

## Temporary Order

The Commission has considered the matter and finds that Applicants have made the necessary showing to justify granting a temporary exemption.

Accordingly,

*It is hereby ordered*, pursuant to section 9(c) of the Act, that Covered Persons are granted a temporary exemption from the provisions of section 9(a), effective as of the date of the Injunction, solely with respect to the Injunction, subject to the condition in the application, until the date the Commission takes final action on an application for a permanent order.

By the Commission.

**Elizabeth M. Murphy**,  
Secretary.

[FR Doc. 2010-18313 Filed 7-26-10; 8:45 am]

BILLING CODE 8010-01-P

## SECURITIES AND EXCHANGE COMMISSION

### Sunshine Act Meetings

Notice is hereby given, pursuant to the provisions of the Government in the Sunshine Act, Public Law 94-409, that the Securities and Exchange Commission will hold Closed Meetings on Wednesday, July 28, 2010 at 2:30 p.m. and on Thursday, July 29, 2010 at 2 p.m.

Commissioners, Counsel to the Commissioners, the Secretary to the Commission, and recording secretaries will attend the Closed Meetings. Certain staff members who have an interest in the matters also may be present.

The General Counsel of the Commission, or his designee, has certified that, in his opinion, one or more of the exemptions set forth in 5 U.S.C. 552b(c)(3), (5), (7), 9(B) and (10) and 17 CFR 200.402(a)(3), (5), (7), 9(ii) and (10), permit consideration of the scheduled matters at the Closed Meeting.

Commissioner Casey, as duty officer, voted to consider the items listed for the Closed Meetings in closed session, and determined that no earlier notice thereof was possible.

The subject matter of the Closed Meeting scheduled for Wednesday, July 28, 2010 will be:

Institution and settlement of an injunctive action; and

Institution and settlement of administrative proceedings.

The subject matter of the Closed Meeting scheduled for Thursday, July 29, 2010 will be:

Institution and settlement of injunctive actions;

Institution and settlement of administrative proceedings; and  
Other matters relating to enforcement proceedings.

At times, changes in Commission priorities require alterations in the scheduling of meeting items.

For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact:

The Office of the Secretary at (202) 551-5400.

Dated: July 22, 2010.

**Elizabeth M. Murphy**,  
Secretary.

[FR Doc. 2010-18451 Filed 7-23-10; 11:15 am]

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-62539; File No. SR-FINRA-2010-029]

### Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Order Approving the Proposed Rule Change To Adopt FINRA Rule 5141 (Sale of Securities in a Fixed Price Offering) in the Consolidated FINRA Rulebook

July 21, 2010.

#### I. Introduction

On May 27, 2010, 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 FINRA Rule 5141 (Sale of Securities in a Fixed Price Offering) in the consolidated FINRA rulebook and to delete NASD Rules 0120(h), 2730, 2740 and 2750, and NASD IM-2730, IM-2740 and IM-2750. This proposal was published for comment in the **Federal Register** on June 21, 2010.<sup>3</sup> The Commission received no comments regarding the proposal. This order approves this proposed rule change.

#### II. Description of the Proposed Rule Change

As part of the process of developing a new consolidated rulebook ("Consolidated FINRA Rulebook"),<sup>4</sup>

FINRA proposed to adopt FINRA Rule 5141 (Sale of Securities in a Fixed Price Offering) in the Consolidated FINRA Rulebook and to delete NASD Rules 0120(h), 2730, 2740 and 2750, and NASD IM-2730, IM-2740 and IM-2750.

Proposed FINRA Rule 5141 would be a new, consolidated rule intended to protect the integrity of fixed price offerings<sup>5</sup> by ensuring that securities in such offerings are sold to the public at the stated public offering price or prices, thereby preventing an undisclosed better price. The proposed rule is based in part on, and would replace, the current fixed price offering rules (NASD Rules 0120(h), 2730, 2740 and 2750 and associated Interpretive Materials ("IMs") 2730, 2740 and 2750).<sup>6</sup> Like the current fixed price offering rules, the proposed rule would prohibit the grant of certain preferences (e.g., selling concessions, discounts, other allowances or various economic equivalents) in connection with fixed price offerings of securities.

