

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-56504; File No. SR-NASD-2007-055)

September 24, 2007

Self-Regulatory Organizations; National Association of Securities Dealers, Inc. (n/k/a Financial Industry Regulatory Authority, Inc.); Order Approving Proposed Rule Change Relating to Interpretative Material 9216, Violations Appropriate for Disposition Under Plan Pursuant to SEC Rule 19d-1(c)(2)

I. Introduction

On July 24, 2007, the National Association of Securities Dealers, Inc. (“NASD”) (n/k/a Financial Industry Regulatory Authority, Inc. (“FINRA”))¹ filed with the Securities and Exchange Commission (“Commission” or “SEC”) pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Exchange Act”)² and Rule 19b-4 thereunder,³ a proposed rule change to amend Interpretative Material 9216 (Violations Appropriate for Disposition Under Plan Pursuant to SEC Rule 19d-1(c)(2)) (“IM-9216”) to expand the list of violations eligible for disposition under NASD’s Minor Rule Violation Plan (“MRVP”). The proposed rule change was published for comment in the Federal Register on August 7, 2007.⁴ The Commission received no comment letters on the proposed rule change. This order approves the proposed rule change.

II. Description of the Proposed Rule Change

In connection with the recently approved plan to consolidate the member regulation

¹ On July 26, 2007, the Commission approved a proposed rule change filed by NASD to amend NASD’s Certificate of Incorporation to reflect its name change to the Financial Industry Regulatory Authority, Inc., or FINRA, in connection with the consolidation of the member firm regulatory functions of NASD and NYSE Regulation, Inc. See Securities Exchange Act Release No. 56146 (July 26, 2007).

² 15 U.S.C. 78s(b)(1).

³ 17 CFR 240.19b-4.

⁴ See Securities Exchange Act Release No. 56175 (July 31, 2007), 72 FR 44201 (“Notice”).

operations of NASD and the NYSE Group, Inc. into a single organization (“Transaction”),⁵ NASD proposed to amend IM-9216 to expand the list of violations eligible for disposition under NASD’s MRVP to include certain NYSE rules that pertain to the regulation of member firm conduct.⁶ The proposed rule change would amend NASD’s MRVP to include those Incorporated NYSE Rules currently enumerated in NYSE’s MRVP. This would permit FINRA, during the interim period until the adoption of a consolidated rulebook, to impose a fine for minor rule violations by a Dual Member of the Incorporated NYSE Rules in lieu of commencing disciplinary proceedings. As discussed in Release No. 34-56147, NASD is not proposing to incorporate, among other rules, the NYSE disciplinary rules or related interpretations, including NYSE’s MRVP as set forth in NYSE Rule 476A (Imposition of Fines for Minor Violation(s) of Rules).⁷

⁵ On July 26, 2007, the Commission approved amendments to NASD’s By-Laws to implement governance and related changes to accommodate the consolidation of the member firm regulatory functions of NASD and NYSE Regulation, Inc. See Securities Exchange Act Release No. 56145 (July 26, 2007). The date of closing of the Transaction was July 30, 2007.

⁶ Until the adoption of a consolidated rulebook that would reduce to one the two sets of rules currently applicable to members of both the NASD and NYSE (“Dual Members”),⁶ NASD has proposed to incorporate into FINRA’s rulebook certain NYSE Rules that pertain to the regulation of member firm conduct (“Incorporated NYSE Rules”). See Securities Exchange Act Release No. 56147 (July 26, 2007) (SR-NASD-2007-054, Exhibit 5) (incorporating certain NYSE Rules relating to member firm conduct into FINRA’s rulebook) (“Release No. 34-56147”). As noted in Release No. 34-56147, the Incorporated NYSE Rules apply solely to FINRA members that are Dual Members on or after the date of closing of the Transaction. NASD represented that FINRA will work expeditiously to consolidate the rules that apply to its member firms. See Notice, supra note 4. The Incorporated NYSE Rules will apply solely to Dual Members until such time as FINRA adopts, subject to Commission approval, consolidated rules applicable to all of its members.

⁷ NASD is not proposing to incorporate NYSE’s MRVP (NYSE Rule 476A), because NYSE Rule 476A contains procedures that would conflict with the finding of a minor rule violation by FINRA. For example, NYSE Rule 476A permits a person against whom a fine is imposed to contest the NYSE’s fine determination by, among other

The proposed amendments to IM-9216 also would specify the applicability of the rules listed therein to various members of FINRA. Specifically, any Dual Member (including any persons affiliated with such member) may be subject to a fine under Rule 9216(b) with respect to any rule listed in IM-9216 that applies to such member or person; provided, however, that any Dual Member that was not also a member of NASD as of the date of closing of the Transaction and that does not engage in any activities that would have required it to be an NASD member (and its affiliated persons that are not otherwise subject to NASD rules) would only be subject to a fine under Rule 9216(b) with respect to the following rules listed in IM-9216: any NYSE rule, Exchange Act rule, NASD By-Law or Schedule to By-Laws, or the NASD Rule 8000 Series. In addition, any member of FINRA that is not also a member of the NYSE (and its associated persons that are not otherwise subject to NYSE rules) may be subject to a fine under Rule 9216(b) with respect to any rule listed in IM-9216, with the exception of the NYSE rules.

NASD is not proposing to adopt the provision in NYSE's MRVP that establishes a \$5,000 maximum fine that may be imposed under NYSE's MRVP for minor violations of NYSE rules. Rather, FINRA would continue to apply the \$2,500 maximum fine level under NASD's MRVP in determining fine levels for minor violations of either an NASD or NYSE rule included in NASD's MRVP.⁸

things, appealing to the NYSE board of directors.

