

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-64512; File No. SR-FINRA-2011-017)

May 18, 2011

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Order Granting Accelerated Approval of a Proposed Rule Change to Amend FINRA Rule 5131 (New Issue Allocations and Distributions)

I. Introduction

On April 26, 2011, the Financial Industry Regulatory Authority, Inc. (“FINRA”) filed with the Securities and Exchange Commission (“Commission”), 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> a proposed rule change to amend FINRA Rule 5131 (New Issue Allocations and Distributions) to simplify the spinning provision in that Rule and to delay the implementation date of paragraphs (b) and (d)(4) under that Rule. This proposal was published for comment in the Federal Register on April 29, 2011.<sup>3</sup> The Commission received no comments regarding the proposal.<sup>4</sup> This order approves this proposed rule change on an accelerated basis.

II. Description of the Proposed Rule Change

On November 29, 2010, FINRA issued Regulatory Notice 10-60 announcing Commission approval of SR-NASD-2003-140<sup>5</sup> and designating the effective date of new

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

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

<sup>3</sup> Securities Exchange Act Release No. 64341 (Apr. 26, 2011), 76 FR 24076 (Apr. 29, 2011) (SR-FINRA-2011-017).

<sup>4</sup> The Commission received one comment whose caption indicated that it was filed in response to this proposal, but whose substance was directed to another proposal by the Commission. See comment letter submitted by Nancy DeTine, dated April 29, 2011.

<sup>5</sup> See Securities Exchange Act Release No. 63010 (September 29, 2010), 75 FR 61541 (October 5, 2010) (Order Approving File No. SR-NASD-2003-140).

Rule 5131 (the “Rule”) as May 27, 2011.<sup>6</sup>

Paragraph (b) of the Rule (Spinning), implements a recommendation from the IPO Advisory Committee Report<sup>7</sup> to prohibit spinning—i.e., an underwriter’s allocation of IPO shares to directors or executives of investment banking clients in exchange for receipt of investment banking business. The primary means by which the Rule prohibits spinning is through a series of prophylactic prohibitions on the allocation of new issues. Specifically, the Rule prohibits allocations of a new issue to any account in which an executive officer or director of a public company or a covered non-public company, or a person materially supported by such executive officer or director, has a beneficial interest: (A) if the company is currently an investment banking services client of the member or the member has received compensation from the company for investment banking services in the past 12 months; (B) if the person responsible for making the allocation decision knows or has reason to know that the member intends to provide, or expects to be retained by the company for, investment banking services within the next 3 months; or (C) on the express or implied condition that such executive officer or director, on behalf of the company, will retain the member for the performance of future investment banking services.

Paragraph (b)(1) requires that members establish, maintain, and enforce policies and procedures reasonably designed to ensure that investment banking personnel have no involvement or influence, directly or indirectly, in the new issue allocation decisions of the member. Because the term “investment banking personnel” is not defined in the Rule, members

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<sup>6</sup> See Regulatory Notice 10-60 (November 2010) (Approval of New Issue Rule).

<sup>7</sup> NYSE/NASD IPO Advisory Committee Report and Recommendations (May 2003). <http://www.finra.org/web/groups/industry/@ip/@reg/@guide/documents/industry/p010373.pdf>.

have raised concern that, if the term is read co-extensively with the definition of “investment banking services,” certain necessary functions traditionally performed by syndicate personnel would be prohibited. In light of this unintended consequence, FINRA proposes to delete paragraph (b)(1). FINRA believes that benefits of the anti-spinning provisions can be attained without this particular provision inasmuch as firms currently are required to have written policies and procedures with respect to the spinning prohibitions in paragraph (b)(2) pursuant to NASD Rule 3010.

In addition, upon further discussions with member firms regarding the steps necessary to prepare for compliance with the spinning provisions,<sup>8</sup> FINRA proposes to delay the implementation date of paragraph (b), as amended, until September 26, 2011.

Paragraph (d)(4) of the Rule (Market Orders) prohibits members from accepting any market order for the purchase of shares of a new issue in the secondary market prior to the commencement of trading of such shares in the secondary market. Members have requested additional time to develop a process for reliably identifying new issues and to modify their order handling systems to prevent the acceptance of market orders in new issue shares in contravention of the Rule. Accordingly, FINRA proposes to delay the implementation date of paragraph (d)(4) until September 26, 2011.

FINRA represented that these proposed rule changes would be effective on the date of Commission approval.

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<sup>8</sup> For example, members have requested additional time to: (1) create additional forms, account documents and other measures of obtaining information from clients necessary to assess eligibility for new issue allocations under the new Rule; (2) build systems and surveillance infrastructure to ensure appropriate blocks of allocations; and (3) develop appropriate compliance policies and procedures and training materials on the new policies and procedures.

### III. Discussion and Findings

After careful review, the Commission finds that the proposed rule change to amend FINRA Rule 5131 is consistent with the requirements of the Act, and the rules and regulations thereunder that are applicable to a national securities association.<sup>9</sup> In particular, the Commission finds that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,<sup>10</sup> which requires, among other things, that FINRA rules 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. The proposed rule change reflects the concern that the Rule, as written, would prohibit certain necessary functions traditionally performed by syndicate personnel. To respond to this concern, the Rule simplifies FINRA members' obligations with respect to Rule 5131, thereby aiding member compliance efforts and helping to maintain investor confidence in the capital markets. Further, delay of the implementation date of paragraphs (b) and (d)(4) until September 26, 2011 will enable FINRA members to develop a process for reliably identifying new issues and to modify their order handling systems to prevent the acceptance of market orders in new issue shares in contravention of the Rule.

In addition, the Commission finds good cause, pursuant to Section 19(b)(2) of the Exchange Act,<sup>11</sup> for approving the proposed rule change on an accelerated basis. Without accelerated approval the Rule would take effect on May 27, 2011, even though the Commission is approving delaying the effective date of the Rule until September 26, 2011. Moreover,

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<sup>9</sup> 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).

<sup>10</sup> 15 U.S.C. 78o-3(b)(6).

<sup>11</sup> 15 U.S.C. 78s(b)(2).

accelerated approval is appropriate because the proposed rule changes are minor and do not raise material or novel issues. Accordingly, the Commission finds that good cause exists for approving the rule change on an accelerated basis.

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,<sup>12</sup> that the proposed rule change (File No. SR-FINRA-2011-017) be, and hereby is, approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>13</sup>

Cathy H. Ahn  
Deputy Secretary

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<sup>12</sup> 15 U.S.C. 78s(b)(2).

<sup>13</sup> 17 CFR 200.30-3(a)(12).