#### A. Proposed FINRA Rule 5141

Paragraph (a) of the proposed rule would provide that no member or person associated with a member that participates in a selling syndicate or

incorporated from NYSE ("Incorporated NYSE Rules") (together, the NASD Rules and Incorporated NYSE Rules are referred to as the "Transitional Rulebook"). While the NASD Rules generally apply to all FINRA members, the Incorporated NYSE Rules apply only to those members of FINRA that are also members of the NYSE ("Dual Members"). The FINRA Rules apply to all FINRA members, unless such rules have a more limited application by their terms. For more information about the rulebook consolidation process, see *Information Notice*, March 12, 2008 (Rulebook Consolidation Process).

<sup>5</sup> NASD Rule 0120(h) defines the term "fixed price offering" to mean the offering of securities at a stated public offering price or prices, all or part of which securities are publicly offered in the United States or any territory thereof, whether or not registered under the Securities Act of 1933. The term does not include offerings of "exempted securities" or "municipal securities" as those terms are defined in Sections 3(a)(12) and 3(a)(29), respectively, of the Securities Exchange Act or offerings of redeemable securities of investment companies registered pursuant to the Investment Company Act of 1940 which are offered at prices determined by the net asset value of the securities. The proposed rule change would incorporate the definition of "fixed price offering" into the proposed rule in substantially identical form. See proposed FINRA Rule 5141.04. See also Section II.B *infra* and Section (C) under Item II.C in the Notice.

<sup>6</sup> The current fixed price offering rules are also known as the *Papilsky* rules because of the court decision with which they are commonly associated. See *Papilsky v. Berndt*, Fed. Sec. L. Rep (CCH) ¶ 95,627 (S.D.N.Y. June 24, 1976). For more information regarding the background of NASD Rules 0120(h), 2730, 2740 and 2750 and the associated IMs, see *Notice to Members* 81-3 (February 1981) (Adoption of New Rules Concerning Securities Distribution Practices) ("Notice to Members 81-3"); see also Securities Exchange Act Release No. 17371 (December 12, 1980), 45 FR 83707 (December 19, 1980) (File No. SR-NASD-78-3).

<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. 62299 (June 16, 2010), 75 FR 35105 (June 21, 2010) (SR-FINRA-2010-029) ("Notice").

<sup>4</sup> The current FINRA rulebook consists of: (1) FINRA Rules; (2) NASD Rules; and (3) rules

selling group<sup>7</sup> or that acts as the single underwriter<sup>8</sup> in connection with a fixed price offering may offer or grant, directly or indirectly, to any person<sup>9</sup> or account that is not a member of the selling syndicate or selling group or that is a person or account other than the single underwriter<sup>10</sup> any securities in the offering at a price below the stated public offering price (*i.e.*, a “reduced price”).<sup>11</sup>

Proposed FINRA Rule 5141(a) further provides that, subject to the requirements of FINRA Rule 5130,<sup>12</sup> a member of a selling syndicate or selling group, or a member that acts as the single underwriter, would be permitted to sell securities in the offering to an affiliated person, provided the member does not sell the securities to the affiliated person at a reduced price as set forth under proposed FINRA Rule 5141.01.<sup>13</sup> The requirements of the

<sup>7</sup> The terms “selling group” and “selling syndicate” are defined in NASD Rules 0120(p) and (q), respectively. Other than to reflect the new conventions of the Consolidated FINRA Rulebook, FINRA did not propose to alter these two definitions.

<sup>8</sup> In response to commenter suggestion, FINRA revised the proposed rule to clarify that it would apply to any member acting as the single underwriter in an offering. *See* Section (A) under Item I.C. in the Notice; *see also* proposed FINRA Rules 5141(a), 5141.02 and 5141.03.

<sup>9</sup> NASD Rule 0120(n) defines “person” to include any natural person, partnership, corporation, association, or other legal entity. Other than to reflect the new conventions of the Consolidated FINRA Rulebook, FINRA did not propose to alter this definition.

