



ASSOCIATION YEAR 2009-2010

CHAIR

Nathaniel L. Dolner
4221 West Boy Scout Boulevard
Suite 1000
Tampa, FL 33607-5780

CHAIR-ELECT

Lynne B. Barr
Exchange Place
53 State Street
Boston, MA 02109-2803

VICE-CHAIR

Linda J. Rusch
P.O. Box 3528
721 North Cincinnati Street
Spokane, WA 99220-3528

SECRETARY

Martin E. Lybecker
1875 Pennsylvania Avenue NW
Washington, DC 20006-3642

BUDGET OFFICER

Renie Yoshida Grohl
8300 Fox Hound Run NE
Warren, OH 44484-1774

CONTENT OFFICER

Scott E. Ludwig
Suite 900
200 Clinton Avenue W
Huntsville, AL 35801-4933

IMMEDIATE PAST CHAIR

Karl J. Ege
Suite 4800
1201 Third Avenue
Seattle, WA 98101-3099

SECTION DELEGATES TO THE ABA HOUSE OF DELEGATES

Mary Beth Clary
Naples, FL

Barbara Mendel Mayden
Nashville, TN

Maury B. Pascover
St. Louis, MO

Hon. Elizabeth S. Stong
Brooklyn, NY

COUNCIL

William H. Clark, Jr.
Philadelphia, PA

Donald W. Glazer
Newton, MA

Stephanie A. Heller
New York, NY

Dixie L. Johnson
Washington, DC

William B. Rosenberg
Montreal, QC

Mitchell L. Bach
Philadelphia, PA

Conrad G. Goodkind
Milwaukee, WI

Paul (Chip) L. Lion III
Palo Alto, CA

Timothy M. Lupinacci
Birmingham, AL

Jacqueline Parker
San Jose, CA

Margaret M. Foran
Naperville, IL

Lawrence A. Hamemesh
Wilmington, DE

Myles V. Lynk
Tempe, AZ

Christopher J. Rockers
Kansas City, MO

Jolene A. Yee
Modesto, CA

Doneene Keemer Damon
Wilmington, DE

Jean K. FitzSimon
Philadelphia, PA

Lawrence A. Goldman
Newark, NJ

Joel I. Greenberg
New York, NY

Donald C. Lampe
Greensboro, NC

BOARD OF GOVERNORS LIAISON

Stephen L. Tober
Portsmouth, NH

SECTION DIRECTOR

Susan Daly
Chicago, IL
(312) 988-6244
suedaly@staff.abanet.org

September 18, 2009

Via E-mail: pubcom@finra.org

Ms. Marcia E. Asquith
Office of the Corporate Secretary
Financial Industry Regulatory Authority, Inc.
1735 K Street, N.W.
Washington, D.C. 20006-1506

Re: Proposed Rule 5141 Relating to Fixed Price Offerings

Dear Ms. Asquith:

This letter is submitted on behalf of the Committee on Federal Regulation of Securities (the "Committee" or "we") of the Section of Business Law of the American Bar Association (the "ABA") in response to the request of the Financial Industry Regulatory Authority, Inc. ("FINRA") for comments on the proposal by FINRA to adopt new FINRA Rule 5141 ("Sale of Securities in a Fixed Priced Offering") (the "Proposed Rule"), as published for comment through FINRA Regulatory Notice to Members 09-45 (the "Notice"). This letter was prepared by the Committee's Subcommittee on FINRA Corporate Financing Rules.

The comments expressed in this letter represent the views of the Committee only and have not been approved by either the ABA's House of Delegates or Board of Governors, and therefore do not represent the official position of the ABA. In addition, these comments do not represent the official position of the ABA Section of Business Law, nor do they necessarily reflect the views of all members of the Committee.

We welcome the opportunity to comment on the Proposed Rule.

