

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-59961; File No. SR-FINRA-2009-018)

May 21, 2009

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Order Granting Approval of Proposed Rule Change to Adopt IM-2830-1 (“Breakpoint” Sales) in the Consolidated FINRA Rulebook

On March 26, 2009, 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”) a proposed rule change pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder.² Notice of the proposal was published for comment in the Federal Register on April 20, 2009.³ The Commission received no comments on the proposed rule change. This order approves the proposed rule change.

I. Description of the Proposed Rule Change

As part of the process of developing a new consolidated rulebook (“Consolidated FINRA Rulebook”),⁴ FINRA proposed to adopt NASD IM-2830-1 (“Breakpoint” Sales), renumbered as FINRA Rule 2342, into the Consolidated FINRA Rulebook with the minor changes discussed

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Exchange Act Rel. No. 59754 (Apr. 13, 2009), 74 FR 18007 (Apr. 20, 2009).

⁴ 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 FINRA Information Notice, March 12, 2008 (Rulebook Consolidation Process).

below. NASD IM-2830-1 prohibits sales of mutual fund shares in amounts below a “breakpoint” if such sales are made “so as to share in the higher sales charges.” In the context of mutual fund sales, a “breakpoint” is that point at which the sales charge is reduced for quantity purchases of fund shares.

The application of the standard in NASD IM-2830-1 depends on the facts and circumstances of particular transactions to determine whether a member executed a transaction for the purpose of earning a higher sales charge. In 1998, NASD IM-2830-1 was amended to address the use of modern portfolio investment strategies that utilize many different mutual funds with varying investment objectives.⁵ The amendments specify more precisely those facts and circumstances that FINRA will consider when examining whether trades that miss breakpoints, but are made pursuant to bona fide asset allocation programs, may have violated NASD IM-2830-1. In making such determinations, the rule provides that FINRA will consider, among other things, whether a member has retained records that demonstrate that the trade was executed in accordance with a bona fide asset allocation program that the member offers to its customers which is designed to meet their diversification needs and investment goals, and under which the member discloses to its customers that they may not qualify for breakpoint reductions that are otherwise available.

Breakpoint issues have been of concern to the regulatory community. On December 23, 2002, FINRA issued Special Notice to Members 02-85, which reminded firms of their obligation to apply correctly breakpoint discounts to front-end sales load mutual fund transactions.⁶ In

⁵ See Securities Exchange Act Release No. 40659 (Nov. 10, 1998), 63 FR 64136 (Nov. 18, 1998) (Order Approving Proposed Rule Change Relating to Mutual Fund Breakpoint Sales).

⁶ NASD Special Notice to Members 02-85, NASD Requires Immediate Member Firm Action Regarding Mutual Fund Purchases and Breakpoint Schedules (December 2002).

2003, the staffs of FINRA, the SEC, and the NYSE conducted examinations of broker-dealers to assess their ability to deliver breakpoint discounts and memorialized the findings of those examinations in a joint report.⁷ Concurrently, FINRA staff and industry members formed a joint task force to consider issues regarding breakpoints. The joint task force issued a report in July 2003 containing recommendations for the industry to facilitate the accurate delivery of breakpoint discounts.⁸

FINRA proposed to adopt NASD IM-2830-1 as FINRA Rule 2342, stating it believes this rule continues to be an important tool in regulating members' sales of mutual fund shares to ensure that they are not sold in dollar amounts just below breakpoints so as to share in higher sales charges. FINRA proposed to eliminate references to "just and equitable principles of trade" and make other minor changes to the text to reflect that it would be a stand-alone rule, rather than Interpretive Material, and to eliminate certain redundant text that is inconsistent with a rules-based format.

FINRA stated that it 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.

II. Discussion and Findings

After careful review of the proposal, the Commission finds that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,⁹ which requires, among other

⁷ See Joint SEC/NASD/NYSE Report of Examinations of Broker/Dealers Regarding Discounts on Front-End Sales Charges on Mutual Funds (March 2003), available at <http://www.finra.org/Industry/Issues/Breakpoints/P006438>.

⁸ See Report of the Joint NASD/Industry Task Force on Breakpoints (July 2003), available at <http://www.finra.org/Industry/Issues/Breakpoints/P006422>.

⁹ 15 U.S.C. 78o-3(b)(6).

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.¹⁰ The Commission believes that the proposed rule change will continue to provide FINRA with an important tool in regulating members' sales of mutual fund shares, consistent with the goals of protecting investors and the public interest.

III. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,¹¹ that the proposed rule change (SR-FINRA-2009-018) be, and hereby is, approved.

For the Commission by the Division of Trading and Markets, pursuant to delegated authority.¹²

Florence E. Harmon
Deputy Secretary

¹⁰ 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).

¹¹ 15 U.S.C. 78s(b)(2).

¹² 17 CFR 200.30-3(a)(12).