

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-77786; File No. SR-FINRA-2016-014)

May 9, 2016

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of a Proposed Rule Change Relating to National Adjudicatory Council Composition, Member Terms and Election Procedures

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on April 28, 2016, 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 amend the By-Laws of FINRA’s regulatory subsidiary, FINRA Regulation, Inc. (“FINRA Regulation”), to expand the size of the National Adjudicatory Council (“NAC”) to 15 members, with the number of non-industry members exceeding the number of industry members; lengthen the terms of office of future NAC members to four years; and update the process used for sending and counting ballots in the event of a contested nomination and election to fill certain NAC industry member seats.

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

The text of the proposed rule change is available on FINRA's website 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 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

Background

In 2007, as part of the consolidation of the member firm regulatory functions of National Association of Securities Dealers, Inc. ("NASD") and NYSE Regulation, Inc. into a combined organization, FINRA, the SEC approved changes to the NASD By-Laws that, among other things, included a governance structure that apportioned public and industry representation on the FINRA Board of Governors ("FINRA Board") and designated seven governor seats to represent member firms of various sizes based on the criteria of firm size.<sup>3</sup> As a result of these changes, the By-Laws of FINRA ("FINRA By-Laws") require that the FINRA Board consist of no fewer than 16 and no more than 25

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<sup>3</sup> See Securities Exchange Act Release No. 56145 (July 26, 2007), 72 FR 42169 (August 1, 2007), as amended by Securities Exchange Act Release No. 56145A (May 30, 2008), 73 FR 32377 (June 6, 2008) (Order Approving File No. SR-NASD-2007-023).

governors.<sup>4</sup> They provide also that the number of Public Governors serving on the FINRA Board shall exceed the number of Industry Governors.<sup>5</sup>

The FINRA Board consists currently of 24 governors, including 13 Public Governors, 10 Industry Governors and FINRA’s chief executive officer.<sup>6</sup> The ten Industry Governors include a Floor Member Governor, an Independent Dealer/Insurance Affiliate Governor, an Investment Company Affiliate Governor and seven governors that are subject to election to the FINRA Board by member broker-dealers based on the criteria of firm size—three Small Firm Governors, one Mid-Size Firm Governor and three Large Firm Governors.<sup>7</sup>

#### The National Adjudicatory Council

The NAC acts on behalf of FINRA in several capacities and its powers are authorized by the By-Laws of FINRA Regulation (“FINRA Regulation By-Laws”) and FINRA’s Code of Procedure.<sup>8</sup> The NAC presides over disciplinary matters appealed to or called for review by the NAC.<sup>9</sup> The NAC also acts, when requested, in statutory

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<sup>4</sup> See FINRA By-Laws, Article VII, Section 4 (Composition and Qualifications of the Board), paragraph (a).

<sup>5</sup> Supra note 4.

<sup>6</sup> Supra note 4. The number of Public Governors is determined by the FINRA Board.

<sup>7</sup> Supra note 4.

<sup>8</sup> See FINRA Regulation By-Laws, Article V, Section 5.1 (Authority); see also FINRA Rule 9000 Series.

<sup>9</sup> See generally FINRA Rule 9300 Series. FINRA’s disciplinary process begins with its Department of Enforcement or Department of Market Regulation filing a complaint with the Office of Hearing Officers that alleges a member or person associated with a member is violating or has violated any rule, regulation, or statutory provision, including the federal securities laws and related regulations.

disqualification and membership proceedings; considers the appeals of members seeking exemptive relief; and retains the authority to review decisions proposed in other proceedings as set forth in the Code of Procedure.<sup>10</sup> For most matters that the NAC considers, it prepares a proposed written decision, which becomes final FINRA action if the Board does not call the matter for review.<sup>11</sup>

The FINRA Regulation By-Laws establish the composition of the NAC, the terms of its members, and the process by which members are selected. The NAC is composed currently of 14 members.<sup>12</sup> The number of Non-Industry Members, which must include at least three Public Members, equals the number of Industry Members.<sup>13</sup> The seven