1. Comment Summary

NASD Rules 2730, 2740 and 2750 (the "Current Rules") together prevent FINRA members and their associated persons from directly or indirectly making sales of securities in a fixed price offering at less than the stated public offering price or to a "related person" of the member. FINRA is proposing to simplify the provisions by

eliminating the Current Rules and replacing them with a single simplified rule, FINRA Rule 5141 (the “Proposed Rule”). We strongly support this approach, and believe that the Proposed Rule will ease the process of compliance. There are, however, a few aspects of the Proposed Rule that should, in our view, be clarified in the text of the rule, in the supplementary material and in the rule filing with the Securities and Exchange Commission (the “SEC”). Set forth below is a summary of our comments, discussed at greater length below. We recommend that FINRA:

- confirm that FINRA intends to exclude from the coverage of the Proposed Rule a member that acts alone to distribute a fixed price offering of securities on a firm-commitment, best-efforts or bought deal basis;
- revise the Proposed Rule to provide that it does not apply to offers of securities at a reduced price in situations where there are no sales at a reduced price;
- confirm in its rule filing with the SEC that FINRA continues to agree with the policy announced in NASD Notice to Members 81-03 that multiple fixed price arrangements that are disclosed in the prospectus or applicable offering document will not be treated as involving sales at a “reduced price” in violation of the Proposed Rule;
- move the reminder regarding a member’s obligation to comply with FINRA Rule 5130 to Supplementary Material;
- confirm that the Proposed Rule would not prohibit the payment of cash fees by a member of the selling syndicate and selling group to FINRA members and non-members who do not sell securities in a fixed price offering;
- include Supplementary Material that would provide that any credit, rebate, reduction of fee or agreement for products and services that is part of the member’s ordinary course of business shall not be deemed to confer a “reduced price”;
- clarify certain other aspects of the definition of “reduced price”;
- include an explicit exception to address under-subscribed offerings; and
- confirm that FINRA members would no longer be required to obtain written agreements to comply with the Proposed Rule and NASD Rule 2420 from non-member broker/dealers in a foreign country.

2. Specific Comments

a. Members Subject to the Proposed Rule

Paragraph (a) of the Proposed Rule provides that the Rule would apply to any “member or person associated with a member that participates in a selling syndicate or selling group in connection with a fixed price offering . . .” Endnote 6 of the Regulatory Notice indicates that the terms “selling group” and “selling syndicate” are defined by reference to NASD Rules 0120(p) and (q), respectively. In each case, the terms require the formation of a “group” of FINRA members for purposes of distribution of the securities. In comparison, we note that the Current Rules apply more broadly. Specifically, NASD Rules 2730 and 2750 apply to any “member engaged in a fixed price offering” and Rule 2740 applies to any member that may grant or receive a selling concession, discount or other allowances in connection with

the sale of securities which are part of a fixed price offering. We would appreciate confirmation that FINRA therefore intends to exclude from the coverage of the Proposed Rule a member that acts alone to distribute a fixed price offering of securities on a firm-commitment, best-efforts or bought deal basis.

b. Offer of Securities at a Reduced Price

Paragraph (a) of the Proposed Rule provides that a member of the selling syndicate or selling group shall not “offer or grant, directly or indirectly, to any person or account that is not a member of such selling syndicate or selling group any securities in the offering at a price below the stated public offering price (‘reduced price’).” Further, the definition of “reduced price” would cover an offer or grant of any selling concession, discount, or other allowance, etc. In comparison, NASD Rule 2740 does not prohibit the “offer” of a reduced price, but directly prohibits a member from granting or receiving a selling concession, discount, or other allowance except as consideration for services rendered in the distribution. Thus, a FINRA enforcement action under the Proposed Rule could be based on a FINRA member’s offer of securities at a reduced price, even if it does not result in a sale, whereas an enforcement action under current NASD Rule 2740 can only arise from the actual granting of a selling concession, discount or other allowance at such an impermissible reduced price.

