

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-60066; File No. SR-FINRA-2009-036)

June 8, 2009

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of Proposed Rule Change to Adopt FINRA Rules 2124 (Net Transactions with Customers), 2220 (Options Communications), 4370 (Business Continuity Plans and Emergency Contact Information) and 5250 (Payments for Market Making) 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 May 21, 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”) 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 Rules 2220 (Options Communications), 2441 (Net Transactions with Customers), 2460 (Payments for Market Making), 3510 (Business Continuity Plans) and 3520 (Emergency Contact Information) as FINRA rules in the consolidated FINRA rulebook without substantive change. The proposed rule change would renumber NASD Rule 2220 as FINRA Rule 2220, NASD Rule 2441 as FINRA Rule 2124, NASD Rule 2460 as FINRA Rule 5250, and NASD Rules 3510 and 3520 would be combined into FINRA Rule 4370 in the consolidated FINRA rulebook.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

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 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 Rules 2220 (Options Communications), 2441 (Net Transactions with Customers), 2460 (Payments for Market Making), 3510 (Business Continuity Plans) and 3520 (Emergency Contact Information) as FINRA rules in the consolidated FINRA rulebook without substantive change.

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

Proposed FINRA Rule 2220

FINRA is proposing to adopt NASD Rule 2220 (Options Communications) without substantive change into the Consolidated FINRA Rulebook as FINRA Rule 2220. NASD Rule 2220 sets forth a member's obligations with respect to its options communications with the public. In 2008, FINRA revised NASD Rule 2220 to make it more consistent with FINRA's general rules on communications with the public and the options communications rules of other self-regulatory organizations (SROs).⁴ As amended, NASD Rule 2220, among other things: (1) uses, to the extent appropriate, the same terminology and definitions as in FINRA's general rules on communications with the public; (2) makes the requirements for principal review of correspondence concerning options the same as for correspondence generally; and (3) updates the standards on the content of communications that precede the delivery of the options disclosure document (ODD). The amended rule became effective on March 4, 2009.⁵

FINRA recommends that NASD Rule 2220 be transferred as FINRA Rule 2220 into the Consolidated FINRA Rulebook without substantive change in light of the recent amendments.

⁴ See Securities Exchange Act Release No. 58738 (October 6, 2008), 73 FR 60371 (October 10, 2008) (Order Approving File No. SR-FINRA-2008-013).

⁵ See Regulatory Notice 08-73 (December 2008) (SEC Approves Amendments to NASD Rule 2220 to Update the Standards for Options Communications). There is no longer a comparable Incorporated NYSE Rule. FINRA previously deleted substantially similar Incorporated NYSE Rule 791 (Communications to Customers) as part of a rule change that, among other things, reduced regulatory duplication for Dual Members during the interim period before the completion of the Consolidated FINRA Rulebook. See Securities Exchange Act Release No. 58533 (September 12, 2008), 73 FR 54652 (September 22, 2008) (Order Approving File No. SR-FINRA-2008-036).

Proposed FINRA Rule 2124

FINRA is proposing to adopt NASD Rule 2441 (Net Transactions with Customers) without substantive change into the Consolidated FINRA Rulebook as FINRA Rule 2124. NASD Rule 2441 requires members to provide disclosure and obtain consent when trading on a “net” basis with customers.⁶ With respect to non-institutional customers, the member must obtain the customer’s written consent on an order-by-order basis prior to executing the transaction and such consent must evidence the customer’s understanding of the terms and conditions of the order. With respect to institutional customers, a member must obtain the customer’s consent prior to executing the transaction and such consent may be obtained by either: (1) use of a negative consent letter; (2) oral disclosure and consent on an order-by-order basis; or (3) written consent on an order-by-order basis.

Rule 2441 was approved by the SEC in 2006, and was the product of notice and comment rulemaking.⁷ There have not been subsequent amendments to the rule, and FINRA does not believe any substantive changes to this rule are necessary. Therefore, FINRA recommends that NASD Rule 2441 be transferred without substantive change into the Consolidated FINRA Rulebook as FINRA Rule 2124.

⁶ A “net” transaction is a principal transaction in which a market maker, after having received an order to buy (sell) an equity security, purchases (sells) the equity security at one price (from (to) another broker-dealer or another customer) and then sells to (buys from) the customer at a different price.

⁷ See Securities Exchange Act Release No. 54088 (June 30, 2006), 71 FR 38950 (July 10, 2006) (Order Approving File No. SR-NASD-2004-135).

