

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-57257; File No. SR-FINRA-2007-020)

February 1, 2008

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Order Approving Proposed Rule Change to Create Exception to Principal Approval Requirements for Certain Filed Sales Material

I. Introduction

On November 1, 2007, the Financial Industry Regulatory Authority, Inc. (“FINRA”) (f/k/a National Association of Securities Dealers, Inc. (“NASD”)) filed with the Securities and Exchange Commission (“Commission”) pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder,² a proposed rule change relating to amendments to NASD Rule 2210. The proposed rule change was published for comment in the Federal Register on December 28, 2007.³ The Commission received three comment letters in response to the proposed rule change.⁴ This order approves the proposed rule change.

II. Description of the Proposed Rule Change

The proposed rule change amends NASD Rule 2210 (Communications with the Public) to create an exception from the principal approval requirements for certain filed sales material.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 57010 (December 20, 2007); 72 FR 73928 (Dec. 28, 2007).

⁴ See letter from Neal E. Nakagiri, President, CEO & CCO, NPB Financial Group, LLC, dated January 16, 2008 (“NPB letter”); letter from Dale E. Brown, President & CEO, Financial Services Institute, dated January 18, 2008 (“FSI letter”); and letter from Dorothy Donohue, Senior Associate Counsel, Investment Company Institute, dated January 18, 2008 (“ICI letter”).

NASD Rule 2210 (Communications with the Public) requires that a registered principal of a FINRA member firm approve in writing all advertisements, sales literature, and independently prepared reprints (collectively, “sales material”) prior to use. Certain types of sales material, such as advertisements and sales literature concerning mutual funds or variable insurance products must be filed with the FINRA Advertising Regulation Department (“Department”).

For funds and variable products that are sold through intermediary firms, a registered principal at the fund’s or variable product’s underwriter typically approves sales material internally and files the material with the Department. FINRA rules require registered principals at each of the intermediary firms that use the underwriter’s sales material to re-approve in writing each of these items used by their firms. (The intermediary firm is not required to re-file the sales material with the Department so long as it is used without material change.) If firms have selling agreements with multiple fund families and insurance companies, the number of items that require re-approval can easily be in the hundreds, and often thousands, per firm annually.

Based on recommendations made by its Small Firms Rules Impact Task Force,⁵ and to eliminate what FINRA regards as a compliance redundancy, FINRA proposed to create an exception to Rule 2210’s registered principal approval requirements for intermediary firms that use the sales material of another firm. The exception would apply only to sales material that another firm has filed with the Department, and for which the

⁵ NASD established the Small Firms Rules Impact Task Force in September 2006 to examine how existing NASD rules impact smaller firms. In particular, the Task Force focuses on possible opportunities to amend or modernize certain conduct rules that may be particularly burdensome for small firms, where such changes are consistent with investor protection and market integrity.

Department has issued a review letter finding that the material appears to be consistent with applicable standards.

The intermediary firm that relies on this exception could not materially alter the sales material or use it in a manner that is inconsistent with any conditions stated in the Department's review letter. For example, if the Department's review letter was based in part upon the representation by the filing firm that the sales material would be accompanied by a fund prospectus, the intermediary firm would be subject to a similar constraint.

Although FINRA anticipates that firms will utilize the exception primarily with respect to mutual fund and variable insurance product sales material, the exception is not limited to sales material for particular products. Thus, the exception also would apply to sales material for other products, such as real estate investment trusts or direct participation programs, provided the sales material meets the exception's requirements.

FINRA believes this exception would save intermediary firms' compliance personnel numerous hours that are currently spent reviewing sales material that has already been approved by a registered principal at the product underwriter, and that the Department staff also has reviewed and found to be consistent with applicable standards. Of course, some firms may want to continue to review this sales material, and the proposal would allow them to do so.⁶

⁶ The proposed rule change would not affect the contractual obligations that exist between underwriters and intermediary firms. Some dealer agreements may, for example, restrict the ability of underwriters and product wholesalers to send their sales material directly to a retail firm's sales force. These restrictions can facilitate the intermediary firm's ability to supervise its sales force. The proposed rule change would not alter the underwriter's obligations to comply with these contractual restrictions.

The proposed rule change would also revise certain of the advertising record-keeping requirements. Today, Rule 2210(b)(2)(A) states that firms must maintain a copy of all sales material for a period of three years from the date of last use. Existing practice has been to assume that the record-keeping requirement begins on the date of first use. The proposal would codify this position. For sales material subject to the principal approval exception, firms would have to keep a record of the name of the firm that filed the sales material and a copy of the related FINRA review letter.

III. Comment Letters

The Commission received three comment letters in response to the proposed rule change.⁷ All of the commenters supported the proposed rule change. Two commenters stated that the proposed rule change would eliminate hours of unnecessary work.⁸ One commenter expressed support for the proposal, stating it would be a less burdensome alternative for intermediary firms.⁹ Moreover, two commenters indicated that the proposed rule change should not compromise investor protection.¹⁰ Similarly, one commenter opined that the existing requirement serves no useful or beneficial purpose, in terms of additional investor protection concerns.¹¹

IV. Discussion and Findings

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of the Act, and the rules and regulations thereunder that

⁷ Supra note 4.

⁸ FSI letter; NPB letter.

⁹ ICI letter.

¹⁰ FSI letter; ICI letter.

¹¹ NPB letter.

are applicable to a national securities association.¹² In particular, the Commission believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,¹³ 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. The Commission believes that eliminating the requirement for firms to re-approve sales material in limited circumstances when a registered principal of a firm has previously approved the sales material and the Department has previously supplied a favorable review letter will eliminate a compliance redundancy while maintaining investor protections. Notably, the initial firm creating all sales material subject to this exception will continue to be required to obtain sales material approval from its registered principal, file the sales material for review with the Department, and obtain a favorable review letter from the Department.

¹² 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).

¹³ 15 U.S.C. 78o-3(b)(6).

V. Conclusions

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,¹⁴ that the proposed rule change (SR-FINRA-2007-020) be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁵

Florence E. Harmon
Deputy Secretary

¹⁴ 15 U.S.C. 78s(b)(2).

¹⁵ 17 CFR 200.30-3(a)(12).