<sup>10</sup> Proposed FINRA Rule 5141(a) is based in part on NASD Rule 2740(a), which provides, among other things, that in connection with the sale of securities which are part of a fixed price offering a member may not grant or receive selling concessions, discounts, or other allowances except as consideration for services rendered in distribution and may not grant such concessions, discounts or other allowances to anyone other than a broker or dealer actually engaged in the investment banking or securities business. FINRA stated that it believes that it serves the interest of clarity for the new, consolidated rule to specify that its requirements apply to members of the selling syndicate or selling group, as those terms are defined under the FINRA rulebook, or the member acting as the single underwriter, as applicable.

<sup>11</sup> As discussed below, proposed FINRA Rule 5141.01 defines the term “reduced price” for purposes of the proposed rule.

<sup>12</sup> FINRA Rule 5130 (former NASD Rule 2790) addresses restrictions on the purchase and sale of initial equity public offerings. The rule generally prohibits sales to and purchases by a broker-dealer and accounts in which a broker-dealer has a beneficial interest.

<sup>13</sup> The proposed rule change would eliminate the general prohibition on transactions with related persons as set forth in current NASD Rule 2750 (subject, as already discussed, to the requirements of FINRA Rule 5130). FINRA stated that it believes that the new, consolidated rule serves the core purpose of the fixed price offering rules because it prohibits the conferring of a reduced price on a person or account that is not a member of the selling syndicate or selling group or that is a person or account other than the single underwriter,

proposed rule would apply until the termination of the offering or until a member, having made a bona fide public offering of the securities, is unable to continue selling such securities at the stated public offering price.<sup>14</sup>

Proposed FINRA Rule 5141(b) provides that nothing in the proposed rule would prohibit the purchase and sale of securities in a fixed price offering between members of the selling syndicate or selling group.<sup>15</sup>

Proposed FINRA Rule 5141.01 defines the term “reduced price.” The proposed rule provides that, for purposes of the rule, “reduced price” includes, without limitation, any offer or grant of any selling concession, discount or other allowance, credit, rebate, reduction of any fee (including any advisory or service fee), any sale of products or services at prices below reasonable commercially available rates for similar products and services (except for research, which, as discussed below, is subject to proposed FINRA Rule 5141.02), or any purchase of or arrangement to purchase securities from the person or account at more than their fair market price in exchange for securities in the offering.<sup>16</sup> FINRA noted

regardless of whether they are an affiliated person. Accordingly, the new rule would render Rule 2750’s general prohibition on related person transactions redundant. *See* Section II.B *infra*.

<sup>14</sup> The proposed rule provides that, for purposes of the rule, securities in a fixed price offering would be presumed salable if the securities immediately trade in the secondary market at a price or prices which are above the stated public offering price. This is based in part on NASD Rule 2750(d), which provides among other things that a member or a related person of a member is “presumed not to have made a bona fide public offering \* \* \* if the securities being offered immediately trade in the secondary market at a price or prices which are at or above the public offering price.” FINRA stated that it believes that the standard set forth in the proposed rule is clear and easily applied. *See* Section (F) under Item I.C. in the Notice. FINRA noted that the proposed rule does not attempt to define “bona fide public offering” *per se* because the term “bona fide” speaks for itself and, as noted in current IM-2750, any such determination must rest on the basis of all relevant facts and circumstances.

<sup>15</sup> FINRA stated that it believes that it serves the interest of regulatory clarity for the new, consolidated rule to provide that the rule does not prohibit this aspect of the underwriting process.

<sup>16</sup> The proposed rule defines “fair market price” to refer generally to a price or range of prices at which a buyer and a seller, each unrelated to the other, would purchase the securities in the ordinary course of business in transactions that are of similar size and similar characteristics and are independent of any other transaction. FINRA stated that it believes that this standard, based in part on current NASD Rule 2730(b)(2), is straightforward and easily applied. For further discussion, *see* Section (E) under Item I.C. in the Notice. Similarly, FINRA stated that it believes that the standard “reasonable commercially available rates for similar products and services”—new for purposes of the proposed rule—is clear and effective. Lastly, FINRA noted that the proposed definition of “fair market price”

that the proposed rule’s approach of setting forth a definition for the term “reduced price” is new and is designed, like the current fixed price offering rules, to prohibit in comprehensive terms the direct or indirect offering of various economic equivalents of a price below the stated public offering price. For example, under the proposed definition of “reduced price” the practice of overtrading—addressed under current NASD Rule 2730<sup>17</sup>—would be prohibited. Similarly, under the proposed definition improper underwriting recapture—addressed under current NASD Rule 2740<sup>18</sup>—would also be prohibited.

