

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-62970; File No. SR-FINRA-2010-037)

September 22, 2010

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Order Approving the Proposed Rule Change to Amend FINRA Rule 5190 (Notification Requirements for Offering Participants)

I. Introduction

On July 27, 2010, 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”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder,² a proposal to amend FINRA Rule 5190 (Notification Requirements for Offering Participants) relating to the notice requirements applicable to distributions of “actively traded” securities, as defined under Regulation M. This proposal was published for comment in the Federal Register on August 13, 2010.³ The Commission received no comments regarding the proposal. This order approves this proposed rule change.

II. Description of the Proposed Rule Change

FINRA Rule 5190 imposes certain notice requirements on FINRA members participating in distributions of listed and unlisted securities and is designed to ensure that FINRA receives pertinent distribution-related information from its members in a timely fashion to facilitate its Regulation M surveillance program.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ Securities Exchange Act Release No. 62664 (Aug. 9, 2010), 75 FR 49542 (Aug. 13, 2010) (SR-FINRA-2010-037).

Rule 5190(d) sets forth the notice requirements applicable to distributions of securities that are considered “actively traded” and thus are not subject to a restricted period under Rule 101 of Regulation M.⁴ In connection with such distributions, pursuant to Rule 5190(d)(1), FINRA members are required to provide written notice to FINRA of the member’s determination that no restricted period applies and the basis for such determination. FINRA members must provide such notice at least one business day prior to the pricing of the distribution, unless later notification is necessary under specific circumstances. Rule 5190(d)(2) requires that, upon pricing a distribution of an “actively traded” security, FINRA members provide written notice to FINRA along with pricing-related information such as the offering price, the last sale before the distribution, and the pricing basis. Notice of pricing must be provided no later than the close of business the next business day following the pricing of the distribution, unless later notification is necessary under specific circumstances.

FINRA proposed to amend Rule 5190(d) to require that notice under subparagraphs (1) and (2) be provided at the same time, specifically no later than the close of business the next business day following the pricing of the distribution. While the timing of notice under subparagraph (1) would change, the information required would not change. Thus, pursuant to the proposed rule change, FINRA members will be required to provide a single notice after pricing of the distribution and will be required to provide all of the same information that they provide today.

⁴ The exception for “actively traded” securities in Rule 101 of Regulation M applies to securities with an ADTV value, as defined in Rule 100 of Regulation M, of at least \$1 million and are issued by an issuer whose common equity securities have a public float value of at least \$150 million, provided, however, that such securities are not issued by the distribution participant or an affiliate of the distribution participant. 17 CFR 242.101(c)(1).

FINRA has determined that it will be sufficient for members to provide notice of their determination that no restricted period applies following the pricing of the distribution. FINRA clarified that the proposed rule change will not impact FINRA's Regulation M surveillance program.

In its filing, FINRA stated that a significant number of distributions of "actively traded" securities evolve quickly after the market close and are priced overnight before the next trading session. Thus, FINRA believes that its members frequently do not have sufficient advance knowledge of their participation in the distribution to provide notice to FINRA at least one business day prior to pricing and in such instances are unable to comply with the express terms of Rule 5190(d)(1). FINRA then must make a determination whether later notification was necessary under the circumstances, in accordance with the rule. FINRA has stated that the proposed rule change will clarify members' notice obligations in the context of such distributions.

FINRA represented that the proposed rule change will be effective on the date of Commission approval.

III. Discussion and Findings

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.⁵ In particular, the Commission believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,⁶ which requires, among

⁵ 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).

⁶ 15 U.S.C. 78o-3(b)(6).

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 proposed rule change will streamline FINRA member obligations and continue FINRA's surveillance program regarding Regulation M to protect investors.

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,⁷ that the proposed rule change (File No. SR-FINRA-2010-037) be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁸

Florence E. Harmon
Deputy Secretary

⁷ 15 U.S.C. 78s(b)(2).

⁸ 17 CFR 200.30-3(a)(12).