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See FINRA Rule 9212. When requested, trial-level hearings take place before a Hearing Panel or an Extended Hearing Panel, which listens to the presentation of evidence and issues a written decision setting forth findings as to whether a respondent engaged in the alleged misconduct and describing the sanctions, if any, imposed. See FINRA Rule 9221; see generally FINRA Rule 9260 Series. A respondent or the Department of Enforcement or Market Regulation may appeal a disciplinary decision to the NAC. See FINRA Rule 9311. In the absence of an appeal, a decision may be subject to NAC review if called for review by any member of the NAC, any member of the NAC's Review Subcommittee, or in the event of a default, the General Counsel. See FINRA Rule 9312.

<sup>10</sup> See FINRA Rule 9524; NASD Rule 1015; FINRA Rule 9630; FINRA Rule 9559; FINRA Rule 9760.

<sup>11</sup> See FINRA Rule 9349.

<sup>12</sup> See FINRA Regulation By-Laws, Article V, Section 5.2 (Number of Members and Qualifications), paragraph (a).

<sup>13</sup> Supra note 12. A "Non-Industry Member" of the NAC includes any Public Member, an officer or employee of an issuer of securities listed on a market for which FINRA provides regulation, an officer or employee of an issuer of unlisted securities that are traded in the over-the-counter market, or any individual who would not otherwise fall within the definition of an Industry Member. See FINRA Regulation By-Laws, Article I, paragraph (ee). A "Public Member" is a Non-Industry Member who has no material business relationship with a broker or dealer or a self-regulatory organization registered under the Act. See FINRA Regulation By-Laws, Article I, paragraph (hh). An "Industry Member" includes a

Industry Members include two Small Firm NAC Members, one Mid-Size Firm NAC Member, two Large Firm NAC Members and two at-large Industry Members.<sup>14</sup>

The FINRA Board appoints the NAC and its members.<sup>15</sup> The FINRA Board appoints Non-Industry Members and at-large Industry Members from candidates recommended by the Nominating Committee. The FINRA Board also appoints Small Firm, Mid-Size Firm and Large Firm NAC Members, either from candidates recommended by the Nominating Committee, or in the event of a contested election for a Small Firm, Mid-Size Firm or Large Firm NAC Member vacancy, the candidate that results from an election in which FINRA members have an opportunity to vote directly for a candidate based on firm size.<sup>16</sup> The Small Firm, Mid-Size Firm or Large Firm NAC Member candidate receiving the largest number of votes from firms of corresponding size is declared the nominee, and the Nominating Committee sends a written certification of

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person who is or served in the prior year as an officer, director, employee or controlling person of a broker-dealer; is an officer, director or employee of an entity that owns a material equity interest in a broker-dealer; owns personally a material equity interest in a broker-dealer; provides professional services to broker-dealers, or to a director, officer, or employee of a broker-dealer in their professional capacity, where the revenues from such services meet material thresholds; or is or served in the prior year as a consultant, employee or provider of professional services to a self-regulatory organization registered under the Act. See FINRA Regulation By-Laws, Article I, paragraph (x).

<sup>14</sup> Supra note 12.

<sup>15</sup> See FINRA Regulation By-Laws, Article V, Section 5.3 (Appointments).

<sup>16</sup> Supra note 15. A person who has not been nominated by the Nominating Committee may be included on a ballot for election to fill an open Small Firm, Mid-Size Firm or Large Firm NAC Member seat by contesting the Nominating Committee's nominee after successfully petitioning for inclusion on the ballot. See FINRA Regulation By-Laws, Article VI, Section 6.2 (Designation of Additional Candidates).

the results to the FINRA Board and nominates such candidate for appointment to the NAC.<sup>17</sup>

#### Discussion of the Proposed Rule Change

The proposed rule change would amend the FINRA Regulation By-Laws in three principal ways. First, the proposed rule change would make a limited modification to the NAC's composition and align it more closely with that of the FINRA Board. Second, the proposed rule change would lengthen the terms of future NAC members to encourage consistency and continuity in NAC decision making. Finally, the proposed rule change would modernize the selection process used in the event of a contested nomination and election for certain industry member NAC seats by permitting new balloting methods and streamlining the process by which ballots are counted.

