

OMB APPROVAL

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

File No. SR - 2008 - 038

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 ☐**Description**

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

Proposed rule change to amend NASD Rules 2210 and 2211 and Incorporated NYSE Rule 472 to define market letters as correspondence rather than as sales literature.

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.

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

Add

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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

Add

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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 amend NASD Rules 2210 (Communications with the Public) and 2211 (Institutional Sales Material and Correspondence) and Incorporated NYSE Rule 472 (Communications with the Public) to define market letters as correspondence rather than as sales literature.

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

* * * * *

NASD Rules

2200. COMMUNICATIONS WITH CUSTOMERS AND THE PUBLIC

2210. Communications with the Public

(a) Definitions. For purposes of this Rule and any interpretation thereof, “communications with the public” consist of:

(1) No Change.

(2) “Sales Literature.” Any written or electronic communication, other than an advertisement, independently prepared reprint, institutional sales material and correspondence, that is generally distributed or made generally available to customers or the public, including circulars, research reports, [market letters,]

¹ 15 U.S.C. 78s(b)(1).

performance reports or summaries, form letters, telemarketing scripts, seminar texts, reprints (that are not independently prepared reprints) or excerpts of any other advertisement, sales literature or published article, and press releases concerning a member's products or services.

(3) through (6) No Change.

(b) through (e) No Change.

2211. Institutional Sales Material and Correspondence

(a) Definitions

For purposes of Rule 2210, this Rule, and any interpretation thereof:

(1) “Correspondence” consists of any written letter or electronic mail message and any market letter distributed by a member to:

(A) one or more of its existing retail customers; and

(B) fewer than 25 prospective retail customers within any 30 calendar-day period.

(2) through (4) No Change.

(5) “Market Letter” means any communication excepted from the definition of “research report” pursuant to Rule 2711(a)(9)(A).

(b) through (e) No Change.

* * * * *

Incorporated NYSE Rules

Rule 472. Communications with the Public

(a) Approval of Communications and Research Reports

(1) Each advertisement, [market letter,] sales literature or other similar type of communication which is generally distributed or made available by a member organization to customers or the public must be approved in advance by an allied member, supervisory analyst, or qualified person designated under the provisions of Rule 342(b)(1).

(2) No Change.

(b) through (m) No Change.

• • • **Supplementary Material:** -----

.10 Definitions

(1) through (3) No Change.

(4) **Market letter[s]**. “Market letter[s]” [are]is defined as[, but are not limited to, any written comments on market conditions, individual securities, or other investment vehicles that are not defined as research reports. They may also include “follow-ups” to research reports and articles prepared by member organizations which appear in newspapers and periodicals.] any communication excepted from the definition of “research report” pursuant to Rule 472.10(2)(a).

(5) No Change.

.20 through .140 No Change.

* * * * *

(b) Not applicable.

(c) Not applicable.

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. 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. The implementation date will be the date FINRA publishes the Regulatory Notice announcing Commission approval.

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

(a) Purpose

NASD Rule 2210 (Communications with the Public) requires a registered principal of a member to approve prior to use any item of sales literature. The term “sales literature” is defined to include “market letters.” Incorporated NYSE Rule 472 similarly requires a qualified person to approve in advance of distribution any market letter. FINRA is concerned that the pre-approval requirements may, in some circumstances, inhibit the flow of information to traders and other investors who base their investment decisions on timely market analysis.

To address this concern, the proposed rule change would allow firms to supervise market letters as correspondence rather than as sales literature. Accordingly, the proposal would amend the definition of “sales literature” in NASD Rule 2210 to exclude market letters and would revise the definition of “correspondence” in NASD Rule 2211 to include them. The proposal also would amend Incorporated NYSE Rule 472 to

eliminate the requirement that a qualified person approve market letters in advance of distribution.

