

EXHIBIT 5

Exhibit 5 shows the text of the proposed rule change. Proposed new language is underlined; proposed deletions are in brackets.

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**Text of Proposed New FINRA Rule
(Marked to Show Changes from NASD Rule 2320 and IM-2320; NASD Rule 2320 and IM-2320 to be Deleted in their Entirety from the Transitional Rulebook)**

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0100. GENERAL STANDARDS

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0150. Application of Rules to Exempted Securities Except Municipal Securities

(a) through (b) No Change.

(c) Unless otherwise indicated within a particular Rule, the following FINRA and NASD rules are applicable to transactions in, and business activities relating to, exempted securities, except municipal securities, conducted by members and associated persons: FINRA Rules 2010, 2020, 2060, 2150, 2261, 2269, 2320(g), 3220, 3270, 4120, 4130, 4210, 4311, 4530, 5160, 5210, 5220, 5230, 5310, 8110, 8120, 8210, 8310, 8311, 8312, 8320, 8330 and 9552; NASD Rules 2210, IM-2210-1, IM-2210-2, IM-2210-3, 2310, IM-2310-2, IM-2310-3, [2320,] 2330, IM-2330, 2340, 2430, 2510, 3010, 3020, 3040, 3050, 3110, IM-3110, 3140.

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5000. SECURITIES OFFERING AND TRADING STANDARDS AND PRACTICES

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5300. HANDLING OF CUSTOMER ORDERS

[2320] 5310. **Best Execution and Interpositioning**

(a)(1) In any transaction for or with a customer or a customer of another broker-dealer, a member and persons associated with a member shall use reasonable diligence to ascertain the best market for the subject security and buy or sell in such market so that the resultant price to the customer is as favorable as possible under prevailing market conditions. Among the factors that will be considered in determining whether a member has used “reasonable diligence” are:

- (A) the character of the market for the security[,] (e.g., price, volatility, relative liquidity, and pressure on available communications);
- (B) the size and type of transaction;
- (C) the number of markets checked;
- (D) accessibility of the quotation; and
- (E) the terms and conditions of the order which result in the transaction, as communicated to the member and persons associated with the member.

(2) In any transaction for or with a customer or a customer of another broker-dealer, no member or person associated with a member shall interject a third party between the member and the best market for the subject security in a manner inconsistent with paragraph (a)(1) of this Rule.

(b) When a member cannot execute directly with a market [maker] but must employ a broker's broker or some other means in order to [i]ensure an execution advantageous to the customer, the burden of showing the acceptable circumstances for doing so is on the [retail firm] member. [Examples of acceptable circumstances are where a customer's order is “crossed” with another retail firm which has a corresponding order on the other side, or where the identity of the

retail firm, if known, would likely cause undue price movements adversely affecting the cost or proceeds to the customer.]

(c) Failure to maintain or adequately staff an over-the-counter order room or other department assigned to execute customers' orders cannot be considered justification for executing away from the best available market; nor can channeling orders through a third party as described above as reciprocation for service or business operate to relieve a member of [his] its obligations under this Rule. [However, the channeling of customers' orders through a broker's broker or third party pursuant to established correspondent relationships under which executions are confirmed directly to the member acting as agent for the customer, such as where the third party gives up the name of the retail firm, are not prohibited if the cost of such service is not borne by the customer.]

(d) A member through [whom] which an [retail] order is channeled[, as described above,] and [who] that knowingly is a party to an arrangement whereby the initiating member has not fulfilled [his] its obligations under this Rule, will also be deemed to have violated this Rule.

(e) The obligations described in paragraphs (a) through (d) above exist not only where the member acts as agent for the account of [his] its customer but also where [retail] transactions are executed as principal [and contemporaneously offset]. Such obligations [do not relate to] are distinct from the reasonableness of commission rates, markups or markdowns, which are governed by NASD Rule 2440 and IM-2440.

[(f)(1) Except as provided in subparagraph (3) below, in any transaction for or with a customer pertaining to the execution of an order in a non-exchange-listed security, a member or person associated with a member shall contact and obtain quotations from

three dealers (or all dealers if three or less) to determine the best inter-dealer market for the subject security.]

[(2) Members that display priced quotations on a real-time basis for a non-exchange-listed security in two or more quotation mediums that permit quotation updates on a real-time basis must display the same priced quotations for the security in each medium, except with respect to a priced quotation that represents a customer limit order displayed on an electronic communications network in conformance with the exception to FINRA Rule 6460 provided in paragraph (b)(5) of that rule.]