#### Proposal to Change the Composition of the NAC

The proposed rule change would amend Section 5.2 of the FINRA Regulation By-Laws to expand the size of the NAC to 15 members and apply the requirement that the NAC have more Non-Industry Members, including three Public Members, than Industry Members, thus following closely the requirement that exists in the FINRA By-Laws that the number of Public Governors on the FINRA Board exceed the number of Industry Governors.<sup>18</sup> FINRA proposed, and the SEC approved, the current FINRA Board

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<sup>17</sup> See FINRA Regulation By-Laws, Article VI, Section 6.13 (Certification of Nomination). The FINRA Board is required to appoint to the NAC the candidate who receives the most votes in any contested election for a Small Firm, Mid-Size Firm or Large Firm NAC Member seat. See FINRA Regulation By-Laws Article V, Section 5.5 (Rejection of Nominating Committee Nominee).

<sup>18</sup> Although the terms "Non-Industry Member" and "Public Governor" are not by their definitions exact analogs, both terms are comparable in excluding from their definitions any person who has a material business relationship or interests that align closely with a FINRA member broker-dealer or a self-regulatory

governance structure to strike an appropriate balance between the necessity for overall independence of the FINRA Board and the desire for substantial, meaningful and diverse industry representation in FINRA's governing process.<sup>19</sup> The condition that the number of Public Governors exceed the number of Industry Governors permits the FINRA Board to consider the needs of the entire securities industry, including issuers, large and small investors and securities firms and their professionals, while at the same time broadly assuring the independence of FINRA's regulatory function.<sup>20</sup>

Under the proposed rule change, the NAC would consist of 15 members, including eight Non-Industry Members and seven Industry Members. FINRA would thus achieve the objective of a majority non-industry NAC by adding one Non-Industry Member seat to the current 14-member committee. Requiring that the number of Non-Industry Members exceed the number of Industry Members will enhance overall the independence of the NAC and reinforce the integrity of the NAC as an impartial and fair adjudicatory body.

#### Proposal to Change NAC Member Terms

The proposed rule change would also lengthen the terms of office of future NAC members. NAC members are divided currently into three classes, with members serving three-year terms of office that commence and expire on a staggered, annual basis.<sup>21</sup>

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organization registered under the Act. Compare FINRA Regulation By-Laws, Article I, paragraph (ee), with FINRA By-Laws, Article I, paragraph (tt).

<sup>19</sup> See supra note 3.

<sup>20</sup> See supra note 3.

<sup>21</sup> See FINRA Regulation By-Laws, Article V, Section 5.6 (Term of Office), paragraphs (a) and (b).

Consequently, approximately one-third of the NAC members complete their service in a particular year and are replaced with newly appointed members. This represents a significant amount of turnover annually and risks undermining the cohesion and continuity of the NAC as an adjudicatory body.

The proposed rule change would amend Section 5.6 of the FINRA Regulation By-Laws to extend by one year, to four total years, the terms of new NAC members.<sup>22</sup> This would result in a NAC that is divided into four classes, rather than the current three, that are as equal in number as feasible.<sup>23</sup> Extending to four years the term of each NAC member will allow for greater utilization of the unique skills and expertise of each member, diminish the risk associated with recurrent losses of institutional knowledge and provide FINRA more opportunity to recoup over a longer period of time its investment in training NAC members to fulfill their roles as adjudicators.<sup>24</sup>

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<sup>22</sup> The proposed rule change would not alter or extend the term of any NAC member serving currently but would affect instead the term of any NAC member appointed to serve by the FINRA Board after the effective date of the rule change.