Proposed FINRA Rule 5141.02 is based generally on NASD Rules 2740(a)(1) and (b) and IM-2740 and would preserve the allowance permitted under those rules with respect to research services. Specifically, the proposed rule provides that nothing in the new rule would prohibit a member or person associated with a member that participates in a selling syndicate or selling group, or that acts as the single underwriter, from selling securities in the offering to a person or account to which it has provided or will provide research, provided the person or account pays the stated public offering price for the securities and the research is provided pursuant to<sup>19</sup> the requirements of Section 28(e) of the Act.<sup>20</sup> The proposed rule would provide

is solely for purposes of proposed FINRA Rule 5141 and is not intended to affect any other provisions with respect to pricing that are set forth in FINRA rules.

<sup>17</sup> When Rule 2730 was adopted in its current form—then designated as Section 8 of Article III of the Rules of Fair Practice—FINRA explained: “An overtrade occurs when, as part of a swap, a dealer pays more for securities purchased from an institution than their fair market price. It also occurs if the member acting as agent charges less than a normal commission. In either event, the net effect of what the customer receives is a discount from the public offering price and is therefore prohibited.” *See Notice to Members* 81–3.

<sup>18</sup> In *Notice to Members* 81–3, FINRA explained that Rule 2740, then designated as Section 24 of Article III of the Rules of Fair Practice, “serves the twofold function of promoting the securities distribution process and assuring that the selling concession, discount or other allowance offered to professional broker/dealers to facilitate the distribution of securities to investors is given, consistent with the representations made to the public in prospectuses, only to persons who are entitled to it. Thus, the section prohibits the surreptitious and unfair discriminatory granting of a discount to select investors who are in a position to take advantage of various recapture devices.”

<sup>19</sup> FINRA made a minor revision to proposed FINRA Rule 5141.02 so as to clarify that research, in order to qualify under the proposed rule, must be provided pursuant to the cited provision of the Act. *See Regulatory Notice* 09–45 (Fixed Price Offerings) (August 2009).

<sup>20</sup> FINRA noted their belief that proposed FINRA Rule 5141.02 serves the interest of regulatory clarity

that, like current NASD Rule 2740(b) and IM-2740, investment management or investment discretionary services are not research. The proposed rule further requires that any product or service provided by a member or person associated with a member that does not qualify as research must not confer a reduced price as set forth in proposed FINRA Rule 5141.01.

Proposed FINRA Rule 5141.03 is new and provides that transactions between a member of a selling syndicate or selling group, or between a single underwriter, and an affiliated person that are part of the normal and ordinary course of business and are unrelated to the sale or purchase of securities in a fixed price offering would not be deemed to confer a reduced price under the rule.<sup>21</sup>

Proposed FINRA Rule 5141.04 incorporates the current definition of “fixed price offering” as set forth in current NASD Rule 0120(h) with only minor changes, primarily to reflect the new conventions of the Consolidated FINRA Rulebook.<sup>22</sup>

Lastly, proposed FINRA Rule 5141.05 is new and would clarify that a member that is an investment adviser may exempt securities that are purchased as part of a fixed price offering from the calculation of annual or periodic asset-based fees that the member charges a customer, provided the exemption is part of the member’s normal and ordinary course of business with the customer and is not in connection with an offering.

#### *B. Deletion of NASD Rules 2730, 2740, 2750 and 0120(h) and Associated IMs 2730, 2740 and 2750*

As noted above, proposed FINRA Rule 5141 is a new, consolidated rule that is based in part on, and replaces, the current fixed price offering rules (NASD Rules 2730, 2740, 2750 and 0120(h) and associated IMs 2730, 2740 and 2750). Following are the specific requirements set forth in the current fixed price offering rules that would be deleted as rendered redundant or obsolete by the new, consolidated rule:

by articulating the allowance for research in straightforward and streamlined fashion.

