

OMB APPROVAL

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Page 1 of 33

SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549
Form 19b-4

File No. SR - 2008 - 028

Amendment No.

Proposed Rule Change by Financial Industry Regulatory Authority
Pursuant to Rule 19b-4 under the Securities Exchange Act of 1934

Initial ☒ Amendment ☐ Withdrawal ☐

Section 19(b)(2) ☒ Section 19(b)(3)(A) ☐ Section 19(b)(3)(B) ☐

Rule

Pilot ☐ Extension of Time Period
for Commission Action ☐ Date Expires

☐ 19b-4(f)(1) ☐ 19b-4(f)(4)
☐ 19b-4(f)(2) ☐ 19b-4(f)(5)
☐ 19b-4(f)(3) ☐ 19b-4(f)(6)

Exhibit 2 Sent As Paper Document
☐

Exhibit 3 Sent As Paper Document
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Description

Provide a brief description of the proposed rule change (limit 250 characters).

Proposed rule change to adopt FINRA Rule 2010 (Standards of Commercial Honor and Principles of Trade), FINRA Rule 2020 (Use of Manipulative, Deceptive or Other Fraudulent Devices), and FINRA Rule 5150 (Fairness Opinions) in the Consolidated FINRA Rulebook

Contact Information

Provide the name, telephone number and e-mail address of the person on the staff of the self-regulatory organization prepared to respond to questions and comments on the proposed rule change.

First Name Last Name
Title
E-mail
Telephone Fax

Signature

Pursuant to the requirements of the Securities Exchange Act of 1934,

has duly caused this filing to be signed on its behalf by the undersigned thereunto duly authorized officer.

Date

By
(Name)

(Title)

NOTE: Clicking the button at right will digitally sign and lock this form. A digital signature is as legally binding as a physical signature, and once signed, this form cannot be changed.

Patrice Gliniecki,

SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

For complete Form 19b-4 instructions please refer to the EDFS website.

Form 19b-4 Information

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The self-regulatory organization must provide all required information, presented in a clear and comprehensible manner, to enable the public to provide meaningful comment on the proposal and for the Commission to determine whether the proposal is consistent with the Act and applicable rules and regulations under the Act.

Exhibit 1 - Notice of Proposed Rule Change

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The Notice section of this Form 19b-4 must comply with the guidelines for publication in the Federal Register as well as any requirements for electronic filing as published by the Commission (if applicable). The Office of the Federal Register (OFR) offers guidance on Federal Register publication requirements in the Federal Register Document Drafting Handbook, October 1998 Revision. For example, all references to the federal securities laws must include the corresponding cite to the United States Code in a footnote. All references to SEC rules must include the corresponding cite to the Code of Federal Regulations in a footnote. All references to Securities Exchange Act Releases must include the release number, release date, Federal Register cite, Federal Register date, and corresponding file number (e.g., SR-[SRO]-xx-xx). A material failure to comply with these guidelines will result in the proposed rule change being deemed not properly filed. See also Rule 0-3 under the Act (17 CFR 240.0-3)

Exhibit 2 - Notices, Written Comments, Transcripts, Other Communications

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Copies of notices, written comments, transcripts, other communications. If such documents cannot be filed electronically in accordance with Instruction F, they shall be filed in accordance with Instruction G.

Exhibit Sent As Paper Document

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Exhibit 3 - Form, Report, or Questionnaire

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Copies of any form, report, or questionnaire that the self-regulatory organization proposes to use to help implement or operate the proposed rule change, or that is referred to by the proposed rule change.

Exhibit Sent As Paper Document

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Exhibit 4 - Marked Copies

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The full text shall be marked, in any convenient manner, to indicate additions to and deletions from the immediately preceding filing. The purpose of Exhibit 4 is to permit the staff to identify immediately the changes made from the text of the rule with which it has been working.

Exhibit 5 - Proposed Rule Text

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The self-regulatory organization may choose to attach as Exhibit 5 proposed changes to rule text in place of providing it in Item I and which may otherwise be more easily readable if provided separately from Form 19b-4. Exhibit 5 shall be considered part of the proposed rule change.

Partial Amendment

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If the self-regulatory organization is amending only part of the text of a lengthy proposed rule change, it may, with the Commission's permission, file only those portions of the text of the proposed rule change in which changes are being made if the filing (i.e. partial amendment) is clearly understandable on its face. Such partial amendment shall be clearly identified and marked to show deletions and additions.

1. Text of Proposed Rule Change

(a) Pursuant to the provisions of Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),¹ Financial Industry Regulatory Authority, Inc. (“FINRA”) (f/k/a National Association of Securities Dealers, Inc. (“NASD”)) is filing with the Securities and Exchange Commission (“SEC” or “Commission”) a proposed rule change to adopt NASD Rules 2110 (Standards of Commercial Honor and Principles of Trade), 2120 (Use of Manipulative, Deceptive or Other Fraudulent Devices), and 2290 (Fairness Opinions) as FINRA rules in the consolidated FINRA rulebook without material change and to delete Incorporated NYSE Rule 401(a) (Business Conduct), Incorporated NYSE Rule 435 (Miscellaneous Prohibitions), with the exception of paragraph (5), and NYSE Rule Interpretations 401/01 and 401/02. The proposed rule change would renumber NASD Rule 2110 as FINRA Rule 2010, NASD Rule 2120 as FINRA Rule 2020, and NASD Rule 2290 as FINRA Rule 5150 in the consolidated FINRA rulebook.