As correspondence, market letters would remain subject to the supervision and review requirements of NASD Rule 3010, which requires each firm to establish written procedures that are appropriate to its business, size, structure, and customers for the review of outgoing correspondence. If these procedures do not require review of all correspondence prior to use or distribution, they must provide for the education and training of associated persons as to the firm's procedures governing correspondence, documentation of such education and training, and surveillance and follow-up to ensure that such procedures are implemented and adhered to.²

Thus, the changes would allow firms to distribute market letters in a timely manner without requiring a registered principal to review each market letter prior to distribution, but would maintain investor protection by requiring firms to review such correspondence in accordance with mandated supervisory policies and procedures.

The proposal also would create a new definition of the term "market letter" in NASD Rule 2211 – and modify the existing definition in Incorporated NYSE Rule 472 – to mean any communication specifically excepted from the definition of "research

² FINRA has requested comment on a proposal to amend the current requirements governing the supervision and review of correspondence. See Regulatory Notice 08-24 (May 2008). That proposal, if adopted, would reorganize the supervision rules and codify existing guidance with respect to the supervision and review of correspondence. Thus, FINRA does not anticipate any significant changes to the supervision standards on which the proposed rule change is predicated.

report” under NASD Rule 2711(a)(9)(A) and Incorporated NYSE Rule 472.10(2)(a).

This exception consists of:

- discussions of broad-based indices;
- commentaries on economic, political or market conditions;
- technical analyses concerning the demand and supply for a sector, index or industry based on trading volume and price;
- statistical summaries of multiple companies' financial data, including listings of current ratings;
- recommendations regarding increasing or decreasing holdings in particular industries or sectors; and
- notices of ratings or price target changes (subject to certain disclosure requirements).

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. The implementation date will be the date FINRA publishes the Regulatory Notice announcing 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,³ 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

³ 15 U.S.C. 78o-3(b)(6).

interest. The proposed amendment will allow firms to distribute market letters in a timely and expedient manner, while still requiring firms to review and supervise these communications to ensure that they are fair, balanced and not misleading.

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.⁴

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

Not applicable.

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.

⁴ 15 U.S.C. 78s(b)(2).

EXHIBIT 1

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34- ; File No. SR-FINRA-2008-038)

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc., Notice of Filing of Proposed Rule Change to Amend NASD Rules 2210 and 2211 and Incorporated NYSE Rule 472 to Define Market Letters as Correspondence Rather than as Sales Literature

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 , 2008, 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 amend NASD Rules 2210 (Communications with the Public) and 2211 (Institutional Sales Material and Correspondence) and Incorporated NYSE Rule 472 (Communications with the Public) to define market letters as correspondence rather than as sales literature. Below is the text of the proposed rule change. Proposed new language is underlined; proposed deletions are in brackets.

* * * * *

NASD Rules

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

2200. COMMUNICATIONS WITH CUSTOMERS AND THE PUBLIC

2210. Communications with the Public

(a) Definitions. For purposes of this Rule and any interpretation thereof, “communications with the public” consist of:

(1) No Change.

(2) “Sales Literature.” Any written or electronic communication, other than an advertisement, independently prepared reprint, institutional sales material and correspondence, that is generally distributed or made generally available to customers or the public, including circulars, research reports, [market letters,] performance reports or summaries, form letters, telemarketing scripts, seminar texts, reprints (that are not independently prepared reprints) or excerpts of any other advertisement, sales literature or published article, and press releases concerning a member's products or services.

(3) through (6) No Change.

(b) through (e) No Change.

2211. Institutional Sales Material and Correspondence

(a) Definitions

For purposes of Rule 2210, this Rule, and any interpretation thereof:

(1) “Correspondence” consists of any written letter or electronic mail message and any market letter distributed by a member to:

(A) one or more of its existing retail customers; and

(B) fewer than 25 prospective retail customers within any 30 calendar-day period.

(2) through (4) No Change.

(5) “Market Letter” means any communication excepted from the definition of “research report” pursuant to Rule 2711(a)(9)(A).

(b) through (e) No Change.

* * * * *

Incorporated NYSE Rules

Rule 472. Communications with the Public

(a) Approval of Communications and Research Reports

(1) Each advertisement, [market letter,] sales literature or other similar type of communication which is generally distributed or made available by a member organization to customers or the public must be approved in advance by an allied member, supervisory analyst, or qualified person designated under the provisions of Rule 342(b)(1).