Proposed FINRA Rule 5250

FINRA is proposing to adopt NASD Rule 2460 (Payment for Market Making) without substantive change into the Consolidated FINRA Rulebook as FINRA Rule 5250. NASD Rule 2460 prohibits any payments by an issuer or an issuer's affiliates and promoters, directly or indirectly, to a member or person associated with a member for publishing a quotation, acting as a market maker, or submitting an application in connection therewith. The rule contains two exceptions that permit a member to accept (1) payment for bona fide services, including, but not limited to, investment banking services and (2) reimbursement for registration or listing fees. The SEC approved NASD Rule 2460 after notice and comment in July 1997 with no subsequent amendments.⁸

FINRA believes no changes to this rule are appropriate or necessary. FINRA continues to believe, as stated in FINRA's 1997 rule filing, that a market maker should have considerable latitude and freedom to make or terminate market making activities in an issuer's securities. The decision by a firm to make a market in a given security and the question of price generally are dependent on a number of factors, including, among others, supply and demand, the firm's expectations toward the market, its current inventory, and exposure to risk and competition. This decision should not be influenced by payments to the member from issuers or promoters. Therefore, FINRA proposes to transfer NASD Rule 2460 without substantive change into the Consolidated FINRA Rulebook as FINRA Rule 5250.

⁸ See Securities Exchange Act Release No. 38812 (July 3, 1997), 62 FR 37105 (July 10, 1997) (Order Approving File No. SR-NASD-97-29).

Proposed FINRA Rule 4370

FINRA is proposing to adopt NASD Rule 3510 (Business Continuity Plans) and NASD Rule 3520 (Emergency Contact Information) without substantive change into the Consolidated FINRA Rulebook and combine the rules as FINRA Rule 4370 (Business Continuity Plans and Emergency Contact Information). NASD Rule 3510 requires members to create and maintain a written business continuity plan identifying procedures relating to an emergency or significant business disruption and enumerates the minimum elements that a member's business continuity plan must address, to the extent those elements are applicable and necessary to the member's business. NASD Rule 3510 further requires members to update their business continuity plans upon any material change and, at a minimum, conduct an annual review of their plans. Each member also must disclose to its customers how its business continuity plan addresses the possibility of a future significant business disruption and how the member plans to respond to events of varying scope. Each member must make this disclosure, at a minimum, in writing to customers at account opening, by posting it on the member's Web site (if the member maintains a Web site), and by mailing it to customers upon request.

NASD Rules 3510 is one part of the NASD Rule 3500 Series (Emergency Preparedness), which requires members to establish emergency preparedness plans and procedures. NASD Rule 3520, which comprises the remainder of the NASD Rule 3500 Series, requires members to designate two emergency contact persons and provide this information to FINRA via electronic process.⁹

⁹ There is no longer a comparable Incorporated NYSE Rule to NASD Rules 3510 and 3520. FINRA previously deleted from the Transitional Rulebook NYSE Rule 446 (Business Continuity and Contingency Plans), which contained substantially

FINRA recommends that NASD Rules 3510 and 3520 be adopted as one rule, FINRA Rule 4370, in the Consolidated FINRA Rulebook without any substantive changes to the respective rules' provisions.

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.

2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,¹⁰ 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 transferring NASD Rule 2220 into the Consolidated Rulebook protects investors and the public interest by providing the investing public with options communications rules that are designed to provide appropriate safeguards and greater clarity by promoting harmonization between FINRA's and other SROs' options communications rules. FINRA believes that transferring NASD Rule 2441 into the Consolidated FINRA Rulebook promotes investor protection by requiring members to provide disclosure and obtain customer consent when trading on a net basis. In addition, FINRA believes that the benefits to investors of requiring certain disclosures and obtaining customer consent when trading on a net basis outweighs the additional

similar requirements as the two NASD rules, as part of the rule change to reduce regulatory duplication for Dual Members during the period before completion of the Consolidated FINRA Rulebook. See Securities Exchange Act Release No. 58533 (September 12, 2008), 73 FR 54652 (September 22, 2008) (Order Approving File No. SR-FINRA-2008-036).

¹⁰ 15 U.S.C. 78q-3(b)(6).

responsibilities placed on broker-dealers. FINRA believes that transferring NASD Rule 2460 into the Consolidated FINRA Rulebook will protect investors and the public interest and avert a potential conflict of interest by prohibiting members from receiving compensation or other payments from an issuer or others for listing, quoting or making a market in an issuer's securities. Finally, FINRA believes that transferring and combining NASD Rules 3510 and 3520 in the Consolidated FINRA Rulebook will help ensure that members are prepared in the event of a significant business disruption. The proposed rule change makes non-substantive changes to rules that have proven effective in meeting 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

(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-2009-036 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-2009-036. 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 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 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 a.m. and 3 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-2009-036 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.¹¹

Florence E. Harmon
Deputy Secretary

¹¹ 17 CFR 200.30-3(a)(12).