleted.

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. The effective date will be no later than 180 days following publication of the Regulatory Notice announcing 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,³⁷ which requires, among other things, that FINRA rules must be designed

³⁵ NASD Rule 2750(d) and corresponding interpretive material in the second paragraph under IM-2750 further set forth certain provisions with respect to bona fide public offerings. See note 13 and accompanying text.

³⁶ See note 4.

³⁷ 15 U.S.C. 78o-3(b)(6).

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 rulebook consolidation process, the proposed rule change will streamline and reorganize the existing rules that protect the integrity of fixed price offerings by ensuring that securities in such offerings are sold to the public at the stated public offering price or prices, thereby preventing an undisclosed better price. Further, the proposed rule change will provide greater regulatory clarity with respect to this area.

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

The proposed rule change was published for comment in Regulatory Notice 09-45 (August 2009) (the "Notice"). One comment was received in response to the Notice.³⁸ A copy of the Notice is attached as Exhibit 2a. A copy of the comment letter received in response to the Notice is attached as Exhibit 2b.

(A) Single Underwriters

CFRS suggested that proposed FINRA Rule 5141 should exclude from its coverage members that act as single underwriters rather than as members of a selling syndicate or selling group to distribute fixed price offerings of securities. In response, FINRA believes that permitting such an exclusion would seriously undermine the purposes of the proposed rule by

³⁸ Letter from Jeffrey W. Rubin, Chair, Committee on Federal Regulation of Securities, Section of Business Law, American Bar Association ("CFRS"), to Marcia E. Asquith, Corporate Secretary, FINRA, dated September 18, 2009.

eliminating a significant portion of offerings from its coverage. Accordingly, FINRA has revised the proposed rule to clarify that its requirements apply to members that act as single underwriters of fixed price offerings, not just members that are part of a selling syndicate or selling group.³⁹

(B) Offer of Securities

CFRS suggested that the proposed rule's prohibitions should not extend to an offer of securities at a reduced price as defined under the rule, but rather only to transactions that are consummated. Though CFRS acknowledged that members should not make offers to sell securities at reduced prices that would be prohibited under the rule, it suggested that extending the rule's prohibitions to such offers would place undue burdens on members' compliance programs. CFRS further suggested that improper offers do not harm customers, issuers or the public. FINRA rejects this view. FINRA believes that to condone a view that improper offers are not harmful so long as they do not result in consummated transactions would be highly deleterious to the public interest. Further, FINRA takes this occasion to remind members that monitoring personnel to ensure that they do not make improper offers is an important function of any member's compliance program. Accordingly, FINRA declines to make the suggested revision to the rule.

(C) Definition of Fixed Price Offering

CFRS sought confirmation that the term "fixed price offering" as defined in proposed FINRA Rule 5141.04 permits multiple fixed prices in an offering of securities as explained in Notice to Members 81-3. In response, FINRA believes that the term "price or prices" as set forth

³⁹ See proposed FINRA Rules 5141(a), 5141.02 and 5141.03. See also note 7.

in proposed FINRA Rule 5141.04, which is largely identical to current NASD Rule 0120(h), is clear that the rule does not by its terms prohibit multiple price offerings.

CFRS further suggested that the definition of the term “fixed price offering” should be revised to specifically exclude offerings made pursuant to certain Securities Act provisions and regulations thereunder. CFRS suggested that the definition of “fixed price offering” should align with the definition of “public offering” as set forth in NASD Rule 2720(f)(11) (FINRA has addressed NASD Rule 2720 in filing SR-FINRA-2010-026). In response, FINRA notes that CFRS has confused the differing purposes of the two rules. As a matter of investor protection with respect to any fixed price offering, proposed FINRA Rule 5141.04 is intended to reach any such offering at a stated public offering price or prices, all or part of which securities are publicly offered in the United States or any territory thereof, whether or not registered under the Securities Act. The scope of the proposed rule is different from that of NASD Rule 2720(f)(11) because the proposed rule regulates fixed price offerings, whether or not they are registered. Accordingly, FINRA declines to revise the proposed rule language.

(D) Sales to Affiliates

CFRS suggested that the provision with respect to affiliated persons set forth in proposed FINRA Rule 5141(a) should be placed in a separate Supplementary Material. CFRS proposed language that would suggest the sole function of the provision is to remind members that they should comply with FINRA Rule 5130 when making sales to affiliates. FINRA disagrees. FINRA believes that the proposed rule text as written is clear and serves to expressly provide that members must not sell securities in a fixed price offering to an affiliated person at a reduced price under the rule.

CFRS further suggests that proposed FINRA Rule 5141.03's provisions with respect to transactions with affiliated persons should be revised to expressly provide that such transactions are presumed to be unrelated to the sale or purchase of securities in a fixed price offering. FINRA disagrees. Such a presumption would undermine the rule's purpose, which, among other things, is intended to ensure that affiliate transactions are not employed as a device to confer an impermissible reduced price under the rule.

