

Prohibition on Payments for Market Making

New Payments for Market Making Certification Requirement for FINRA Form 211

Effective Date: July 7, 2014

Executive Summary

FINRA is issuing this *Regulatory Notice* to remind firms and associated persons of the FINRA Rule 5250 (Payments for Market Making) prohibition on accepting payments for market making, which includes payments for filing a Form 211 pursuant to FINRA Rule 6432 (Compliance with the Information Requirements of SEA Rule 15c2-11). This *Notice* also announces the July 7, 2014, effective date of a new requirement under Rule 6432 that firms certify that neither the firm nor its associated persons have accepted or will accept any payment or other consideration prohibited by Rule 5250.¹

Questions regarding this *Notice* should be directed to Racquel Russell, Associate General Counsel, Office of General Counsel, at (202) 728-8363.

Background and Discussion

Rule 5250 prohibits firms and their associated persons from accepting any payment or other consideration, directly or indirectly, from an issuer of a security, or any affiliate or promoter thereof, for publishing a quotation, acting as market maker in a security, or submitting an application in connection therewith. Rule 5250 is intended to, among other things, assure that a firm acts in an independent capacity when publishing a quotation or making a market in an issuer's securities. The Rule 5250 prohibition on receiving payments for market making includes within its scope the receipt of payments for submitting a Form 211 to FINRA pursuant to Rule 6432, which sets forth the standards applicable to firms for demonstrating compliance with SEA Rule 15c2-11 and must be complied with prior to initiating or resuming quotations in a quotation medium.

June 2014

Notice Type

- ▶ Guidance
- ▶ Rule Amendment

Suggested Routing

- ▶ Compliance
- ▶ Legal
- ▶ Operations
- ▶ Systems
- ▶ Trading and Market Making
- ▶ Training

Key Topics

- ▶ Form 211
- ▶ Market Making
- ▶ Payments for Market Making
- ▶ SEA Rule 15c2-11

Referenced Rules & Notices

- ▶ FINRA Rule 2020
- ▶ FINRA Rule 5250
- ▶ FINRA Rule 6432
- ▶ NTM 75-16
- ▶ SEA Rule 15c2-11
- ▶ Securities Act Section 5

Rule 6432 generally requires firms to review and attach specified information concerning the issuer whose security is being quoted in a quotation medium. This information includes, as applicable, a recent prospectus, the issuer's most recent annual and periodic reports or other financial information, the price at which the security will be quoted and the basis thereof.² Form 211 also asks the firm to certify that the responsible principal has a reasonable basis for believing that the information accompanying the Form 211 is accurate in all material respects and obtained from a reliable source.

FINRA is reminding firms that accepting monetary compensation or receiving shares of stock in connection with publishing a quotation, including, but not limited to, the filing of a Form 211 with FINRA, is expressly prohibited by Rule 5250, irrespective of whether such payments are solicited or unsolicited. Accepting such prohibited payments compromises the independence of a firm's decision regarding its quoting and market making activities and, among other things, harms investor confidence in the overall marketplace because investors are unable to ascertain which quotations are based on actual interest and which quotations are supported by issuers or promoters.³

To further emphasize firms' obligations in this area, FINRA has adopted an additional certification under Rule 6432 that requires firms to certify to FINRA that neither the firm nor its associated persons have accepted or will accept any payment or other consideration, directly or indirectly, from the issuer of the security to be quoted, or any affiliate or promoter thereof, for publishing a quotation or acting as market maker in the security to be quoted, or submitting an application in connection therewith, including the submission of the Form 211.⁴

The new certification will be included in the Form 211 beginning on July 7, 2014.⁵ Only firms submitting a form pursuant to Rule 6432 going forward will be required to submit the new certification, though FINRA notes that the prohibition on accepting payments for market making already is applicable to firms and associated persons.⁶

Endnotes

1. See Securities Exchange Act Release No. 71720 (March 13, 2014), 79 FR 15363 (March 19, 2014) (Notice of Filing and Immediate Effectiveness of File No. SR-FINRA-2014-011).
2. As stated in *Notice to Members 75-16* (February 1975), payments for market making may be viewed as a conflict of interest since they may influence the firm's decision as to whether to quote or make a market in a security and, thereafter, the prices that the firm would quote.
3. See Securities Exchange Act Release No. 38812 (July 3, 1997), 62 FR 37105 (July 10, 1997) ("Order Approving File No. SR-NASD-97-29"). The rule prohibits indirect payments by the issuers, affiliates, or promoters through other members. Therefore, firms may not accept payments from other firms that originate from an issuer, affiliate or promoter of the issuer. See Order Approving File No. SR-NASD-97-29.
4. FINRA continues to believe a market maker should have considerable latitude and freedom to make or terminate market making activities in an issuer's securities. The decision by a firm to make a market in a given security and the question of price generally are dependent on a number of factors, including, among others, supply and demand, the firm's expectations toward the market, its current inventory position, and exposure to risk and competition. The decision, however, should not be influenced by payments to the firm by the issuer. FINRA's policy concerning payments for market making was first set forth in *Notice to Members 75-16* and then codified as NASD Rule 2460 (now FINRA Rule 5250) in 1997. See *Notice to Members 75-16* (February 1975), [*Notice to Members 97-46*](#) (August 1997) and Order Approving File No. SR-NASD-97-29.
5. The Exemption Request Form pursuant to Rule 6432 also will include the new certification.
6. Firms should be mindful that charging an issuer a fee for making a market, or accepting an unsolicited payment from an issuer where the firm makes a market in the issuer's securities, could also subject the firm to violations of the anti-fraud provisions of federal securities laws and FINRA Rule 2020 (Use of Manipulative, Deceptive or Other Fraudulent Devices). See Order Approving File No. SR-NASD-97-29. FINRA Rule 2020 provides that no firm shall effect any transaction in, or induce the purchase or sale of, any security by means of any manipulative, deceptive or other fraudulent device or contrivance. A payment by an issuer to a market maker to facilitate market making activities also could involve the firm in potential violations of the registration requirements of Section 5 of the Securities Act of 1933. See Order Approving File No. SR-NASD-97-29.

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