

Fixed Price Offerings

SEC Approves Consolidated FINRA Rule on the Sale of Securities in a Fixed Price Offering

Effective Date: February 8, 2011

Executive Summary

The SEC approved FINRA's proposed rule change¹ to adopt a new rule governing fixed price offerings for the consolidated FINRA rulebook (the Consolidated FINRA Rulebook).² The new rule—FINRA Rule 5141—protects 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. The new rule is based in part on, and replaces, provisions in the NASD Rules.³

The text of the new rule is set forth in Attachment A.

The rule change takes effect on February 8, 2011.

Questions concerning this *Notice* should be directed to:

- ▶ Adam H. Arkel, Assistant General Counsel, Office of General Counsel (OGC), at (202) 728-6961; or
- ▶ Gary L. Goldsholle, Vice President and Associate General Counsel, OGC, at (202) 728-8104.

Background & Discussion

FINRA Rule 5141 is a new, consolidated rule that protects the integrity of fixed price offerings⁴ by ensuring that securities in such offerings are sold to the public at the stated public offering price or prices. The rule prohibits the grant of certain preferences (*e.g.*, selling concessions, discounts, other allowances or various economic equivalents) in connection with fixed price offerings of securities.

October 2010

Notice Type

- ▶ Consolidated FINRA Rulebook
- ▶ New Rule

Suggested Routing

- ▶ Corporate Financing
- ▶ Compliance
- ▶ Legal
- ▶ Operations
- ▶ Senior Management

Key Topics

- ▶ Fixed Price Offerings

Referenced Rules & Notices

- ▶ NASD Rule 0120
- ▶ NASD Rule 2730
- ▶ NASD Rule 2740
- ▶ NASD Rule 2750
- ▶ NASD IM-2730
- ▶ NASD IM-2740
- ▶ NASD IM-2750
- ▶ FINRA Rule 5130
- ▶ FINRA Rule 5141

General Requirements; Definition of “Reduced Price”

FINRA Rule 5141(a) provides that no member or person associated with a member that participates in a selling syndicate or selling group⁵ in connection with a fixed price offering may offer or grant, directly or indirectly, to any person⁶ or account that is not a member of the selling syndicate or selling group any securities in the offering at a price below the stated public offering price (*i.e.*, a “reduced price”).⁷ The term “reduced price” is defined under FINRA Rule 5141.01 to include, 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 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.⁸

The requirements of the new rule 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. For purposes of the rule, securities in a fixed price offering are presumed salable if the securities immediately trade in the secondary market at a price or prices which are above the stated public offering price.

Sales to Affiliated Persons

FINRA Rule 5141(a) provides that, subject to the requirements of FINRA Rule 5130,⁹ a member of a selling syndicate or selling group is 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 the rule. FINRA Rule 5141.03 provides 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 new rule.

Research

FINRA Rule 5141.02 states that nothing in the new rule prohibits a member or person associated with a member that participates in a selling syndicate or selling group from selling securities in the offering to a person or account to which it has provided or will provide research, as long as the person or account pays the stated public offering price for the securities and the research is provided pursuant to the requirements of Section 28(e) of the Exchange Act. The rule provides that investment management or investment discretionary services are not research for purposes of the provision. The 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 under FINRA Rule 5141.01 (see above).

Investment Advisers

FINRA Rule 5141.05 permits a member that is an investment adviser to 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.

Endnotes

- 1 For more information, see Securities Exchange Act Release No. 62539 (July 21, 2010), 75 FR 44033 (July 27, 2010) (Order Approving Proposed Rule Change; File No. SR-FINRA-2010-029).
- 2 The current FINRA rulebook consists of: (1) FINRA Rules; (2) NASD Rules; and (3) rules 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 member firms, 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 member firms, unless such rules have a more limited application by their terms. For more information about the rulebook consolidation process, see *Information Notice 03/12/08* (Rulebook Consolidation Process).
- 3 Effective February 8, 2011, NASD Rules 0120(h), 2730, 2740 and 2750, and NASD IM-2730, IM-2740 and IM-2750 will be deleted from the Transitional Rulebook.
- 4 FINRA Rule 5141.04—transferred from NASD Rule 0120(h) in substantially identical form—defines “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, except that 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 Exchange Act or offerings of redeemable securities of investment companies registered pursuant to the Investment Company Act which are offered at prices determined by the net asset value of the securities.
- 5 FINRA Rule 5141(b) provides that nothing in the rule prohibits the purchase and sale of securities in a fixed price offering between members of the selling syndicate or selling group. The terms “selling group” and “selling syndicate” are defined in NASD Rules 0120(p) and (q), respectively, and will be addressed later in the rulebook consolidation process. Other than to reflect the new conventions of the Consolidated FINRA Rulebook, FINRA does not plan to alter these two definitions.

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Endnotes

- 6 NASD Rule 0120(n), which will be addressed later in the rulebook consolidation process, 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 does not plan to alter this definition.
- 7 The new rule’s requirements also apply to any member or person associated with a member that acts as the single underwriter in connection with a fixed price offering. For convenience, all references in this *Notice* to requirements that apply to the selling syndicate or selling group include single underwriters. See FINRA Rules 5141(a), 5141.02 and 5141.03; see also 75 FR 44033 at 44034.
- 8 FINRA Rule 5141.01 provides that “fair market price” refers 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 notes that this definition of “fair market price” is solely for purposes of FINRA Rule 5141 and is not intended to affect any other provisions with respect to pricing that are set forth in the FINRA rulebook.
- 9 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.

ATTACHMENT A

Below is the text of new FINRA Rule 5141.

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5141. Sale of Securities in a Fixed Price Offering

(a) No member or person associated with a member that participates in a selling syndicate or selling group or that acts as the single underwriter in connection with a fixed price offering shall offer or grant, directly or indirectly, to any 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 any securities in the offering at a price below the stated public offering price (“reduced price”). Subject to the requirements of Rule 5130, a member of a selling syndicate or selling group, or a member that acts as the single underwriter, is permitted to sell securities in the offering to an affiliated person, provided such member does not sell the securities to the affiliated person at a reduced price under this Rule. The requirements of this Rule shall 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. For purposes of this Rule, securities in a fixed price offering shall 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.

(b) Nothing in this Rule shall prohibit the purchase and sale of securities in a fixed price offering between members of the selling syndicate or selling group.

• • • Supplementary Material: -----

.01 Reduced Price. For the purposes of this 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 subject to 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. For purposes of this Supplementary Material, “fair market price” refers 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.

.02 Research. Nothing in this Rule shall prevent a member or person associated with a member that participates in a selling syndicate or selling group, or a member 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 the requirements of Section 28(e) of the Exchange Act. Investment management or investment discretionary services are not research for purposes of this Supplementary Material. Any product or service provided by a member or person associated with a member that does not qualify as research under this Supplementary Material must not confer a reduced price as set forth in Rule 5141.01.

.03 Affiliated Persons. Transactions between a member of a selling syndicate or selling group, or between a member that acts as the 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 shall not be deemed to confer a reduced price under this Rule.

.04 Fixed Price Offering. The term “fixed price offering” means 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, except that 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 Exchange Act or offerings of redeemable securities of investment companies registered pursuant to the Investment Company Act which are offered at prices determined by the net asset value of the securities.

.05 Asset-Based Fees. 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 such member charges to a customer, provided such exemption is part of the member’s normal and ordinary course of business with the customer and is not in connection with an offering.

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