<sup>23</sup> The proposed rule change would amend Section 5.6(a) of the FINRA Regulation By-Laws to provide a three-year transitional period during which the FINRA Board may appoint new NAC members to terms of office less than four years to achieve the staggering necessary to divide the NAC into four classes. FINRA anticipates that, beginning in January 2017, and ending in December 2019, new NAC members shall be appointed to terms of either three years or four years to achieve the result of a NAC that is divided into four classes, with each NAC member serving a term of four years. The proposed rule change would also make a conforming amendment to Section 5.6(b) of the FINRA Regulation By-Laws to delete obsolete text related to a prior rule change that replaced region-based Industry NAC members with Industry members that represent FINRA member firms of various sizes. See Securities Exchange Act Release No. 58909 (November 6, 2008), 73 FR 68467 (November 18, 2008) (Order Approving File No. SR-FINRA-2008-046).

<sup>24</sup> A NAC member, absent a limited exception, may not serve consecutive terms. See FINRA Regulation By-Laws, Article V, Section 5.6 (Term of Office),



### Proposal to Change the NAC Selection Process

Finally, the proposed rule change would make limited, procedural and administrative modifications to the NAC selection process. The proposed changes would make the NAC election process streamlined, accessible and align it with the process used currently for elections involving the FINRA District Committees.

The FINRA Regulation By-Laws, as currently written, require that the Nominating Committee prepare and deliver by mail, in the event of a contested election for a Small Firm, Mid-Size Firm or Large Firm NAC Member seat, a ballot with the names of the candidates standing for election, and a FINRA member eligible to vote based on their firm size must return the ballot envelope by mail with a postmark bearing a date on or before the return date specified on the ballot.<sup>25</sup> The proposed rule change would amend Section 6.7 of the FINRA Regulation By-Laws to delete language that suggests that voting by paper ballot is the sole method of voting in contested NAC elections and recognize the delivery of ballots by other efficient, contemporary means.<sup>26</sup> The proposed rule change would align the ballot preparation process in NAC elections with that permitted currently in FINRA District Committee elections and allow FINRA members to vote using online and telephonic methods in addition to paper ballots.<sup>27</sup>

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paragraph (c). The proposed rule change would make a conforming amendment to this By-Law provision.

<sup>25</sup> See FINRA Regulation By-Laws, Article VI, Section 6.7 (Ballots).

<sup>26</sup> The proposed rule change would also make a conforming amendment to Section 6.9 of the FINRA Regulation By-Laws concerning ballots that are returned as undelivered.

<sup>27</sup> See FINRA Regulation By-Laws, Article VIII, Section 8.11 (Ballots).

The proposed rule change would also amend Section 6.10 of the FINRA Regulation By-Laws to simplify the tabulation of ballots by the Independent Agent. The proposed rule change would eliminate the provision in Section 6.10 of the FINRA Regulation By-Laws that permits NAC candidates and their representatives to observe the Independent Agent's accounting of ballots in contested NAC elections. The proposed rule change would align the ballot counting process used in NAC elections with the process used in FINRA District Committee elections, which does not provide candidates the ability to be present while the Independent Agent opens and counts the ballots.<sup>28</sup> The proposed rule change will allow the Independent Agent to expedite the accounting process and permit the Secretary of FINRA to notify the candidates more quickly of NAC election results.

If the Commission approves the proposed rule change, FINRA will announce the effective date of the proposed rule change in a Regulatory Notice to be published no later than 60 days following Commission approval. The effective date will be no later than 30 days following publication of the Regulatory Notice announcing Commission approval.

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<sup>28</sup> See FINRA Regulation By-Laws, Article VIII, Section 8.14 (General Procedures for Qualification and Accounting of Ballots). The opportunity to observe the Independent Agent's qualification and accounting of ballots is one which NAC candidates have infrequently availed themselves and provides candidates no additional grounds for recourse. Candidates and their representatives are not allowed to see the vote of any FINRA member and the final determination of the qualification of a ballot rests with the Secretary of the Corporation. See FINRA Regulations By-Laws, Article VI, Section 6.10 (General Procedures for Qualification and Accounting of Ballots). The proposed rule change does not alter the requirement that the Secretary of the Corporation certify election results. See FINRA Regulation By-Laws, Article VI, Section 6.13 (Certification of Nomination).