<sup>21</sup> FINRA believes that this provision is a useful clarification that would generally protect ordinary-course business transactions between members of a selling syndicate or selling group, or between a single underwriter, and affiliates from being deemed transactions that confer a reduced price (so long as such transactions are unrelated to the sale or purchase of securities in a fixed price offering). See Section (D) under Item II.C in the Notice.

<sup>22</sup> See note 5.

#### 1. NASD Rule 2730 and IM-2730

NASD Rule 2730(a) generally prohibits overtrading by providing that a member engaged in a fixed price offering, who purchases or arranges the purchase of securities taken in trade, must purchase the securities at a fair market price at the time of purchase or act as agent in the sale of such securities and charge a normal commission. NASD Rule 2730(b) defines the terms “taken in trade,” “fair market price” and “normal commission.” NASD Rule 2730(c) sets forth certain criteria as to what constitutes the fair market price of securities taken in trade.<sup>23</sup> FINRA proposed to delete NASD Rules 2730(a) through (c) and the corresponding provisions under IM-2730 because FINRA believed that proposed FINRA Rule 5141(a) and the definitions of “reduced price” and “fair market price” set forth in proposed FINRA Rule 5141.01 would serve the purposes of the NASD provisions in more straightforward and streamlined fashion and accordingly render them obsolete.<sup>24</sup>

NASD Rule 2730(d) addresses how bid and offer quotations for transactions subject to Rule 2730 must be obtained.<sup>25</sup> FINRA proposed to delete NASD Rule 2730(d) and the corresponding provisions under IM-2730 because FINRA believed that they are rendered obsolete in view of FINRA’s proposed deletion of the other portions of NASD Rule 2730.

NASD Rule 2730(e) imposes certain recordkeeping requirements. Among other things, the rule requires a member who purchases a security taken in trade to keep adequate records to demonstrate compliance with the rule and to preserve the records for at least 24 months after the transaction.<sup>26</sup> FINRA proposed to delete NASD Rule 2730(e) and the corresponding provisions under IM-2730 because FINRA believed that they are rendered obsolete in light of FINRA’s proposed deletion of the other portions of Rule 2730 and in light of members’ supervisory and transactional

<sup>23</sup> Corresponding interpretive material in the first paragraph of IM-2730 addresses in detail, for compliance purposes, a “safe harbor” for certain transactions in securities with respect to the fair market price requirements. Corresponding interpretive materials under “Presumption of Noncompliance,” “No Presumptions” and “Fair Market Price at the Time of Purchase,” all under IM-2730, address additional fair market price-related criteria.

<sup>24</sup> See notes 16 and 17 and accompanying text.

<sup>25</sup> The quotations requirements set forth in NASD Rule 2730(d) are further elaborated by corresponding interpretive material under “Quotations” under IM-2730.

<sup>26</sup> Corresponding interpretive material under “Adequate Records” under IM-2730 sets forth additional requirements with respect to recordkeeping.

recordkeeping obligations under FINRA and Commission rules.<sup>27</sup>

#### 2. NASD Rule 2740 and IM-2740

NASD Rule 2740(a) generally provides that in connection with a fixed price offering, selling concessions, discounts or other allowances may only be paid to brokers or dealers actually engaged in the investment banking or securities business and only as consideration for services rendered in distribution.<sup>28</sup> Rule 2740(a)(1) provides that nothing in the rule prohibits a member from selling securities in a fixed price offering to any person or account to whom the member has provided, or will provide, bona fide research, if the purchaser pays the stated public offering price for the securities. Rule 2740(a)(2) provides that nothing in the rule prohibits a member from selling securities in a fixed price offering that the member owns to any person at any net price which may be fixed by the member unless prevented by agreement. FINRA proposed to delete NASD Rules 2740(a), (a)(1) and (a)(2) and the corresponding provisions under IM-2740 because FINRA believed that proposed FINRA Rules 5141(a), 5141.01 and 5141.02, in combination, achieve the purpose of the NASD provisions and accordingly render them obsolete.<sup>29</sup>

NASD Rule 2740(b) defines “bona fide research” to mean advice, rendered either directly or through publications or writings, as to the value of securities, the advisability of investing in, purchasing, or selling securities, and the availability of securities or purchasers or sellers of securities, or analyses and reports concerning issuers, industries, securities, economic factors and trends, portfolio strategy, and performance of accounts.<sup>30</sup> Rule 2740(b) and the interpretive material under “Bona Fide Research Exclusion” under IM-2740 further provide that investment

<sup>27</sup> The Commission staff remind FINRA members of their recordkeeping obligations under Rules 17a-3 and 17a-4 under the Act.