We agree that a member should not offer a discount or a related credit or fee reduction that would be considered a prohibited “reduced price” in a fixed price offering. However, we are concerned that the extension of the Proposed Rule to an offer that does not result in a sale at a reduced price creates an unnecessary burden on compliance programs, especially given the lack of harm to the customer, the issuer or the public. Of course, the sale to a customer at a fixed price after the customer has been led to believe that it could purchase the securities at a reduced price represents a separate form of wrongdoing, more properly addressed by rules relating to the duty of fair dealing. In order to avoid a situation where an offer is made, but there is no resulting reduction in the price paid on the sale of a security, we recommend that the first sentence of the Proposed Rule and the definition of “reduced price” be revised to delete the word “offer” and, thus, simply prohibit a sale at a “reduced price.”

c. Definition of “Fixed Price Offering” - - Multiple Fixed Prices

The Proposed Rule would incorporate a substantially identical definition of “fixed price offering” into the supplementary material of Rule 5141.04 as the definition that is currently in NASD Rule 0120(h). In light of the fact that the proposed definition continues to provide that a “fixed price offering” means the offer of securities “at a stated public offering price or prices,” we believe that under the Proposed Rule the issuer and the underwriters may establish two or more fixed prices to accommodate volume discounts and other arrangements, including waiver of commissions in the case of sales through a registered investment advisor, sales in

connection with wrap fee accounts, and sales net of commissions to issuer insiders in a directed share program, in each case as disclosed in the prospectus, without any lower fixed price being treated as an impermissible reduced price under the Proposed Rule.

The ability of the issuer and the underwriters to offer securities at different fixed prices without violating NASD Rule 2740 was discussed in SEC Release No. 34-15807 (May 9, 1979), which requested comment on the "Papilsky" amendments to the NASD rules that imposed the current restrictions found in Rule 2740. The SEC stated in Section V.C. of such release that "the proposed rule change would not prevent an issuer and the underwriters from agreeing, for example, to offer the securities at different prices depending upon the amount of securities that a customer was willing to buy or other such arrangements that would provide different levels of prices."

The clearest explanation by the NASD of the ability of the issuer and underwriter to establish multiple fixed prices in compliance with Rule 2740 is found in NASD Notice to Members 81-03 (February 9, 1981), at page 9, where the NASD stated, with respect to the adoption of the "Papilsky" amendments:

"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. The Board wishes to emphasize that the proposals are designed to assure that members who decide to offer securities to the public at a fixed, stated public offering price conduct the offering in a manner consistent with their public representations made in the prospectus. They are not, however, designed to, and do not prohibit so-called multiple price offerings permitted by the Securities Act of 1933 if the registration statement and prospectus are clear as to the price being charged and to whom the differing prices will be available. In this connection, Section 16 of Schedule A of the 1933 Act requires disclosure of the price at which a security is to be offered to the public 'or the method by which such price is computed and any variation therefrom at which any portion of such security is proposed to be offered to any persons or classes of persons, other than underwriters, naming them or specifying the class.' Thus, if more than one price is to be charged, the specifics of how it must be treated are clear in the '33 Act."

Because NASD Notice to Members 81-03 is not available on the FINRA website and is not easily accessible to persons who are not already aware of its existence, we respectfully request that FINRA confirm in its rule filing with the SEC that FINRA continues to agree with the policy announced in 1981 that multiple fixed price arrangements that are disclosed in the prospectus or applicable offering document will not be treated as a "reduced price" that would violate the Proposed Rule.

d. Definition of “Fixed Price Offering” - - Exclusions

The definition of “fixed price offering”, which is defined in terms of a “public offering”, should specifically exclude offerings made pursuant to Section 4(1), 4(2) or 4(6) of the Securities Act, or Rule 144A, 505 or 506 or Regulation S under that Act. Although the words “publicly offered in the United States or any territory thereof” have been, and may reasonably be, interpreted to exclude such offerings, adding the specific exclusions will provide greater clarity. In addition, such an interpretation of the term “public offering” would be consistent with the definition thereof in NASD Rule 2720(b)(14) (which was renumbered as NASD Rule 2720(f)(11) as of September 14, 2009 – *see* FINRA Regulatory Notice 09-49).

e. Sales to Affiliates

The Proposed Rule would appear to eliminate the requirement of NASD Rule 2750, which currently prohibits FINRA members from selling securities from a fixed priced offering to a person or account which is a “related person” of the member (as defined in Rule 2750). The second sentence of the Proposed Rule would expressly allow a member of the selling syndicate or selling group to sell securities from a fixed price offering to an “affiliated person,” provided that such sale complies with FINRA Rule 5130 and that “such member does not sell the securities to the affiliated person at a reduced price under this Rule.” We take this to mean that with respect to a fixed price offering, a sale of securities by a member of the selling syndicate or selling group to an affiliate of such member, including the parent of such member or to an internal proprietary trading desk of the member, at a stated public offering price will not be deemed to be a sale to such affiliated person at a reduced price for the purposes of the Proposed Rule. The term “affiliated person” is not proposed to be defined.