The text of the proposed rule change is attached as Exhibit 5.

(b) Upon Commission approval and implementation of the proposed rule change, the corresponding NASD rules and incorporated NYSE rules, or sections thereof, will be eliminated from the current FINRA rulebook.

(c) Not applicable.

¹ 15 U.S.C. 78s(b)(1).

2. Procedures of the Self-Regulatory Organization

At its meeting on April 17, 2008, the FINRA Board of Governors authorized the filing of the proposed rule change with the SEC. No other action by FINRA is necessary for the filing of the proposed rule change.

FINRA will announce the implementation date of the proposed rule change in a Regulatory Notice to be published no later than 60 days following Commission approval.

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

(a) Purpose

As part of the process of developing the new consolidated rulebook ("Consolidated FINRA Rulebook"),² FINRA is proposing to adopt NASD Rules 2110, 2120, and 2290 as FINRA Rules 2010, 2020, and 5150, respectively, in the Consolidated FINRA Rulebook. The rules would be adopted without change, with the exception of re-numbering the rules to reflect the new organizational structure of the Consolidated FINRA Rulebook. The proposed rule change would also delete Incorporated NYSE Rule 401(a) (including two accompanying Interpretations to the rule) and certain provisions of Incorporated NYSE Rule 435 from the Transitional Rulebook.

- (1) FINRA Rule 2010 (Standards of Commercial Honor and Principles of Trade)

² 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 about the rulebook consolidation process, see FINRA Information Notice, March 12, 2008 (Rulebook Consolidation Process).

The proposed rule change would transfer NASD Rule 2110 into the Consolidated FINRA Rulebook as FINRA Rule 2010. Incorporated NYSE Rule 401 (including two accompanying Interpretations to the rule) would be deleted from the Transitional Rulebook.

Section 15A(b)(6) of the Act requires that FINRA design its rules to “promote just and equitable principles of trade.”³ The Act’s mandate is reflected in NASD Rule 2110, which requires that members, in the conduct of their business, observe high standards of commercial honor and just and equitable principles of trade. This general ethical standard articulated in NASD Rule 2110 is broader and provides more flexibility than prescriptive regulations and legal requirements. NASD Rule 2110 protects investors and the securities industry from dishonest practices that are unfair to investors or hinder the functioning of a free and open market, even though those practices may not be illegal or violate a specific rule or regulation. NASD Rule 2110 has proven effective through nearly 70 years of regulatory experience.

The Incorporated NYSE Rules also include general ethical rules and associated rule interpretations that correspond to NASD Rule 2110 and other provisions in the FINRA rulebook. Specifically:

- Good Business Practice: Using somewhat different language than NASD Rule 2110, Incorporated NYSE Rule 401(a) requires members at all times to adhere to the principles of good business practice in the conduct of their

³ 15 U.S.C. 78o-3(b)(6).

business affairs.⁴ This overarching ethical requirement is subsumed under NASD Rule 2110.

- Firm/Personal Trading: Incorporated NYSE Rule Interpretation 401/01 addresses ethical considerations in connection with transactions by a member or its personnel shortly before or after the member issues a purchase or sale recommendation. These considerations are subsumed under NASD Rules 2110 and 2120.⁵
- Private Sales: Incorporated NYSE Rule Interpretation 401/02 broadly addresses the obligation of members to monitor the activities of associated personnel with respect to their marketing of securities through private sales. These obligations are addressed by the requirements in NASD Rule 3040 and Incorporated NYSE Rules 407(b) and 407.11.⁶

⁴ In addition to the general good business practice requirement in Incorporated NYSE Rule 401(a), paragraph (b) of the rule requires that members maintain written policies and procedures, administered pursuant to the internal control requirements of Incorporated NYSE Rule 342.23, with respect to transmittals of funds or securities, customer changes of address, and customer changes of investment objectives. These provisions duplicate requirements under NASD Rule 3012(a)(2)(B), which FINRA has proposed be relocated to the supervision rule in the Consolidated FINRA Rulebook. See Regulatory Notice 08-24 (May 2008) (Proposed Consolidated FINRA Rules Governing Supervision and Supervisory Controls) (“Supervision Notice”).

⁵ In addition, Incorporated NYSE Rule Interpretation 401/01 includes an unrelated, obsolete template relating to the identification of counterfeit stock certificates and a cross-reference provision reminding firms of the personal trading restrictions for research analysts under Incorporated NYSE Rule 472(e).

⁶ FINRA has proposed that the provisions concerning private securities transactions in NASD Rule 3040 and Incorporated NYSE Rules 407(b) and 407.11 be rewritten and relocated to the supervision rule in the Consolidated FINRA Rulebook. See Supervision Notice.