<sup>28</sup> Corresponding interpretive material in the first four paragraphs of IM-2740 provide further elaboration of requirements with respect to the term “services in distribution” and related issues.

<sup>29</sup> See notes 10 and 18 and accompanying text.

<sup>30</sup> Corresponding interpretive material under “Bona Fide Research Exclusion” under IM-2740 provides that the definition of “bona fide research” is “substantially the same” as the definition of research that is set forth under Securities Exchange Act Section 28(e)(3), and incorporates by reference Commission guidance as to the circumstances when the exclusion for bona fide research is available. The “Bona Fide Research Exclusion” interpretive material further reiterates that investment management or investment discretionary services are not bona fide research. Additional corresponding interpretive material under “Indirect Discounts” under IM-2740 addresses products or services that fail to qualify as bona fide research.

management or investment discretionary services are not bona fide research. FINRA proposed to delete NASD Rule 2740(b) and the corresponding provisions under IM-2740 because FINRA believed that proposed FINRA Rule 5141.02 serves the purpose of the NASD provisions in more straightforward and streamlined fashion and accordingly renders them obsolete.<sup>31</sup>

NASD Rule 2740(c) requires a member who grants a selling concession, discount or other allowance to another person to obtain a written agreement from that person that he or she will comply with Rule 2740. If a member grants a selling concession, discount or other allowance to a non-member broker or dealer in a foreign country, the rule requires that the member must obtain from that non-member an agreement that it will comply with NASD Rules 2730 and 2750 (in addition to Rule 2740) as if the non-member were a member, and that the non-member will comply with NASD Rule 2420 as that rule applies to a non-member broker-dealer in a foreign country. FINRA proposed to delete NASD Rule 2740(c) because FINRA believed that it is sufficient to apply the requirements of the new, consolidated rule to FINRA members. The relationships between foreign non-members and their customers are beyond the scope of the proposed rule change.<sup>32</sup> FINRA noted that the requirements of proposed FINRA Rule 5141 would apply to members—and would reach any reduced prices that members offer or grant to non-members—regardless of whether agreements to comply with rules are obtained.<sup>33</sup>

NASD Rule 2740(d) requires a member that receives an order from any person designating another broker or dealer to receive credit for the sale to file reports with FINRA within thirty days after the end of each calendar quarter with respect to each fixed price offering that terminated during the quarter. The rule further specifies certain information the reports must contain. NASD Rule 2740(e) requires a member that is designated by its customer for the sale of securities to

keep and maintain for twenty-four months records of information similar to that set forth in NASD Rule 2740(d). FINRA proposed to delete NASD Rules 2740(d) and (e) because FINRA believed that they are rendered obsolete in light of the proposed deletion of the other portions of NASD Rule 2740 and in light of members' supervisory and transactional recordkeeping obligations under FINRA and Commission rules.<sup>34</sup> Further, FINRA noted that its regulatory programs in connection with the proposed rule change will not require specific quarterly filings such as those currently required pursuant to NASD Rule 2740(d).

### 3. NASD Rule 2750 and IM-2750

NASD Rule 2750(a) provides that no member engaged in a fixed price offering of securities is permitted to sell the securities to, or place the securities with, any person or account which is a related person of the member, unless the related person is itself subject to the rule or is a non-member broker-dealer that has entered into the agreements required under Rule 2740(c). NASD Rules 2750(b) and (c) address criteria pertaining to the term "related person." As discussed earlier, the proposed rule change would eliminate the prohibitions under Rule 2750(a), which FINRA believes would be redundant in light of the proposed rule's overall protections against the conferring of a reduced price.<sup>35</sup> Accordingly, FINRA proposed to delete NASD Rule 2750(a), as well as Rules 2750(b) and (c), as FINRA believed that the criteria pertaining to the term "related person" would be rendered obsolete.