Because the Proposed Rule would prohibit a FINRA member that is a member of the selling syndicate or selling group from selling a security to any person or account at a reduced price, we believe that the primary purpose of the second sentence of the Proposed Rule is to remind members of their obligation to comply with FINRA Rule 5130 when making sales to affiliates. Therefore, in our view, the inclusion of a separate requirement to comply with the Proposed Rule in the case of sales to an account or person deemed to be an “affiliate” of the FINRA member is unnecessary and confusing. We recommend that the second sentence be eliminated and that instead a reminder to comply with FINRA Rule 5130 be included in Supplementary Material as follows:

“Sales to Affiliates: When making sales of equity securities to affiliates, FINRA members are reminded of their obligation to comply with FINRA Rule 5130.”

The Proposed Rule would adopt Supplementary Material providing that transactions between a member of a selling syndicate or selling group 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 shall not be deemed to confer a reduced price under the Proposed Rule. Although we support the inclusion of this clarifying Supplementary Material in the Proposed Rule, if a transaction with an affiliated person is entered into as part of the normal and ordinary course of business, there should, in our view, be an express presumption that such transaction is unrelated to the sale or purchase of the applicable securities in a fixed price offering. We therefore believe the further requirement that such transaction be “unrelated to the sale or purchase of securities in a fixed price offering” would not provide any additional safeguard and is unnecessary. Moreover, as set forth below in connection with the definition of “reduced price,” we recommend that the Supplementary Material proposed in Rule 5141.03 be expanded to apply to any customer that purchases securities in a fixed price offering.

f. Definition of “Reduced Price”

(i) Cash Fees. The scope of the Proposed Rule would be limited to situations where there is a potential to sell securities included in a fixed price offering at a reduced price. Therefore, the Proposed Rule would not apply to either the payment by a FINRA member of a cash fee to a FINRA member that is not selling any of the securities from the fixed price offering or to the payment to a non-member subject to compliance with NASD Rule 2420. We would appreciate confirmation that the Proposed Rule is not intended to prohibit the payment of any such cash advisory or referral fees to a non-participating FINRA member in accordance with the FINRA interpretative letter issued to Dana Fleischman, Cleary, Gottlieb, Steen & Hamilton, dated November 24, 2003 and to non-FINRA members in accordance with the FINRA interpretative letter issued to Daniel Schloendorn, Willkie Farr & Gallagher, dated June 18, 1998 (in compliance with NASD Rule 2420).

(ii) Credits and Rebates. Given the specific reference to credits and rebates in the definition of “reduced price” (which conforms to the FINRA interpretative letter dated December 22, 1988), we support the inclusion of Supplementary Material clarifying that a member which 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 to the customer, provided such exemption is part of the member’s normal and ordinary course of business with the customer. For the same reasons discussed above with respect to the Supplementary Material at proposed Rule 5141.03 (Affiliated Persons), we also believe that there is no additional safeguard afforded by imposing an additional requirement that the aforesaid calculation be “not in connection with an offering.”

(iii) Ordinary Course Transactions. More generally, we believe that there should be an express presumption that any credit, rebate or reduction of fee granted by a selling member as part of its normal and ordinary course of business should be permissible, and would not constitute a reduced price in connection with fixed price offering. We also believe that so long as agreements for products and services are entered into as part of the normal and ordinary course of business, the agreements should be treated as being at commercially reasonable rates for purposes of compliance with the Proposed Rule. We recommend that the Supplementary Material proposed in Rule 5141.03 be replaced and expanded to apply to any customer that purchases securities in a fixed price offering, as follows:

“Ordinary Course Transactions. Any (i) credit, rebate or reduction of fee (other than a reduction to the stated offering price) granted by a member of a selling syndicate or selling group to a person or account that purchases securities in a fixed price offering and (ii) agreement for products and services entered into by a member of a selling syndicate or selling group with any person or account that purchases securities in a fixed price offering that, in each case, is part of the member’s normal and ordinary course of business shall not be deemed to constitute a “reduced price” under this Rule.”