For the reasons discussed above, FINRA is proposing to transfer NASD Rule 2110 into the Consolidated FINRA Rulebook as FINRA Rule 2010 with no changes. In addition, FINRA is proposing to delete from the Transitional Rulebook Incorporated NYSE Rule 401(a) and Incorporated NYSE Rule Interpretations 401/01 and 401/02.⁷

(2) FINRA Rule 2020 (Use of Manipulative, Deceptive or Other Fraudulent Devices)

The proposed rule change would transfer NASD Rule 2120, which is FINRA's general antifraud provision, into the Consolidated FINRA Rulebook as FINRA Rule 2020 with no changes to the rule text. The proposed rule change would also delete Incorporated NYSE Rule 435 (with the exception of paragraph (5)) from the Transitional Rulebook.

NASD Rule 2120, which has remained unchanged for nearly 70 years, states in its entirety that "[n]o member 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." FINRA has used this broad antifraud rule to address a wide variety of manipulative, deceptive, and fraudulent misconduct, including market manipulation,⁸

⁷ In addition to Incorporated Rule Interpretations 401/01 and 401/02, discussed above, there are two other interpretations under Incorporated NYSE Rule 401. Incorporated NYSE Rule Interpretations 401/03 and 401/04 address member notification requirements in the event of certain organizational or operational changes, such as mergers with or acquisitions of other broker-dealers, or certain conditions that they reasonably believe could lead to capital, liquidity or similar problems. FINRA will be considering the requirements of these remaining two interpretations as part of a later phase of the rulebook consolidation process. Consequently, the proposed rule change would not delete these two interpretations from the Transitional Rulebook.

⁸ See, e.g., Securities Exchange Act Release No. 53731 (April 26, 2006).

excessive trading,⁹ insider trading,¹⁰ and fraudulent misrepresentation.¹¹ Given the rule's broad reach and substantial history, FINRA believes the rule should be transferred unchanged into the Consolidated FINRA Rulebook as FINRA Rule 2020.

Although there is no identical NYSE rule equivalent to NASD Rule 2120, Incorporated NYSE Rule 435 includes three provisions that prohibit specific manipulative and fraudulent misconduct that would generally also violate NASD Rules 2110 or 2120. In addition, these provisions of Incorporated NYSE Rule 435 are duplicative of provisions in NASD Rule 5120.¹²

- Incorporated NYSE Rule 435(1) prohibits excessive trading by a member for accounts in which the member is directly or indirectly interested if the trading is "excessive in view of his or its financial resources or in view of the market for such security."
- Incorporated NYSE Rule 435(3)¹³ prohibits buying or selling a security at successively higher or lower prices, respectively, for the purpose of

⁹ See, e.g., Securities Exchange Act Release No. 50543A (November 30, 2004).

¹⁰ See, e.g., Securities Exchange Act Release No. 40297 (August 3, 1998).

¹¹ See, e.g., Securities Exchange Act Release No. 49216 (February 10, 2004).

¹² See NASD Rule 5120(a), (c), (d). FINRA has proposed transferring NASD Rule 5120 into the Consolidated FINRA Rulebook as FINRA Rule 6140. See SR-FINRA-2008-021. Paragraph (5) of Incorporated NYSE Rule 435 concerning the circulation of rumors has no precise equivalent in NASD Rule 5120; however, NASD Rule 5120(e) is similar in nature. The proposed rule change does not address Incorporated NYSE Rule 435(5) or its related Interpretation, which will be considered during a later phase of the rulebook consolidation process.

¹³ NYSE deleted paragraph (2) of NYSE Rule 435 in 1968 and left the paragraph reserved; thus, there is no rule text for Incorporated NYSE Rule 435(2).

improperly influencing the market price of the security or “making a price which does not reflect the true state of the market in such security.”

- Incorporated NYSE Rule 435(4) prohibits: (1) direct or indirect participation in a manipulative operation, (2) having any interest in the profits of a manipulative operation, and (3) managing or financing a manipulative operation.

Because these three provisions are duplicative of existing NASD rules that FINRA is proposing to transfer into the Consolidated FINRA Rulebook, the proposed rule change would delete these three provisions from the Transitional Rulebook.¹⁴

For the reasons discussed above, FINRA is proposing to transfer NASD Rule 2120 into the Consolidated FINRA Rulebook as FINRA Rule 2020 with no changes. In addition, FINRA is proposing to delete Incorporated NYSE Rule 435 (with the exception of paragraph (5) and its related Interpretation) from the Transitional Rulebook.

(3) FINRA Rule 5150 (Fairness Opinions)

The proposed rule change would transfer NASD Rule 2290 into the Consolidated FINRA Rulebook as FINRA Rule 5150 with no changes to the rule text.

NASD Rule 2290 requires specific disclosures and procedures addressing the conflicts of interest that arise when a broker-dealer provides a fairness opinion in a

¹⁴ Incorporated NYSE Rule 435 also includes two other miscellaneous provisions directed at specific issues: (1) a provision in paragraph (6) preventing the reopening of certain contracts for improper purposes, and (2) a provision in paragraph (7) preventing certain types of loans. FINRA believes that these two provisions are obsolete, and the proposed rule change would also delete these provisions from the Transitional Rulebook. The provisions of the Federal Reserve Board’s Regulation T, which governs credit by broker-dealers, would continue to apply to broker-dealers.

change of control transaction, such as a merger or sale or purchase of assets. The disclosures required by the rule are aimed at informing investor shareholders of potential conflicts, such as whether a member has acted as a financial advisor to any party to the transaction that is the subject of the fairness opinion, and if so, whether it will receive compensation contingent on the successful completion of the transaction. The rule also requires disclosure by a member of other significant contingent payments; material relationships with any parties to the transaction; whether information used by the member has been independently verified; whether the opinion expresses an opinion about the fairness of the compensation to officers, directors or employees, relating to that received by public shareholders; and whether the opinion was approved or issued by a fairness committee.