(2) No Change.

(b) through (m) No Change.

• • • **Supplementary Material:** -----

.10 Definitions

(1) through (3) No Change.

(4) **Market letters.** “Market letters” [are]is defined as[, but are not limited to, any written comments on market conditions, individual securities, or other investment vehicles that are not defined as research reports. They may also include “follow-ups” to research reports and articles prepared by member organizations which appear in

newspapers and periodicals.] any communication excepted from the definition of “research report” pursuant to Rule 472.10(2)(a).

(5) No Change.

.20 through .140 No Change.

* * * * *

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

NASD Rule 2210 (Communications with the Public) requires a registered principal of a member to approve prior to use any item of sales literature. The term “sales literature” is defined to include “market letters.” Incorporated NYSE Rule 472 similarly requires a qualified person to approve in advance of distribution any market letter. FINRA is concerned that the pre-approval requirements may, in some circumstances, inhibit the flow of information to traders and other investors who base their investment decisions on timely market analysis.

To address this concern, the proposed rule change would allow firms to supervise market letters as correspondence rather than as sales literature. Accordingly, the proposal

would amend the definition of “sales literature” in NASD Rule 2210 to exclude market letters and would revise the definition of “correspondence” in NASD Rule 2211 to include them. The proposal also would amend Incorporated NYSE Rule 472 to eliminate the requirement that a qualified person approve market letters in advance of distribution.

As correspondence, market letters would remain subject to the supervision and review requirements of NASD Rule 3010, which requires each firm to establish written procedures that are appropriate to its business, size, structure, and customers for the review of outgoing correspondence. If these procedures do not require review of all correspondence prior to use or distribution, they must provide for the education and training of associated persons as to the firm’s procedures governing correspondence, documentation of such education and training, and surveillance and follow-up to ensure that such procedures are implemented and adhered to.³

Thus, the changes would allow firms to distribute market letters in a timely manner without requiring a registered principal to review each market letter prior to distribution, but would maintain investor protection by requiring firms to review such correspondence in accordance with mandated supervisory policies and procedures.

The proposal also would create a new definition of the term “market letter” in NASD Rule 2211 – and modify the existing definition in Incorporated NYSE Rule 472 – to mean any communication specifically excepted from the definition of “research

³ FINRA has requested comment on a proposal to amend the current requirements governing the supervision and review of correspondence. See Regulatory Notice 08-24 (May 2008). That proposal, if adopted, would reorganize the supervision rules and codify existing guidance with respect to the supervision and review of correspondence. Thus, FINRA does not anticipate any significant changes to the supervision standards on which the proposed rule change is predicated.

report” under NASD Rule 2711(a)(9)(A) and Incorporated NYSE Rule 472.10(2)(a).

This exception consists of:

- discussions of broad-based indices;
- commentaries on economic, political or market conditions;
- technical analyses concerning the demand and supply for a sector, index or industry based on trading volume and price;
- statistical summaries of multiple companies' financial data, including listings of current ratings;
- recommendations regarding increasing or decreasing holdings in particular industries or sectors; and
- notices of ratings or price target changes (subject to certain disclosure requirements).

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. The implementation date will be the date FINRA publishes the Regulatory Notice announcing Commission approval.

2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,⁴ 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. The proposed amendment will allow firms to distribute market letters in a

⁴ 15 U.S.C. 78o-3(b)(6).

timely and expedient manner, while still requiring firms to review and supervise these communications to ensure that they are fair, balanced and not misleading.

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, as amended.

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 such 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-2008-038 on the subject line.

Paper Comments:

- Send paper comments in triplicate to Florence Harmon, Acting Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-FINRA-2008-038. 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, 100 F Street, NE, Washington, DC 20549-1090. 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 the

File Number SR-FINRA-2008-038 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.⁵

Florence Harmon

Acting Secretary

⁵ 17 CFR 200.30-3(a)(12).