## 2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(8) of the Act,<sup>29</sup> which requires, among other things, that FINRA rules provide a fair procedure for the disciplining of members and persons associated with members. FINRA believes that the proposed rule change, consistent with this purpose of the Act, assures that disciplinary appeals and other matters considered by the NAC will continue to be heard and resolved by a NAC that is composed of members with a diversity of expertise, experiences and perspectives that fosters making fair decisions and, where necessary, imposing appropriately remedial sanctions.

FINRA believes further that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,<sup>30</sup> 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 making a limited modification to the NAC's composition to align it more closely with that of the FINRA Board will enhance overall the independence of the NAC as an adjudicatory body. Ensuring that the NAC has a majority of Non-Industry Members emphasizes the importance of the unique, balanced perspectives that are valued in NAC deliberations and aid in its ability to address issues in a neutral fashion. FINRA believes that adding one Non-Industry Member seat to the NAC confirms that a diversity of views is represented in the NAC's opinions.

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<sup>29</sup> 15 U.S.C. 78o-3(b)(8).

<sup>30</sup> 15 U.S.C. 78o-3(b)(6).

FINRA believes also that the proposed rule change is consistent with the provisions of Section 15A(b)(4) of the Act,<sup>31</sup> which requires, among other things, that FINRA rules assure a fair representation of its members in the administration of its affairs. Although the proposed rule change would make a limited change to the NAC's composition, it would nevertheless continue FINRA's custom of substantial industry participation in FINRA's adjudicatory process and would not dilute the critically important involvement of FINRA members and their associated persons in NAC deliberations. Under the proposed rule change, the opportunity for FINRA members to vote on five designated Industry Member NAC seats based on firm size—two Small Firm, one Mid-Size Firm and two Large Firm Member seats—is unaltered. The right of FINRA members to elect a total of five Industry Members to the NAC, one-third of all members, based on firm size is consistent with the Act's fair representation requirement.<sup>32</sup> The proposed rule change will also result in a more accessible NAC election process, which FINRA believes will assure a fair representation of its members on the NAC.<sup>33</sup>

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

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<sup>31</sup> 15 U.S.C. 78o-3(b)(4).

<sup>32</sup> The Commission has found the similar composition requirements of the FINRA Board to meet the statutory requirements of Section 15A(b)(4) of the Act. See supra note 3.

<sup>33</sup> The Commission has found that the processes used currently for FINRA District Elections, processes with which those used in NAC elections would be aligned under the proposed rule change, are consistent with the statutory requirements of the Act. See Securities Exchange Act Release No. 64363 (April 28, 2011), 76 FR 25397 (May 4, 2011) (Order Approving File No. SR-FINRA-2011-011).

Act. The proposed rule change is intended solely to enhance impartiality and integrity in FINRA's process for reviewing appeals of disciplinary and other decisions concerning member firms and their associated persons, and will lead to efficiencies in the process by which some NAC members are elected to the NAC by allowing contemporary balloting methods and expediting the process by which ballots are counted. FINRA does not believe that there are any material economic impacts associated with the proposed rule change.

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 45 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 or disapprove 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](mailto:rule-comments@sec.gov). Please include File Number SR-FINRA-2016-014 on the subject line.

Paper comments:

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

All submissions should refer to File Number SR-FINRA-2016-014. 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 website (<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 website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, D.C. 20549 on official business days between the hours of 10:00 a.m. and 3:00 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-2016-014, 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.<sup>34</sup>

Robert W. Errett  
Deputy Secretary

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<sup>34</sup> 17 CFR 200.30-3(a)(12).