NASD Rule 2750(d) provides that the rule's prohibitions do not apply to the sale or placement of securities in a trading or investment account of a member or a related person of a member after the termination of the fixed price offering if the member or related person has made a bona fide public offering of the securities.<sup>36</sup> FINRA proposed to delete NASD Rule 2750(d) and the corresponding provisions under IM-2750 because FINRA believed that the provisions are obsolete in light of the proposed deletion of the other portions of Rule 2750.

The first paragraph of IM-2750 addresses certain conditions under

which a member that acts or plans to act as a sponsor of a unit investment trust is deemed not to violate Rule 2750. FINRA proposed to delete the IM provisions because FINRA believed that they are obsolete in light of the proposed deletion of the other portions of NASD Rule 2750.

Lastly, as noted earlier in this filing, the proposed rule change would incorporate the definition of "fixed price offering" set forth in current NASD Rule 0120(h) into the proposed rule in substantially identical form.<sup>37</sup> Accordingly, NASD Rule 0120(h) would be deleted.

FINRA will announce the effective date of the proposed rule change in a *Regulatory Notice* to be published no later than 90 days following Commission approval. The effective date will be no later than 180 days following publication of the *Regulatory Notice* announcing Commission approval.

### III. 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>38</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>39</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 believes that the proposed rule change will streamline and reorganize the existing rules and protect the integrity of fixed price offerings by ensuring that securities in such offerings are sold to the public at the stated public offering price or prices, thereby preventing an undisclosed better price.

### IV. Conclusion

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>40</sup> that the proposed rule change (File No. SR-FINRA-2010-029) be, and hereby is, approved.<sup>41</sup>

<sup>31</sup> See notes 19 and 20 and accompanying text.

<sup>32</sup> Underwriting terms in foreign jurisdictions vary considerably, as do applicable regulatory requirements.

<sup>33</sup> For further discussion see Section (G) under Item ILC in the Notice. FINRA notes that NASD Rule 2420 is being addressed separately as part of the rulebook consolidation process. See *Regulatory Notice* 09-69 (FINRA Requests Comment on Proposed Consolidated FINRA Rule Governing Payments to Unregistered Persons) (December 2009).

<sup>34</sup> The Commission staff again remind FINRA members of their recordkeeping obligations under Rules 17a-3 and 17a-4 under the Act.

<sup>35</sup> See note 13 and accompanying text.

<sup>36</sup> NASD Rule 2750(d) and corresponding interpretive material in the second paragraph under IM-2750 further set forth certain provisions with respect to bona fide public offerings. See note 13 and accompanying text.

<sup>37</sup> See note 5.

<sup>38</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>39</sup> 15 U.S.C. 78o-3(b)(6).

<sup>40</sup> 15 U.S.C. 78s(b)(2).

<sup>41</sup> 17 CFR 200.30-3(a)(12).

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

**Florence E. Harmon,**

*Deputy Secretary.*

[FR Doc. 2010-18301 Filed 7-26-10; 8:45 am]

BILLING CODE 8010-01-P

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-62543; File No. SR-NASDAQ-2010-075]

### Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by The NASDAQ Stock Market LLC Relating to Fees for Execution of Contracts on the NASDAQ Options Market

July 21, 2010.

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> notice is hereby given that, on June 30, 2010, The NASDAQ Stock Market LLC

("NASDAQ" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

#### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to modify Exchange Rule 7050 governing pricing for NASDAQ members using the NASDAQ Options Market ("NOM"), NASDAQ's facility for executing and routing standardized equity and index options. Specifically, NOM proposes to: (i) Modify pricing for both Penny Pilot<sup>3</sup> Options and All Other Options with respect to the fees for adding<sup>4</sup> and removing liquidity<sup>5</sup> as well as the rebates for adding and removing liquidity; (ii) eliminate the rebates for

adding and fees for removing liquidity in options overlying Standard and Poor's Depository Receipts/SPDRs ("SPY"),<sup>6</sup> PowerShares QQQ Trust ("QQQQ")<sup>®</sup> and Ishares Russell 2000 ("IWM"); (iii) eliminate the fee for an order that executes against another order entered by the same firm; and (iv) allow a rebate for Customer orders which execute against other customer orders.