⁸ Rule 19d-1(c)(2) under the Exchange Act, 17 CFR 240.19d-1(c)(2), provides that any disciplinary action taken by a self-regulatory organization ("SRO") against any person of a rule of the SRO that has been designated as a minor rule violation pursuant to a plan is not considered "final" for purposes of Rule 19d-1(c)(1) under the Exchange Act, 17 CFR 240.19d-1(c)(2), if the sanction imposed consists of a fine not exceeding \$2,500 and the sanctioned person has not sought an adjudication, including a hearing, or otherwise exhausted his administrative remedies at the SRO with respect to the matter. SROs are permitted to report such minor rule violations (where the fine does not exceed \$2,500) to the Commission on a periodic, rather than immediate, basis. In addition, members are

The proposed rule change also would delete from IM-9216 references to NASD rules that have been rescinded.

III. Discussion

After careful review, the Commission finds that the proposed rule change is consistent with the Exchange Act and the rules and regulations thereunder applicable to a national securities association.⁹ Specifically, the Commission finds that the proposed rule change is consistent with Section 15A(b)(2) of the Exchange Act¹⁰ in that it will permit FINRA to be so organized to carry out the purposes of the Exchange Act and to enforce compliance by FINRA members and persons associated with its members with the Exchange Act, the rules and regulations thereunder, and FINRA rules. The Commission also finds that the proposed rule change is consistent with Section 15A(b)(6) of the Exchange Act¹¹ in that it is designed, among other things, to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

not required to report “minor rule violations” on the Forms BD, U4 or U5 (as such term is defined on the forms). These forms provide that a rule violation may be designated as “minor” under a plan approved by the Commission if, among other things, the sanction imposed consists of a fine of \$2,500 or less. See also Securities Exchange Act Release No. 40193 (July 10, 1998), 63 FR 39338 (July 22, 1998) (Order Granting Approval to Proposed Rule Change Relating to Fines for Disruptive Action on the Options Floor) (SR-PCX-98-21) (stating in the context of amendments to the MRVP of the Pacific Exchange, Inc.’s (“PCX”) (now NYSE Arca, Inc.) that, as noted in PCX’s MRVP, pursuant to Securities Exchange Act Release No. 30958, any person or organization found in violation of a minor rule under an MRVP is not required to report such violation on Form BD, provided that, among other things, the sanction imposed consists of a fine not exceeding \$2,500).

⁹ In approving this proposed rule change, the Commission has considered the proposed rule’s impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

¹⁰ 15 U.S.C. 78o-3(b)(2).

¹¹ 15 U.S.C. 78o-3(b)(6).

Further, the Commission finds that the proposed rule change is consistent with Section 15A(b)(7) of the Exchange Act¹² in that it will provide that FINRA members and persons associated with its members will be appropriately disciplined for violations of the Exchange Act, the rules and regulations thereunder, and FINRA rules. The Commission also finds the proposed rule change consistent with Section 15A(b)(8) of the Exchange Act¹³ in that it furthers the statutory goals of providing a fair procedure for the disciplining of members and persons associated with members.

As a result of the proposed rule change, FINRA would be able to impose a fine for minor rule violations with respect to the Incorporated NYSE Rules that currently are enumerated in NYSE's MRVP. The proposed rule change is designed to ensure that Dual Members will have substantially the same set of regulatory obligations immediately following the closing date of the Transaction that such members had prior to the closing of the Transaction until the member conduct rules of the NASD and NYSE are consolidated into a single set of FINRA rules. The proposed rule change provides a reasonable means of addressing violations of both NASD and NYSE rules that do not rise to the level of requiring formal disciplining proceedings, while providing greater flexibility in handling certain violations. The Commission expects that FINRA will continue to conduct surveillance with due diligence and make a determination based on its findings, on a case-by-case basis, whether a fine under the MRVP is appropriate, or whether a violation requires formal disciplinary action.

The proposed rule change also provides that Dual Members will be subject to FINRA's disciplinary procedures, including FINRA's current \$2,500 maximum fine level for minor rule violations of either an NASD or NYSE rule included in FINRA's MRVP. While there are some

¹² 15 U.S.C. 78o-3(b)(7).

¹³ 15 U.S.C. 78o-3(b)(8).

distinctions between NASD's and NYSE's rules, both sets of rules applicable to the disciplinary process were previously approved by the Commission as consistent with the Exchange Act, generally following notice and comment.¹⁴ Accordingly, although Dual Members and their associated persons no longer would be subject to NYSE's disciplinary procedures with respect to the Incorporated NYSE Rules, but to FINRA's instead, the Commission finds that the proposed rule change should help ensure greater consistency in the administration of the disciplinary process for FINRA and its members, as well as in the related reporting obligations for minor violations of rules.

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Exchange Act,¹⁵ that the proposed rule change (SR-NASD-2007-055), be, and it hereby is, approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹⁶

Florence E. Harmon
Deputy Secretary

¹⁴ See Securities Exchange Act Release Nos. 21688 (January 25, 1985), 50 FR 5025 (February 5, 1985) (order approving NYSE's Rule 476A – Imposition of Fines for Minor Violation(s) of Rules); and 32383 (May 28, 1993), 58 FR 31768 (June 4, 1993) (order approving establishment of NASD's Minor Rule Violations Plan).

¹⁵ 15 U.S.C. 78s(b)(2).

¹⁶ 17 CFR 200.30-3(a)(12).