[(3) The requirements described in subparagraph (1) above shall not apply:]

[(A) when two or more priced quotations for a non-exchange-listed security are displayed in an inter-dealer quotation system that permits quotation updates on a real-time basis; or]

[(B) to any transaction for or with a customer pertaining to the execution of an order in a non-exchange-listed security of a foreign issuer that is part of the FTSE All-World Index if such transaction is executed during the regular business hours of the foreign market for the foreign security and no trading halt or other similar trading or quoting restriction is in effect in any foreign market on which such foreign security is listed; or]

[(C) to any transaction for or with a customer pertaining to the execution of an order in a non-exchange-listed security that is listed on a Canadian exchange, provided that (i) such order is executed by the member or a person associated with the member on a Canadian exchange in an agency or riskless principal capacity; and (ii) the member or a person associated with the member

conducts, pursuant to NASD Rule 2320(a) and the duty of best execution, regular and rigorous reviews of the quality of the execution of such orders in such securities.]

[(4) Definitions]

[For purposes of this paragraph (f):]

[(A) The term “inter-dealer quotation system” means any system of general circulation to brokers or dealers that regularly disseminates quotations of identified brokers or dealers.]

[(B) The term “quotation medium” means any inter-dealer quotation system or any publication or electronic communications network or other device that is used by brokers or dealers to make known to others their interest in transactions in any security, including offers to buy or sell at a stated price or otherwise, or invitations of offers to buy or sell.]

[(C) “Non-exchange-listed security” means any equity security that is not traded on any national securities exchange. The term “non-exchange-listed security” shall not include “restricted securities,” as defined by Securities Act Rule 144(a)(3).]

[(5) Pursuant to the Rule 9600 Series, the staff, for good cause shown, after taking into consideration all relevant factors, may exempt any transaction or classes of transactions, either unconditionally or on specified terms, from any or all of the provisions of this paragraph if it determines that such exemption is consistent with the purpose of this Rule, the protection of investors, and the public interest.]

[IM-2320. Interpretive Guidance with Respect to Best Execution Requirements]

[Rule 2320(a) requires, among other things, that a member or person associated with a member comply with Rule 2320(a) when customer orders are routed to it from another broker/dealer for execution. This Interpretive Material addresses certain interpretive questions concerning the applicability of the best execution rule.]

• • • Supplementary Material: -----

.01 Execution of Marketable Customer Orders. A member must make every effort to execute a marketable customer order that it receives fully and promptly.

.02 Definition of “Market.” [The term “market” has been in the text of Rule 2320 since its adoption, but it is an undefined term.] For the purposes of Rule 5310 and the accompanying Supplementary Material [2320], the term “market” or “markets” is to be construed broadly, and it encompasses a variety of different venues, including, but not limited to, market centers that are trading a particular security. This expansive interpretation is meant to both inform broker[/-]dealers as to the breadth of the scope of venues that must be considered in the furtherance of their best execution obligations and to promote fair competition among broker[/-]dealers, exchange markets, and markets other than exchange markets, as well as any other venue that may emerge, by not mandating that certain trading venues have less relevance than others in the course of determining a firm’s best execution obligations.

.03 Best Execution and Debt Securities. Rule [2320] 5310(a)(1)(D) provides that one of the factors used to determine if a member has used reasonable diligence in exercising best execution is the “accessibility of the quotation.” [“location and accessibility to the customer’s broker/dealer of primary markets and quotations sources.”] In the context of the debt market, this means that, when quotations are available, [NASD] FINRA will consider the [“]accessibility of such quotations[”] when examining whether a member has used reasonable diligence. For purposes of

debt securities, the term “quotation” refers to either dollar (or other currency) pricing or yield pricing. [NASD notes, however, that a] Accessibility is only one of the non-exhaustive reasonable diligence factors set out in Rule 5310(a)(1) [2320]. In the absence of accessibility, members are not relieved from taking reasonable steps and employing their market expertise in achieving the best execution of customer orders.