Additionally, NASD Rule 2290 requires that any member issuing a fairness opinion must have written procedures for approval of a fairness opinion. The procedures must address the types of transactions and the circumstances in which the firm will use a fairness committee to approve or issue a fairness opinion, and in those transactions in which it uses a fairness committee: (1) the process for selecting personnel to be on the fairness committee; (2) the necessary qualifications of persons serving on the fairness committee; and (3) the process to promote a balanced review by the fairness committee, which shall include the review and approval by persons who do not serve on the deal team to the transaction. Members are also required to have a process to determine whether the valuation analyses used in the fairness opinion are appropriate.

NASD Rule 2290 was approved by the SEC in October 2007, and was the product of extensive notice and comment rulemaking over a period of several years.¹⁵ FINRA solicited comment on proposed NASD Rule 2290 in a Notice to Members issued in 2004.¹⁶ FINRA modified the proposed rule based upon the comments received, and the SEC published the proposal for comment in the Federal Register in 2006.¹⁷ The final rule reflects additional changes based upon the comments received by the SEC.¹⁸ Consequently, the proposed rule filing would transfer NASD Rule 2290 into the Consolidated FINRA Rulebook as FINRA Rule 5150.

As noted in Item 2 of this filing, FINRA will announce the implementation date of the proposed rule change in a Regulatory Notice to be published no later than 60 days following Commission approval.

(b) Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,¹⁹ which requires, among other things, that FINRA rules must 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. FINRA believes that the proposed rule change to transfer unchanged the rule

¹⁵ See Securities Exchange Act Release No. 56645 (October 11, 2007), 72 FR 59317 (October 19, 2007).

¹⁶ See NASD Notice to Members 04-83 (November 2004).

¹⁷ See Securities Exchange Act Release No. 53598 (April 4, 2006), 71 FR 18395 (April 11, 2006).

¹⁸ See Securities Exchange Act Release No. 56645 (October 11, 2007), 72 FR 59317 (October 19, 2007).

¹⁹ 15 U.S.C. 78o-3(b)(6).

requiring adherence to just and equitable principles of trade and the rule prohibiting fraudulent and manipulative acts and practices is necessary so that FINRA can continue to enforce these overarching provisions that express FINRA's core regulatory objectives and allow FINRA to effectively protect investors and the public interest. FINRA also believes that the provisions of NASD Rule 2290 benefit investors and the public interest by requiring the disclosure of conflicts of interest in connection with fairness opinions and procedures designed to mitigate those conflicts.

4. Self-Regulatory Organization's Statement on Burden on Competition

FINRA does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

5. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

Written comments were neither solicited nor received.

6. Extension of Time Period for Commission Action

FINRA does not consent at this time to an extension of the time period for Commission action specified in Section 19(b)(2) of the Act.²⁰

7. Basis for Summary Effectiveness Pursuant to Section 19(b)(3) or for Accelerated Effectiveness Pursuant to Section 19(b)(2)

Not applicable.

²⁰ 15 U.S.C. 78s(b)(2).

8. Proposed Rule Change Based on Rules of Another Self-Regulatory Organization or of the Commission

Not applicable.

9. Exhibits

Exhibit 1. Completed notice of proposed rule change for publication in the Federal Register.

Exhibit 5. Text of the proposed rule change.

EXHIBIT 1

SECURITIES AND EXCHANGE COMMISSION

(Release No. 34- ; File No. SR-FINRA-2008-028)

Self-Regulatory Organizations: Financial Industry Regulatory Authority, Inc.; Notice of Filing of Proposed Rule Change to Adopt FINRA Rule 2010 (Standards of Commercial Honor and Principles of Trade), FINRA Rule 2020 (Use of Manipulative, Deceptive or Other Fraudulent Devices), and FINRA Rule 5150 (Fairness Opinions) in the Consolidated FINRA Rulebook

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder,² notice is hereby given that on , Financial Industry Regulatory Authority, Inc. (“FINRA”) (f/k/a National Association of Securities Dealers, Inc. (“NASD”)) 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 FINRA. 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

FINRA is proposing to adopt NASD Rules 2110 (Standards of Commercial Honor and Principles of Trade), 2120 (Use of Manipulative, Deceptive or Other Fraudulent Devices), and 2290 (Fairness Opinions) as FINRA rules in the consolidated FINRA rulebook without material change and to delete Incorporated NYSE Rule 401(a) (Business Conduct), Incorporated NYSE Rule 435 (Miscellaneous Prohibitions), with the exception of paragraph (5), and NYSE Rule Interpretations 401/01 and 401/02.

