

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-61171; File No. SR-FINRA-2009-086)

December 15, 2009

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of Proposed Rule Change to Adopt FINRA Rule 5160 (Disclosure of Price and Concessions in Selling Agreements) 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 2, 2009, Financial Industry Regulatory Authority, Inc. (“FINRA”) 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 NASD Rule 2770 (Disclosure of Price in Selling Agreements) as FINRA Rule 5160 in the consolidated FINRA rulebook without material change.

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.

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

¹ 15 U.S.C. 78s(b)(1).

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 NASD Rule 2770 (Disclosure of Price in Selling Agreements), without material change, as FINRA Rule 5160.

NASD Rule 2770 requires certain disclosures in selling agreements.⁴ Specifically, the rule requires that selling syndicate agreements or selling group agreements⁵ (1) set forth the price at which securities are to be sold to the public or the formula by which such price can be

² 17 CFR 240.19b-4.

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 Rule 2770, formerly designated as Section 7 in Article III of the Rules of Fair Practice, was adopted in 1939 as part of FINRA’s original rulebook. See Certificate of Incorporation and By-Laws, Rules of Fair Practice and Code of Procedure for Handling Trade Practice Complaints of National Association of Securities Dealers, Inc. (August 8, 1939). The precursor to NASD Rule 2770 was originally drafted by the Investment Bankers Code Committee in 1934. See Code Of Fair Competition For Investment Bankers With A Descriptive Analysis Of Its Fair Practice Provisions And A History Of Its Preparation (1934).

⁵ 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.)

ascertained and (2) state clearly to whom and under what circumstances concessions, if any, may be allowed.⁶

It is customary industry practice that both of these items are contained in selling agreements. FINRA believes that these disclosures are important in ensuring the integrity of the public offering process. Specifically, the requirement to set forth the price at which the securities are to be sold to the public creates a contractual obligation among the selling group participants to offer the security to investors at the same price. The second requirement to set forth to whom and under what circumstances concessions, if any, are allowed gives the selling syndicate or selling group control over who may be compensated for participating in the offering.

NASD Rule 2770 has not been substantively amended since it was adopted in 1939. FINRA believes that Rule 2770's application and scope are clear and that the rule is achieving its intended purpose as part of FINRA's regulatory scheme governing member activity in securities offerings. FINRA proposes to transfer NASD Rule 2770 into the Consolidated FINRA Rulebook without material change as new FINRA Rule 5160. However, FINRA proposes one minor change to the title of the rule to clarify that in addition to disclosing the price of a security in an offering, selling agreements must also disclose concessions. The proposed title of FINRA Rule 5160 would be "Disclosure of Price and Concessions in Selling Agreements."

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.

⁶ Pursuant to FINRA Rule 0150, NASD Rule 2770 is applicable to transactions in, and business activities relating to, exempted securities, except municipal securities, conducted by members and associated persons.

2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,⁷ 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 disclosures required by the proposed rule are important in ensuring the integrity of the public offering process. In addition, the rule being adopted as part of the Consolidated FINRA Rulebook previously has been found to meet the statutory requirements, and FINRA believes this 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

⁷ 15 U.S.C. 78q-3(b)(6).

(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-2009-086 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-2009-086. 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 submission⁸, 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

⁸ The text of the proposed rule change is available on the Commission's Web site at <http://www.sec.gov/>.

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 a.m. and 3:00 p.m. Copies of the 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-2009-086 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.⁹

Florence E. Harmon
Deputy Secretary

⁹ 17 CFR 200.30-3(a)(12).