.04 Best Execution and Executing Brokers. [Lastly, NASD is clarifying that a] A member’s duty to provide best execution in any transaction “for or with a customer of another broker[/]-dealer” does not apply in instances when another broker[/]-dealer is simply executing a customer order against the member’s quote. [Stated in another manner, t] The duty to provide best execution to customer orders received from other broker[/]-dealers arises only when an order is routed from the broker[/]-dealer to the member for the purpose of order handling and execution. This clarification is intended to draw a distinction between those situations in which the member is acting solely as the buyer or seller in connection with orders presented by a broker[/]-dealer against the member’s quote, as opposed to those circumstances in which the member is accepting order flow from another broker[/]-dealer for the purpose of facilitating the handling and execution of such orders.

.05 Use of a Broker’s Broker. Paragraph (b) of the Rule provides that when a member cannot execute directly with a market but must employ a broker’s broker or some other means in order to ensure an execution advantageous to the customer, the burden of showing the acceptable circumstances for doing so is on the member. Examples of acceptable circumstances are where a customer’s order is “crossed” with another firm that has a corresponding order on the other side, or where the identity of the firm, if known, would likely cause undue price movements adversely affecting the cost or proceeds to the customer.

.06 Orders Involving Securities with Limited Quotations or Pricing Information. Although the best execution requirements in Rule 5310 apply to orders in all securities, markets for securities differ dramatically. One of the areas in which a member must be especially diligent in ensuring that it has met its best execution obligations is with respect to customer orders involving securities for which there is limited pricing information or quotations available. Each member must have written policies and procedures in place that address how the member will determine the best inter-dealer market for such a security in the absence of pricing information or multiple quotations and must document its compliance with those policies and procedures. For example, a member should analyze pricing information based on other data, such as previous trades in the security, to determine whether the resultant price to the customer is as favorable as possible under prevailing market conditions. In these instances, a member should generally seek out other sources of pricing information or potential liquidity, which may include obtaining quotations from other sources (e.g., other firms that the member previously has traded with in the security).

07. Orders Involving Foreign Securities.

The obligation in Rule 5310(a) that a member use “reasonable diligence” in exercising best execution applies to customer orders in both domestic and foreign securities. However, Rule 5310(a) also recognizes that the markets for different securities can vary dramatically, and the standard of “reasonable diligence” must be assessed by examining specific factors, including “the character of the market for the security” and the “accessibility of the quotation.” Accordingly, the determination as to whether a member has satisfied its best execution obligations necessarily involves a “facts and circumstances” analysis.

The handling of customer orders in foreign securities that do not trade in the U.S. can differ substantially from the handling of orders in U.S.-traded securities. In particular, the character of the particular foreign market and the accessibility of quotations in certain foreign markets may vary significantly. Some foreign jurisdictions, for example, may not have similar best execution requirements as those imposed by Rule 5310, or may not have comparable access and pre-trade or post-trade transparency standards.

Even though a security does not trade in the U.S., members still have an obligation to seek best execution for customer orders involving any foreign security. Consequently, a member that handles customer orders involving foreign securities that do not trade in the U.S. must have specific written policies and procedures in place regarding its handling of customer orders for these securities that are reasonably designed to obtain the most favorable terms available for the customer, taking into account differences that may exist between U.S. markets and foreign markets. While best execution obligations take into account differing market structures, best execution obligations also must evolve as changes occur in the market that may give rise to improved executions, including opportunities to trade at more advantageous prices. As such, members also must regularly review these policies and procedures to assess the quality of executions received and update or revise the policies and procedures as necessary.

.08 Customer Instructions Regarding Order Handling. If a member receives an unsolicited instruction from a customer to route that customer's order to a particular market for execution, the member is not required to make a best execution determination beyond the customer's specific instruction. Members are, however, still required to process that customer's order promptly and in accordance with the terms of the order. Where a customer has directed that an order be routed to another specific broker-dealer that is also a FINRA member, the receiving

broker-dealer to which the order was directed would be required to meet the requirements of Rule 5310 with respect to its handling of the order.

.09 Regular and Rigorous Review of Execution Quality.

(a) No member can transfer to another person its obligation to provide best execution to its customers' orders. A member that routes customer orders to other broker-dealers for execution on an automated, non-discretionary basis, as well as a member that internalizes customer order flow, must have procedures in place to ensure the member periodically conducts regular and rigorous reviews of the quality of the executions of its customers' orders if it does not conduct an order-by-order review. The review must be conducted on a security-by-security, type-of-order basis (e.g., limit order, market order, and market on open order). At a minimum, a member must conduct such reviews on a quarterly basis; however, members should consider, based on the firm's business, whether more frequent reviews are needed.