While changes pursuant to this proposal are effective upon filing, the Exchange has designated these changes to be operative for transactions on July 1, 2010.

The text of the proposed rule change is set forth below. Proposed new text is in *italic* and deleted text is in [brackets].

#### 7050. NASDAQ Options Market

The following charges shall apply to the use of the order execution and routing services of the NASDAQ Options Market for all securities.

(1) Fees for Execution of Contracts on the NASDAQ Options Market

#### FEES AND REBATES

(per executed contract)

|                                                   | Customer     | Firm        | Non-NOM market maker | NOM market maker |
|---------------------------------------------------|--------------|-------------|----------------------|------------------|
| Penny Pilot Options:                              |              |             |                      |                  |
| Rebate to Add Liquidity .....                     | \$0.[25]32   | \$0.[25]10  | \$0.25               | \$0.[25]30       |
| Fee for Removing Liquidity .....                  | \$0.[35]40   | \$0.45      | \$0.45               | \$0.45           |
| [IWM, QQQQ, SPY]                                  |              |             |                      |                  |
| [Rebate to Add Liquidity] .....                   | [\$0.30]     | [\$0.30]    | [\$0.30]             | [\$0.30]         |
| [Fee for Removing Liquidity] .....                | [\$0.35]     | [\$0.45]    | [\$0.45]             | [\$0.45]         |
| NDX and MNX                                       |              |             |                      |                  |
| Rebate to Add Liquidity .....                     | \$0.10       | \$0.10      | \$0.10               | \$0.20           |
| Fee for Removing Liquidity .....                  | \$0.50       | \$0.50      | \$0.50               | \$0.40           |
| All Other Options:                                |              |             |                      |                  |
| Fee for Adding Liquidity .....                    | [Free]\$0.00 | \$0.[30]45  | \$0.[30]45           | \$0.30           |
| Fee for Removing Liquidity .....                  | [ - ]\$0.40  | \$0.4[0]5   | \$0.45               | \$0.45           |
| Rebate [for] to [Removing] Add Liquidity[*] ..... | \$0.20       | [ - ]\$0.00 | [ - ]\$0.00          | \$0.00[ - ]      |

[Transactions in which the same participant is the buyer and the seller shall be charged a net fee of \$0.10 per executed contract.]

[\*No rebate will be paid when a customer order executes against another customer order.]

\* \* \* \* \*

The text of the proposed rule change is available on the Exchange's Web site

at <http://www.nasdaqomx.cchwallstreet.com>, at the principal office of the Exchange, and at the Commission's Public Reference Room.

#### II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these

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

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

<sup>3</sup> The Penny Pilot was established in March 2008 and in October 2009 was expanded and extended through December 31, 2010. *See* Securities Exchange Act Release Nos. 57579 (March 28, 2008), 73 FR 18587 (April 4, 2008) (SR-NASDAQ-2008-026) (notice of filing and immediate effectiveness establishing Penny Pilot); 60874 (October 23, 2009), 74 FR 56682 (November 2, 2009) (SR-NASDAQ-2009-091) (notice of filing and immediate

effectiveness expanding and extending Penny Pilot); 60965 (November 9, 2009), 74 FR 59292 (November 17, 2009) (SR-NASDAQ-2009-097) (notice of filing and immediate effectiveness adding seventy-five classes to Penny Pilot); 61455 (February 1, 2010), 75 FR 6239 (February 8, 2010) (SR-NASDAQ-2010-013) (notice of filing and immediate effectiveness adding seventy-five classes to Penny Pilot); and 62029 (May 4, 2010), 75 FR 25895 (May 10, 2010) (SR-NASDAQ-2010-053) (notice of filing and immediate effectiveness adding

seventy-five classes to Penny Pilot). *See also* Exchange Rule Chapter VI, Section 5.

<sup>4</sup> An order that adds liquidity is one that is entered into NOM and rests on the NOM book.

<sup>5</sup> An order that removes liquidity is one that is entered into NOM and that executes against an order resting on the NOM book.

<sup>6</sup> SPY options are based on the SPDR exchange-traded fund ("ETF"), which is designed to track the performance of the S&P 500 Index.