

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-58421; File No. SR-FINRA-2008-025)

August 25, 2008

Self Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Order Approving Proposed Rule Change Relating to the Adoption of NASD Rule 2790 as FINRA Rule 5130 (Restrictions on the Purchase and Sale of Initial Public Offerings) in the Consolidated FINRA Rulebook

I. Introduction

On June 12, 2008, 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”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposal to adopt NASD Rule 2790 (Restrictions on the Purchase and Sale of Initial Equity Public Offerings) (“Rule”) as FINRA Rule 5130 in the consolidated FINRA rulebook, with only minor changes. This proposal was published for comment in the Federal Register on July 16, 2008.<sup>3</sup> The Commission received one comment on the proposal.<sup>4</sup> This order approves this proposed rule change.

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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. 58134 (Jul. 10, 2008), 73 FR 40892 (Jul. 16, 2008) (SR-FINRA-2008-025).

<sup>4</sup> See submission via SEC WebForm from Dan Mayfield, President, Sanderlin Securities, dated July 24, 2008.

## II. Description of the Proposed Rule Change

As part of the process of developing the new consolidated rulebook (the “Consolidated FINRA Rulebook”),<sup>5</sup> FINRA proposed to adopt the Rule as FINRA Rule 5130 in the Consolidated FINRA Rulebook with only minor changes. The Rule is designed to protect the integrity of the initial public offering (“IPO”) process by ensuring that FINRA member firms make bona fide public offerings of securities at the offering price, such firms do not withhold securities in a public offering for their own benefit or use such securities to reward persons who are in a position to direct future business to firms, and industry insiders, including FINRA member firms and their associated persons, do not take advantage of their insider position to purchase new issues for their own benefit at the expense of public customers. Because of these controls, FINRA believes that the Rule plays an important part in maintaining investor confidence in the capital raising and IPO process.

The Rule was originally adopted in 2003, replacing NASD IM-2110-1 (the Free-Riding and Withholding Interpretation) in its entirety.<sup>6</sup> The Rule was subject to extensive input from the industry and other interested persons during a four-year rulemaking process, and FINRA believes that there is broad support for it. The Rule provides necessary predictability and

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<sup>5</sup> The current FINRA rulebook consists of two sets of rules: (1) NASD rules and (2) rules incorporated from NYSE (“Incorporated NYSE Rules”) (together referred to as the “Transitional Rulebook”). The Incorporated NYSE Rules apply only to those members of FINRA that are also members of the NYSE (“Dual Members”). Dual Members also must comply with NASD rules. For more information regarding the rulebook consolidation process, see FINRA Information Notice March 12, 2008 (Rulebook Consolidation Process).

<sup>6</sup> See Securities Exchange Act Release No. 48701 (October 24, 2003), 68 FR 62126 (October 31, 2003) (Order Approving File No. SR-NASD-99-60); see also NASD Notice to Members 03-79 (December 2003) (SEC Approves New Rule 2790 (Restrictions on the Purchase and Sale of IPOs of Equity Securities); Replaces Free-Riding and Withholding Interpretation).

certainty in support of capital formation. Based on FINRA's experience, the Rule is achieving its purpose and is significantly easier than NASD IM-2110-1 for FINRA member firms and the investing public to understand and follow. Among other things, FINRA has seen a significant reduction in the number of interpretive and exemptive issues that have arisen with respect to the IPO allocation process since the Rule became effective. There is no Incorporated NYSE Rule equivalent to the Rule.<sup>7</sup>

For the reasons discussed above, FINRA proposed to transfer NASD Rule 2790 to the Consolidated FINRA Rulebook in substantially the same form. As part of this transfer, FINRA proposed minor changes to the Rule to reflect the registration of the NASDAQ Stock Market LLC ("NASDAQ") as a national securities exchange. The Rule currently refers to the NASDAQ Global Market because at the time the Rule was adopted, references to the listing standards of a national securities exchange did not include NASDAQ's Global Market. Since NASDAQ completed its registration as a national securities exchange, the references to the NASDAQ Global Market in the Rule are no longer necessary. In addition, FINRA proposed certain minor, technical changes to the Rule.

FINRA represented that it would announce the effective date of the proposed rule change in a Regulatory Notice to be published no later than 60 days following Commission approval of the proposed rule change.

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<sup>7</sup> Incorporated NYSE Rules only apply to FINRA members who are also members of the NYSE. All FINRA members are subject to existing NASD rules. See Note 5, supra. Thus, the movement of a rule that existed only the NASD rulebook but was not an Incorporated NYSE Rule into the Consolidated FINRA Rulebook does not create any new obligations for FINRA members.

### III. Summary of Comments

The Commission received one comment letter on the proposal.<sup>8</sup> The commenter urged that FINRA amend the proposal to except FINRA members that are not underwriters from the Rule. FINRA has considered the comment and determined that it is not germane to the proposal in that the comment relates to the substantive requirements of the Rule which FINRA did not propose to change other than in minor, technical ways.

### 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 are applicable to a national securities association.<sup>9</sup> In particular, the Commission believes 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 Commission notes that it has previously approved the Rule,<sup>11</sup> and the proposal merely moves the Rule nearly verbatim from the NASD rulebook to the Consolidated FINRA Rulebook. The Commission believes that the move proposed in this filing is primarily ministerial and only aids FINRA members in complying with existing obligations.

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<sup>8</sup> See Note 4, supra.

<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> See Note 6, supra.

V. 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-2008-025) be, and hereby is, approved.

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

Florence E. Harmon  
Acting 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).