The text of the proposed rule change is attached as Exhibit 5.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

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

In its filing with the Commission, FINRA 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 statements may be examined at the places specified in Item IV below. FINRA has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

As part of the process of developing the new consolidated rulebook (“Consolidated FINRA Rulebook”),³ FINRA is proposing to adopt NASD Rules 2110, 2120, and 2290 as FINRA Rules 2010, 2020, and 5150, respectively, in the Consolidated FINRA Rulebook. The rules would be adopted without change, with the exception of re-numbering the rules to reflect the new organizational structure of the Consolidated FINRA Rulebook. The proposed rule change would also delete Incorporated NYSE Rule 401(a) (including two accompanying Interpretations to the rule) and certain provisions of Incorporated NYSE Rule 435 from the Transitional Rulebook.

³ 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 about the rulebook consolidation process, see FINRA Information Notice, March 12, 2008 (Rulebook Consolidation Process).

(a) FINRA Rule 2010 (Standards of Commercial Honor and Principles of Trade)

The proposed rule change would transfer NASD Rule 2110 into the Consolidated FINRA Rulebook as FINRA Rule 2010. Incorporated NYSE Rule 401 (including two accompanying Interpretations to the rule) would be deleted from the Transitional Rulebook.

Section 15A(b)(6) of the Act requires that FINRA design its rules to “promote just and equitable principles of trade.”⁴ The Act’s mandate is reflected in NASD Rule 2110, which requires that members, in the conduct of their business, observe high standards of commercial honor and just and equitable principles of trade. This general ethical standard articulated in NASD Rule 2110 is broader and provides more flexibility than prescriptive regulations and legal requirements. NASD Rule 2110 protects investors and the securities industry from dishonest practices that are unfair to investors or hinder the functioning of a free and open market, even though those practices may not be illegal or violate a specific rule or regulation. NASD Rule 2110 has proven effective through nearly 70 years of regulatory experience.

The Incorporated NYSE Rules also include general ethical rules and associated rule interpretations that correspond to NASD Rule 2110 and other provisions in the FINRA rulebook. Specifically:

- Good Business Practice: Using somewhat different language than NASD Rule 2110, Incorporated NYSE Rule 401(a) requires members at all times to adhere to the principles of good business practice in the conduct of their

⁴ 15 U.S.C. 78o-3(b)(6).

business affairs.⁵ This overarching ethical requirement is subsumed under NASD Rule 2110.

- Firm/Personal Trading: Incorporated NYSE Rule Interpretation 401/01 addresses ethical considerations in connection with transactions by a member or its personnel shortly before or after the member issues a purchase or sale recommendation. These considerations are subsumed under NASD Rules 2110 and 2120.⁶
- Private Sales: Incorporated NYSE Rule Interpretation 401/02 broadly addresses the obligation of members to monitor the activities of associated personnel with respect to their marketing of securities through private sales. These obligations are addressed by the requirements in NASD Rule 3040 and Incorporated NYSE Rules 407(b) and 407.11.⁷

⁵ In addition to the general good business practice requirement in Incorporated NYSE Rule 401(a), paragraph (b) of the rule requires that members maintain written policies and procedures, administered pursuant to the internal control requirements of Incorporated NYSE Rule 342.23, with respect to transmittals of funds or securities, customer changes of address, and customer changes of investment objectives. These provisions duplicate requirements under NASD Rule 3012(a)(2)(B), which FINRA has proposed be relocated to the supervision rule in the Consolidated FINRA Rulebook. See Regulatory Notice 08-24 (May 2008) (Proposed Consolidated FINRA Rules Governing Supervision and Supervisory Controls) (“Supervision Notice”).

⁶ In addition, Incorporated NYSE Rule Interpretation 401/01 includes an unrelated, obsolete template relating to the identification of counterfeit stock certificates and a cross-reference provision reminding firms of the personal trading restrictions for research analysts under Incorporated NYSE Rule 472(e).

⁷ FINRA has proposed that the provisions concerning private securities transactions in NASD Rule 3040 and Incorporated NYSE Rules 407(b) and 407.11 be rewritten and relocated to the supervision rule in the Consolidated FINRA Rulebook. See Supervision Notice.

For the reasons discussed above, FINRA is proposing to transfer NASD Rule 2110 into the Consolidated FINRA Rulebook as FINRA Rule 2010 with no changes. In addition, FINRA is proposing to delete from the Transitional Rulebook Incorporated NYSE Rule 401(a) and Incorporated NYSE Rule Interpretations 401/01 and 401/02.⁸

(b) FINRA Rule 2020 (Use of Manipulative, Deceptive or Other Fraudulent Devices)

The proposed rule change would transfer NASD Rule 2120, which is FINRA's general antifraud provision, into the Consolidated FINRA Rulebook as FINRA Rule 2020 with no changes to the rule text. The proposed rule change would also delete Incorporated NYSE Rule 435 (with the exception of paragraph (5)) from the Transitional Rulebook.

NASD Rule 2120, which has remained unchanged for nearly 70 years, states in its entirety that “[n]o member 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.” FINRA has used this broad antifraud rule to address a wide variety of manipulative, deceptive, and fraudulent misconduct, including market manipulation,⁹

⁸ In addition to Incorporated Rule Interpretations 401/01 and 401/02, discussed above, there are two other interpretations under Incorporated NYSE Rule 401. Incorporated NYSE Rule Interpretations 401/03 and 401/04 address member notification requirements in the event of certain organizational or operational changes, such as mergers with or acquisitions of other broker-dealers, or certain conditions that they reasonably believe could lead to capital, liquidity or similar problems. FINRA will be considering the requirements of these remaining two interpretations as part of a later phase of the rulebook consolidation process. Consequently, the proposed rule change would not delete these two interpretations from the Transitional Rulebook.

