

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-55878; File No. SR-NASD-2006-074)

June 7, 2007

Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Order Approving Proposed Rule Change Relating to the Application of NASD Rule 2790 to Issuer-Directed Securities

On June 12, 2006, the National Association of Securities Dealers, Inc. (“NASD”) filed with the Securities and Exchange Commission (“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 to amend NASD Rule 2790 as described below. The proposed rule change was published for comment in the Federal Register on January 25, 2007.³ The Commission received one comment on the proposal.⁴ On June 4, 2007, the NASD submitted a response to the comment.⁵ This order approves the proposed rule change.

I. Description of the Proposal

NASD Rule 2790 provides that a member or a person associated with a member may not sell a new issue to any account in which a restricted person has a beneficial interest, or purchase a new issue in any account in which such member or associated person has a beneficial interest. Currently, Rule 2790(d)(1) provides that these prohibitions do not apply to new issues that are specifically directed by the issuer to restricted persons, provided that issuer-directed securities are not sold to or purchased by an account in which broker-dealer personnel,

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 55128 (January 18, 2007), 72 FR 3453.

⁴ See letter from Morgan, Lewis Bockius LLP to Nancy M. Morris, Secretary, Commission, dated February 15, 2007.

⁵ See letter from Afshin Atabaki, Assistant General Counsel, NASD, to Nancy M. Morris, Secretary, Commission, dated June 4, 2007 (“Response Letter”).

finders and fiduciaries, or certain members of their immediate family, have a beneficial interest, unless such persons, or members of their immediate family, are employees or directors of the issuer, the issuer's parent, or a subsidiary of the issuer or the issuer's parent. The NASD is proposing to amend Rule 2790(d)(1) to prohibit issuer-directed allocations of new issues to broker-dealers.

The NASD is also proposing to amend Rule 2790(d) by adding a new subparagraph to Rule 2790(d), to be numbered Rule 2790(d)(2), which would provide that the prohibitions on the purchase and sale of new issues do not apply to securities that are specifically directed by the issuer to restricted persons, provided that a broker-dealer: (A) does not underwrite any portion of the offering; (B) does not solicit or sell any new issue securities in the offering; and (C) has no involvement or influence, directly or indirectly, in the issuer's allocation decisions with respect to any of the new issue securities in the offering.

II. Comments

The Commission received one comment on the proposal, which expressed support for the proposal, but requested clarification regarding two points under proposed NASD Rule 2790(d)(2).⁶

First, the commenter requested clarification that a new issue undertaken by an issuer may qualify for the exception provided for by proposed Rule 2790(d)(2), notwithstanding that the issuer has engaged a broker-dealer to provide advisory services, including advice regarding capital structure and capital raising, so long as no broker-dealer has engaged in the conduct specified in proposed Rule 2790(d)(2)(A)-(C) set forth above. The NASD noted in the Response Letter that nothing in proposed subparagraph (d)(2) would prevent an issuer from

⁶ See supra note 4.

engaging a broker-dealer to provide such advisory services or other limited services, so long as the conditions set forth in the subparagraph continue to be satisfied.

Second, the commenter requested clarification that a purchaser may reasonably rely on a representation from an issuer to the effect that no broker-dealer has engaged in any of the conduct specified in proposed Rule 2790(d)(2)(A)-(C) with respect to the offering, so long as the purchaser neither knows, nor has reason to know, that the representation is false. In the Response Letter, the NASD stated that it believes that, for purposes of compliance with proposed Rule 2790(d)(2), a member or associated person that wishes to purchase new issues in such offerings may rely on a written representation obtained in good faith from the issuer that the conditions in proposed subparagraph (d)(2) are satisfied, so long as the member or associated person does not believe, or have reason to believe, that such representation is inaccurate.

III. Discussion

The Commission has carefully reviewed the proposed rule change and finds that it is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities association,⁷ the requirements of Section 15A of the Act,⁸ in general, and Section 15A(b)(6) of the Act,⁹ in particular, which requires that the NASD's 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 Commission believes that the proposed rule change strikes a reasonable balance between providing issuers with

⁷ In approving the proposed rule change, the Commission has considered its impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

⁸ 15 U.S.C. 78o-3.

⁹ 15 U.S.C. 78o-3(b)(6).

flexibility in directing shares and improving the capital raising process while also preserving the objectives of NASD Rule 2790.

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,¹⁰ that the proposed rule change (SR-NASD-2006-074) be, and it hereby is, approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹¹

Florence E. Harmon
Deputy Secretary

¹⁰ 15 U.S.C. 78s(b)(2).

¹¹ 17 CFR 200.30-3(a)(12).