(iv) Fair Market Price. Consistent with our comments above, we believe that it should be sufficient that a fair market price be determined with respect to a price or range of prices at which a willing buyer and a willing seller would purchase the securities in the ordinary course of business in transactions that are of similar size and similar characteristics. We do not believe that the added requirements that the buyer and seller be “unrelated” and that the transaction in question be “independent of any other transaction” provide any additional safeguards that the other requirements do not already provide. We recommend that these added requirements be deleted.

g. Exception for Under-Subscribed Offerings

At times, underwriters and selling group members in a fixed price offering may, despite making a bona fide public offering, have difficulty placing the entire amount of the offering at the stated price, resulting in what is sometimes referred to as a “sticky offering.” NASD Rule 2750 specifically allows a FINRA member to place securities that the member has been unable to sell in the investment account of the member or a related person of the member after termination of the fixed price offering if the member has made a *bona fide* public offering of the securities. Similarly, FINRA Rule 5130(g) states with respect to “Under-Subscribed Offerings” that “Nothing in this Rule shall prohibit an underwriter, pursuant to an underwriting agreement, from placing a portion of a public offering in its investment account when it is unable to sell that portion to the public.” A version of this exception has not been incorporated into the Proposed Rule.

In addition, the prospectus for a fixed price offering of securities underwritten on a firm-commitment basis will generally include disclosure that “After the initial public offering, the underwriters may change the public offering price and concession and discount to broker/dealers.” NASD Rule 2740 does not include a provision addressing this situation, which we believe should not be treated as a “reduced price” under the Proposed Rule.

We recommend that the Proposed Rule be revised to include the following Supplementary Material that would clarify the operation of the Proposed Rule in the case of an under-subscribed offering by incorporating the exception currently in NASD Rule 2750(d) and explicitly address the situation in which the public offering price must be lowered in order for the underwriters to complete the distribution of the entire offering.

“Under-Subscribed Offering. Nothing in this Rule shall prohibit a member or person associated with a member that participates in a selling syndicate or selling group, pursuant to an underwriting agreement, from reducing the public offering price for the remaining securities when it is unable to sell all of the securities at the initial public offering price or from placing a portion of a public offering in its investment account or, subject to compliance with FINRA Rule 5130, the account of an affiliated person, when it is unable to sell that portion to the public. A member is presumed to have been unable to sell all of the securities at the public offering price for purposes of this provision if the securities being offered immediately trade in the secondary market at a price or prices that are below the public offering price.”

h. Written Agreement of Compliance

The Proposed Rule does not contain the requirements of NASD Rule 2740(c) directing that a member who grants a selling concession or discount to another person must obtain a written agreement from such person (including a non-member broker or dealer in a foreign country) to comply with NASD Rules 2730 and 2750 and NASD Rule 2420 (as that rule applies to a non-member broker or dealer in a foreign country). As a matter of practice, underwriting agreements impose obligations on FINRA members to comply with all applicable FINRA rules. However, there have been differences of opinion as to how Rule 2740(c) applies to various offering structures with respect to sales through non-member broker-dealers in another country. We would appreciate confirmation from FINRA that FINRA members will not be obligated to require compliance with the Proposed Rule or NASD Rule 2420 by non-member broker-dealers in a foreign country that may receive a selling concession in connection with the sale of a fixed price offering.

We hope that these comments will be helpful to FINRA in its consideration of the Proposed Rule. The Committee, including its Subcommittee on FINRA Corporate Financing Rules, would be pleased to discuss any aspect of these comments with the staff of FINRA. Questions may be directed to David M. Katz, Chair of the Subcommittee, at (212) 839-7386.

Respectfully submitted,

/s/ Jeffrey W. Rubin

Jeffrey W. Rubin, Chair
Committee on Federal Regulation of
Securities

Drafting Committee:

David M. Katz
Peter W. LaVigne
Suzanne E. Rothwell