⁹ See, e.g., Securities Exchange Act Release No. 53731 (April 26, 2006).

excessive trading,¹⁰ insider trading,¹¹ and fraudulent misrepresentation.¹² Given the rule's broad reach and substantial history, FINRA believes the rule should be transferred unchanged into the Consolidated FINRA Rulebook as FINRA Rule 2020.

Although there is no identical NYSE rule equivalent to NASD Rule 2120, Incorporated NYSE Rule 435 includes three provisions that prohibit specific manipulative and fraudulent misconduct that would generally also violate NASD Rules 2110 or 2120. In addition, these provisions of Incorporated NYSE Rule 435 are duplicative of provisions in NASD Rule 5120.¹³

- Incorporated NYSE Rule 435(1) prohibits excessive trading by a member for accounts in which the member is directly or indirectly interested if the trading is “excessive in view of his or its financial resources or in view of the market for such security.”
- Incorporated NYSE Rule 435(3)¹⁴ prohibits buying or selling a security at successively higher or lower prices, respectively, for the purpose of

¹⁰ See, e.g., Securities Exchange Act Release No. 50543A (November 30, 2004).

¹¹ See, e.g., Securities Exchange Act Release No. 40297 (August 3, 1998).

¹² See, e.g., Securities Exchange Act Release No. 49216 (February 10, 2004).

¹³ See NASD Rule 5120(a), (c), (d). FINRA has proposed transferring NASD Rule 5120 into the Consolidated FINRA Rulebook as FINRA Rule 6140. See SR-FINRA-2008-021. Paragraph (5) of Incorporated NYSE Rule 435 concerning the circulation of rumors has no precise equivalent in NASD Rule 5120; however, NASD Rule 5120(e) is similar in nature. The proposed rule change does not address Incorporated NYSE Rule 435(5) or its related Interpretation, which will be considered during a later phase of the rulebook consolidation process.

¹⁴ NYSE deleted paragraph (2) of NYSE Rule 435 in 1968 and left the paragraph reserved; thus, there is no rule text for Incorporated NYSE Rule 435(2).

improperly influencing the market price of the security or “making a price which does not reflect the true state of the market in such security.”

- Incorporated NYSE Rule 435(4) prohibits: (1) direct or indirect participation in a manipulative operation, (2) having any interest in the profits of a manipulative operation, and (3) managing or financing a manipulative operation.

Because these three provisions are duplicative of existing NASD rules that FINRA is proposing to transfer into the Consolidated FINRA Rulebook, the proposed rule change would delete these three provisions from the Transitional Rulebook.¹⁵

For the reasons discussed above, FINRA is proposing to transfer NASD Rule 2120 into the Consolidated FINRA Rulebook as FINRA Rule 2020 with no changes. In addition, FINRA is proposing to delete Incorporated NYSE Rule 435 (with the exception of paragraph (5) and its related Interpretation) from the Transitional Rulebook.

(c) FINRA Rule 5150 (Fairness Opinions)

The proposed rule change would transfer NASD Rule 2290 into the Consolidated FINRA Rulebook as FINRA Rule 5150 with no changes to the rule text.

NASD Rule 2290 requires specific disclosures and procedures addressing the conflicts of interest that arise when a broker-dealer provides a fairness opinion in a change of control transaction, such as a merger or sale or purchase of assets. The

¹⁵ Incorporated NYSE Rule 435 also includes two other miscellaneous provisions directed at specific issues: (1) a provision in paragraph (6) preventing the reopening of certain contracts for improper purposes, and (2) a provision in paragraph (7) preventing certain types of loans. FINRA believes that these two provisions are obsolete, and the proposed rule change would also delete these provisions from the Transitional Rulebook. The provisions of the Federal Reserve Board’s Regulation T, which governs credit by broker-dealers, would continue to apply to broker-dealers.

disclosures required by the rule are aimed at informing investor shareholders of potential conflicts, such as whether a member has acted as a financial advisor to any party to the transaction that is the subject of the fairness opinion, and if so, whether it will receive compensation contingent on the successful completion of the transaction. The rule also requires disclosure by a member of other significant contingent payments; material relationships with any parties to the transaction; whether information used by the member has been independently verified; whether the opinion expresses an opinion about the fairness of the compensation to officers, directors or employees, relating to that received by public shareholders; and whether the opinion was approved or issued by a fairness committee.

Additionally, NASD Rule 2290 requires that any member issuing a fairness opinion must have written procedures for approval of a fairness opinion. The procedures must address the types of transactions and the circumstances in which the firm will use a fairness committee to approve or issue a fairness opinion, and in those transactions in which it uses a fairness committee: (1) the process for selecting personnel to be on the fairness committee; (2) the necessary qualifications of persons serving on the fairness committee; and (3) the process to promote a balanced review by the fairness committee, which shall include the review and approval by persons who do not serve on the deal team to the transaction. Members are also required to have a process to determine whether the valuation analyses used in the fairness opinion are appropriate.