(E) Reduced Price

CFRS made a number of suggestions with respect to the definition of "reduced price" as set forth in proposed FINRA Rule 5141.01. CFRS requested that FINRA confirm that the proposed rule is not intended to nullify guidance that FINRA has previously published with respect to referral fees under NASD Rule 2420. In response, such confirmation is not called for in this filing, as the guidance cited by CFRS addresses Rule 2420, not the fixed price offering rules. CFRS suggested that proposed FINRA Rule 5141.05 should be revised so as to eliminate the provision that certain exemptions granted by investment advisers with respect to annual or periodic asset-based fees must not be in connection with an offering. FINRA disagrees. FINRA believes that it serves an important regulatory purpose to expressly provide that any such exemptions must be part of the member's ordinary course of business with the customer and not in connection with an offering. CFRS suggested language to establish an express presumption that credits, rebates, fee reductions and agreements for products and services that are part of member's normal and ordinary course of business would not be deemed to constitute a "reduced price" under the rule. Again, FINRA disagrees because adopting such a presumption would in effect permit the use of "normal and ordinary" business transactions to thwart the fundamental purposes of the rule. Accordingly, FINRA declines to accept the proffered language. Lastly,

CFRS suggested that the proposed rule's definition of "fair market price" should not incorporate the concepts of unrelated parties and independence from any other transaction because the requirements do not provide any additional safeguards. FINRA disagrees. The concepts of unrelated parties and independence from any other transaction provide important standards for identifying whether a bona fide economic transaction has occurred. Further, the proposed language is fundamentally consistent with the basic concepts underlying current NASD Rule 2730. Accordingly, FINRA declines to revise the proposed language as suggested.⁴⁰

(F) Under-Subscribed Offerings

CFRS expressed concern that the proposed rule should not apply to under-subscribed ("sticky") offerings. CFRS proposed exemptive language that generally would, in circumstances where all the securities in a fixed price offering cannot be sold at the stated offering price, permit a member to reduce the price of the remaining securities or to place the securities in the member's investment account or the account of an affiliated person. In response, FINRA appreciates CFRS's concern and has revised the proposed rule to provide that the rule's requirements shall apply until the termination of the offering or until a member, having made a bona fide public offering of the securities, is unable to continue selling such securities at the stated public offering price. As a matter of investor protection, FINRA has further revised the proposed rule to provide that, for purposes of the rule, securities in a fixed price offering shall be

⁴⁰ FINRA has made one minor revision to the proposed definition of "fair market price" not in connection with the comment. As published in the Notice, the proposed rule language would have specified "a willing buyer and a willing seller." For the purpose of greater clarity, FINRA has deleted the word "willing."

presumed salable if the securities immediately trade in the secondary market at a price or prices which are above the stated public offering price.⁴¹

FINRA declines to adopt CFRS's proffered language with respect to placement of offered securities in a member's investment account or the account of an affiliated person. First, the rule as proposed is clear that it does not prohibit a member from selling securities in the offering to affiliated persons, subject to FINRA Rule 5130, provided the member does not sell the securities to such affiliated person at a reduced price under the rule. Second, as already discussed, the rule by its terms is also clear that it does not apply to circumstances where the offering has terminated or where the member, having made a bona fide public offering of the securities, is unable to continue selling the securities at the stated public offering price. Third, FINRA notes that the appropriateness of placing unsold shares in a member's investment account, and the subsequent resale of the shares, raises other potential issues under the federal securities laws or other FINRA rules and is beyond the scope of the proposed rule change.

(G) Written Agreement of Compliance

CFRS sought confirmation that under the proposed rule members would no longer be required to obtain the written agreements required pursuant to current NASD Rule 2740(c) with respect to non-members. In response, FINRA notes that the proposed rule change eliminates NASD Rule 2740 in its entirety, including the requirement to obtain written agreements with non-members pursuant to paragraph (c) of that rule. The proposed rule by its terms regulates the activities of members. FINRA notes, however, that the proposed rule reaches any offer or grant of a reduced price under the rule to any person or account that is not a member of the selling syndicate or selling group (or, in the case of an offering with a single underwriter, to any person

⁴¹ FINRA notes that this standard is based in part on provisions in current NASD Rule 2750(d). See note 13 and accompanying text.

or account other than the single underwriter). Accordingly, the rule would reach reduced prices offered or granted to non-members as well as other members.

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-2010-029 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-2010-029. 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 Web site viewing and printing 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-2010-029 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.⁴²

Florence E. Harmon

Deputy Secretary

⁴² 17 CFR 200.30-3(a)(12).