(b) In conducting its regular and rigorous review, a member must determine whether any material differences in execution quality exist among the markets trading the security and, if so, modify the member's routing arrangements or justify why it is not modifying its routing arrangements. To assure that order flow is directed to markets providing the most beneficial terms for their customers' orders, the member must compare, among other things, the quality of the executions the member is obtaining via current order routing and execution arrangements (including the internalization of order flow) to the quality of the executions that the member could obtain from competing markets. In reviewing and comparing the execution quality of its current order routing and execution arrangements to the execution quality of other markets, a member should consider the following factors:

(1) price improvement opportunities (i.e., the difference between the execution price and the best quotes prevailing at the time the order is received by the market);

(2) differences in price disimprovement (i.e., situations in which a customer receives a worse price at execution than the best quotes prevailing at the time the order is received by the market);

(3) the likelihood of execution of limit orders;

(4) the speed of execution;

(5) the size of execution;

(6) transaction costs;

(7) customer needs and expectations; and

(8) the existence of internalization or payment for order flow arrangements.

(c) A member that routes its order flow to another member that has agreed to handle that order flow as agent for the customer (e.g., a clearing firm or other executing broker-dealer) can rely on that member's regular and rigorous review as long as the statistical results and rationale of the review are fully disclosed to the member and the member periodically reviews how the review is conducted, as well as the results of the review.

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6000. QUOTATION AND TRANSACTION REPORTING FACILITIES

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6400. QUOTING AND TRADING IN OTC EQUITY SECURITIES

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6438. Displaying Priced Quotations in Multiple Quotation Mediums

Members that display priced quotations on a real-time basis for an OTC Equity Security in two or more quotation mediums that permit quotation updates on a real-time basis must display the same priced quotations for the security in each medium, except with respect to a price quotation that represents a customer limit order displayed on an electronic communications network in conformance with the exception to Rule 6460 provided in paragraph (b)(5) of that rule.

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6630. Applicability of FINRA Rules to Securities Previously Designated as PORTAL Securities

(a) The following are specifically applicable to transactions and business activities relating to securities that, prior to October 26, 2009, had been designated by The Nasdaq Stock Market LLC for inclusion in the PORTAL Market (“PORTAL securities”):

(1) NASD Rules 2310, 2440, and FINRA Rules 0130, 0140, 2010, 2020, 2232, 2251, 2261, 2262, 2269, 5310, 8210;

(2) through (3) No Change.

(b) The following are specifically applicable to transactions and business activities relating to PORTAL securities, with the exceptions specified below:

[(1) NASD Rule 2320, except for paragraph (f), which requires that a member obtain quotations from three dealers to determine the best inter-dealer market for the subject security;]

(2) through (3) redesignated as (1) through (2).

(c) through (d) No Change.

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9000. CODE OF PROCEDURE

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9600. PROCEDURES FOR EXEMPTIONS

9610. Application

(a) Where to File

A member seeking exemptive relief as permitted under NASD Rules 1021, 1050, 1070, 2210, [2320,] 2340, 3010(b)(2), 3020, or 3150, or Rules 2114, 2310, 2359, 2360, 4210, 4311, 4320, 5110, 5121, 5122, 5130, 7470, 8211, 8213, 11870, or 11900, or Municipal Securities Rulemaking Board Rule G-37 shall file a written application with the appropriate department or staff of FINRA.

(b) through (c) No Change.

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Text of NASD Rule to Remain in the Transitional Rulebook

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**3000. RESPONSIBILITIES RELATING TO ASSOCIATED PERSONS, EMPLOYEES,
AND OTHERS' EMPLOYEES**

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3100. BOOKS AND RECORDS, AND FINANCIAL CONDITION

3110. Books and Records

(a) No Change.

(b) **[Marking of Customer Order Tickets]** Reserved.

[A person associated with a member shall indicate on the memorandum for each transaction in a non-exchange-listed security, as that term is defined in Rule 2320, the name of

each dealer contacted and the quotations received to determine the best inter-dealer market; however, the requirements of this paragraph shall not apply if the member can establish and has documented that:]

[(1) two or more priced quotations for the security are displayed in an inter-dealer quotation system, as defined in Rule 2320(f), that permits quotation updates on a real-time basis for which NASD has access to historical quotation information; or]

[(2) the transaction is effected in compliance with Rule 2320(f)(3)(B) or (C).]

(c) through (j) No Change.