NASD Rule 2290 was approved by the SEC in October 2007, and was the product of extensive notice and comment rulemaking over a period of several years.¹⁶ FINRA solicited comment on proposed NASD Rule 2290 in a Notice to Members issued in 2004.¹⁷ FINRA modified the proposed rule based upon the comments received, and the SEC published the proposal for comment in the Federal Register in 2006.¹⁸ The final rule reflects additional changes based upon the comments received by the SEC.¹⁹ Consequently, the proposed rule filing would transfer NASD Rule 2290 into the Consolidated FINRA Rulebook as FINRA Rule 5150.

2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,²⁰ which requires, among other things, that FINRA rules must 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. FINRA believes that the proposed rule change to transfer unchanged the rule requiring adherence to just and equitable principles of trade and the rule prohibiting fraudulent and manipulative acts and practices is necessary so that FINRA can continue to enforce these overarching provisions that express FINRA's core regulatory objectives

¹⁶ See Securities Exchange Act Release No. 56645 (October 11, 2007), 72 FR 59317 (October 19, 2007).

¹⁷ See NASD Notice to Members 04-83 (November 2004).

¹⁸ See Securities Exchange Act Release No. 53598 (April 4, 2006), 71 FR 18395 (April 11, 2006).

¹⁹ See Securities Exchange Act Release No. 56645 (October 11, 2007), 72 FR 59317 (October 19, 2007).

²⁰ 15 U.S.C. 78o-3(b)(6).

and allow FINRA to effectively protect investors and the public interest. FINRA also believes that the provisions of NASD Rule 2290 benefit investors and the public interest by requiring the disclosure of conflicts of interest in connection with fairness opinions and procedures designed to mitigate those conflicts.

B. Self-Regulatory Organization's Statement on Burden on Competition

FINRA does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) by order approve such proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-FINRA-2008-028 on the subject line.

Paper Comments:

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-FINRA-2008-028. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing also will be available for inspection and copying at the principal office of FINRA.

All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to

File Number SR-FINRA-2008-028 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²¹

Florence Harmon

Deputy Secretary

²¹ 17 CFR 200.30-3(a)(12).

EXHIBIT 5

Exhibit 5 shows the text of the proposed rule change. Proposed new language is underlined; proposed deletions are in brackets.

* * * * *

**Text of Proposed New FINRA Rules
(marked to show changes from NASD Rules 2110, 2120, and 2290; NASD Rules 2110, 2120,
and 2290 to be deleted in their entirety from the Transitional Rulebook)**

* * * * *

2000. DUTIES AND CONFLICTS

* * * * *

[2110.] 2010. Standards of Commercial Honor and Principles of Trade

A member, in the conduct of its business, shall observe high standards of commercial honor and just and equitable principles of trade.

* * * * *

[2120.] 2020. Use of Manipulative, Deceptive or Other Fraudulent Devices

No member 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.

* * * * *

5000. SECURITIES OFFERING AND TRADING STANDARDS AND PRACTICES

* * * * *

5100. SECURITIES OFFERINGS, UNDERWRITING AND COMPENSATION

[2290.] 5150. Fairness Opinions

(a) Disclosures

If at the time a fairness opinion is issued to the board of directors of a company the member issuing the fairness opinion knows or has reason to know that the fairness opinion will

be provided or described to the company's public shareholders, the member must disclose in the fairness opinion:

(1) if the member has acted as a financial advisor to any party to the transaction that is the subject of the fairness opinion, and, if applicable, that it will receive compensation that is contingent upon the successful completion of the transaction, for rendering the fairness opinion and/or serving as an advisor;

(2) if the member will receive any other significant payment or compensation contingent upon the successful completion of the transaction;

(3) any material relationships that existed during the past two years or that are mutually understood to be contemplated in which any compensation was received or is intended to be received as a result of the relationship between the member and any party to the transaction that is the subject of the fairness opinion;

(4) if any information that formed a substantial basis for the fairness opinion that was supplied to the member by the company requesting the opinion concerning the companies that are parties to the transaction has been independently verified by the member, and if so, a description of the information or categories of information that were verified;

(5) whether or not the fairness opinion was approved or issued by a fairness committee; and

(6) whether or not the fairness opinion expresses an opinion about the fairness of the amount or nature of the compensation to any of the company's officers, directors or employees, or class of such persons, relative to the compensation to the public shareholders of the company.

(b) Procedures

Any member issuing a fairness opinion must have written procedures for approval of a fairness opinion by the member, including:

(1) the types of transactions and the circumstances in which the member will use a fairness committee to approve or issue a fairness opinion, and in those transactions in which it uses a fairness committee:

(A) the process for selecting personnel to be on the fairness committee;

(B) the necessary qualifications of persons serving on the fairness committee;

(C) the process to promote a balanced review by the fairness committee, which shall include the review and approval by persons who do not serve on the deal team to the transaction; and

(2) the process to determine whether the valuation analyses used in the fairness opinion are appropriate.

* * * * *

Text of Incorporated NYSE Rules to Remain in the Transitional Rulebook

* * * * *

Incorporated NYSE Rules

* * * * *

Rule 401. Business Conduct

(a) Reserved. [Every member, allied member and member organization shall at all times adhere to the principles of good business practice in the conduct of his or its business affairs.]

(b) No change.

* * * * *

NYSE Rule 435. Miscellaneous Prohibitions

No member, member organization, or allied member therein shall:

- (1) Reserved. [Excessive trading by members]

[Effect on the Exchange purchases or sales for any account in which he or it is directly or indirectly interested, which purchases or sales are excessive in view of his or its financial resources or in view of the market for such security.]

- (2) Reserved. [Excessive trading in discretionary accounts]

[Deleted by amendment of December 19, 1968.]

- (3) Reserved. [Successive transactions by members]

[Execute or cause to be executed on the Exchange the purchase of any security at successively higher prices or the sale of any security at successively lower prices for the purpose of creating or inducing a false, misleading or artificial appearance of activity in such security, or for the purpose of unduly or improperly influencing the market price of such security, or for the purpose of making a price which does not reflect the true state of the market in such security.]

- (4) Reserved. [Manipulative operations]

[Directly or indirectly participate in or have any interest in the profits of a manipulative operation or knowingly manage or finance a manipulative operation.]

[For the purpose of paragraph (4), (A) any pool, syndicate or joint account, whether in corporate form or otherwise, organized or used intentionally for the purpose of unfairly influencing the market price of any security by means of options or otherwise and for the purpose of making a profit thereby shall be deemed to be a manipulative operation; (B) the soliciting of subscriptions to any such pool, syndicate or joint account or the accepting of discretionary orders from any such pool, syndicate or joint account shall be deemed to be

managing a manipulative operation; and (C) the carrying on margin of either a "long" or a "short" position in securities for, or the advancing of credit through loans of money or of securities to, any such pool, syndicate or joint account shall be deemed to be financing a manipulative operation.]

(5) No change.

(6) Reserved. [Reopening a contract]

[Reopen a contract which is subject to a transfer tax for the purpose of allowing another member or member organization to intervene in such transaction, or for the purpose of making a contract in his or its own interest at a different price.]

(7) Reserved. [Loans for account of non-members]

[Loan money upon the security of stocks, bonds or other investment securities for the account of any nonbanking corporation, partnership, association, business trust, other entity or individual.]

* * * * *

NYSE RULE INTERPRETATION

* * * * *

Rule 401 BUSINESS CONDUCT

/01 Trading Against Firm Recommendations

Reserved.

[Transactions in a security by a member organization or its personnel shortly before or after the firm issues a purchase or sale recommendation raise questions of motive. Firm personnel who participate in making the recommendation or have any pre-publication knowledge of it should refrain from any action in contemplation of the report, such as making a transaction

for their own account or accounts in which they have an interest or discretion or passing on advance information concerning the report to persons outside the firm.]

[At the time that customers generally learn of the recommendation, firm personnel (except “research analysts” as defined in Rule 472.40) should be free to act for unaffiliated discretionary accounts but should refrain from acting for accounts in which they have an interest, either in accordance with or in a manner inconsistent to the recommendation, until the market has absorbed the effect of the recommendation.]

[The time duration of the market effect is very difficult to determine and varies greatly with circumstances. Some firms have lessened the difficulty of individual decisions by selecting a minimum period following a recommendation during which firm personnel are restricted from acting for accounts in which they have an interest.]

[The period of time which elapses before customers generally learn of the recommendation is also difficult to determine and, therefore, it is advisable that a similar policy be adopted with respect to the accounts over which personnel have discretion but in which they have no interest.]

[“Research analysts” as defined in Rule 472.40 are also subject to personal trading restrictions specified in Rule 472(e).]

[GENUINE]

[COUNTERFEIT]

[Vignette (Picture)]

[Human figure has fine, sharp detail]

[Lines and features of the human figure do not appear sharp. Lines will blend into each other giving an overall muddy appearance.]

[Colored Border]

[Lines are sharp and clearly defined, including the thin-ruled lines in the number and share counters.]

[Lines are blurred, even in the number and share counters. The overall color appears muddy or uneven.]

[Texture (Feel)]

[A distinct “rough” or “raspy” feel of raised lettering is sensed when moving fingertips across the corporate name.]

[The corporate name on lithographic counterfeit has no feel at all.]

[The corporate name on a photocopied counterfeit will be raised and will feel “smooth,” “slick” or “silky.”]

[Paper]

[Cream colored, smooth surface on face. Rough surface on back. Often has small multi-colored dots, called planchettes, scattered throughout.]

[Usually of lesser quality, with same surface on both sides. Planchettes may or may not appear on counterfeit.]

/02 Private Sales

Reserved.

[Member organizations must monitor the activities of their associated personnel in regard to their marketing of securities through private sales.]

[The SEC has stated that:]

[“(W)here employees effect transactions for customers outside of the normal channels and without disclosure to the employer, the public is deprived of protection which it is entitled to expect. Moreover the employer may also thus be exposed to risks to which it should not be exposed. Thus, such conduct is not only potentially harmful to public investors, but inconsistent with the obligation of an employee to serve his employer faithfully.”]

[(Securities Exchange Act Release No. 10265 June 29, 1973)]

[(See also Rule 346/04)]

/03 through **/04** No change.