

OMB APPROVAL

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

File No. SR - 2008 - 039

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 Rules 5110 (Corporate Financing Rule), 5190 (Notification Requirements for Offering Participants) and 6470 (Withdrawal of Quotations in an OTC Equity Security in Compliance with SEC Reg M) 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)

Vice President and Director of Capital Markets Policy

(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.

Stephanie Dumont,

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

Add

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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 (1) adopt NASD Rule 2710, without material change except for paragraphs (b)(10) and (11), as a FINRA rule in the consolidated FINRA rulebook; and (2) clarify and streamline the notice and other requirements in FINRA rules relating to Regulation M under the Act (including paragraphs (b)(10) and (11) of NASD Rule 2710 and paragraph (a) of Incorporated NYSE Rule 392). The proposed rule change would renumber NASD Rule 2710 as FINRA Rule 5110 and adopt new FINRA Rules 5190 and 6470 in the consolidated FINRA rulebook.

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

(b) Upon Commission approval and implementation of the proposed rule change, NASD Rule 2710 and Incorporated NYSE Rule 392 will be eliminated from the current FINRA rulebook.

(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 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

¹ 15 U.S.C. 78s(b)(1).

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 (1) adopt NASD Rule 2710 as FINRA Rule 5110, with the exception of paragraphs (b)(10) and (11); (2) adopt new FINRA Rule 5190, which would house the Regulation M-related notice requirements applicable to members participating in securities offerings (including paragraphs (b)(10) and (11) of NASD Rule 2710 and paragraph (a) of Incorporated NYSE Rule 392); (3) adopt new FINRA Rule 6470, which would house certain Regulation M-related requirements that are currently in the OTC Bulletin Board (“OTCBB”) rules and would apply to all OTC Equity Securities;³ and (4) make conforming amendments to the Regulation M-related rules applicable to the Alternative Display Facility (“ADF”).

Corporate Financing Rule

NASD Rule 2710 (Corporate Financing Rule), except paragraphs (b)(10) and (11) (which are discussed below), regulates the underwriting terms and arrangements of most public offerings, including shelf offerings, of securities sold through FINRA members.

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).

³ NASD Rule 6610(d) defines OTC Equity Security as “any non-exchange-listed security and certain exchange-listed securities that do not otherwise qualify for real-time trade reporting.”

The Rule requires members to file with FINRA's Corporate Financing Department (the "Corporate Financing Department") information regarding initial public offerings and certain secondary offerings and to submit pertinent documentation, including registration statements. The Corporate Financing Department reviews this information prior to commencement of the offering to determine whether the underwriting compensation and other terms and arrangements meet the requirements of applicable FINRA rules. Members are required to receive the Corporate Financing Department's opinion of no-objections to the offering terms prior to participating in the offering.

FINRA is proposing to adopt NASD Rule 2710 as FINRA Rule 5110 in the Consolidated FINRA Rulebook. With the exception of the deletion of paragraphs (b)(10) and (11), as discussed below, FINRA is proposing to make only technical non-substantive changes to the Rule, such as replacing references to NASD or the Association with FINRA, and certain conforming changes to references in the Rule to, e.g., the Exchange Act, SEA Rules, the Securities Act and Securities Act Rules.

Regulation M-Related Requirements

Background and Discussion of Current FINRA Rules

Regulation M is designed to prevent manipulation by persons with an interest in the outcome of an offering and generally prohibits activities and conduct that could artificially influence the market for an offered security.⁴ In this regard, Regulation M generally prohibits underwriters, broker-dealers, issuers and other persons participating in a distribution from directly or indirectly bidding for or purchasing the offered security (or

⁴ See Securities Exchange Act Release No. 38067 (December 20, 1996), 62 FR 520 (January 3, 1997) (File No. S7-11-96) (Anti-Manipulation Rules Concerning Securities Offerings; Final Rules).

inducing another person to do so) during the “restricted period,” which commences on the later of either one or five business days prior to the determination of the offering price or such time that a person becomes a distribution participant. For purposes of determining whether a one or five-day or no restricted period applies under Regulation M, the SEC has adopted a dual standard of world-wide average daily trading volume (“ADTV”) and public float value. Regulation M also governs certain market activities, usually undertaken by the managing underwriter or underwriting group (i.e., stabilizing bids, syndicate covering transactions and penalty bids)⁵ in connection with an offering and requires that notice of such activity be provided to the relevant self-regulatory organization or, in the case of stabilizing bids, the market where the stabilizing bid is to be posted. Finally, Regulation M generally prohibits any person from selling short a security that is the subject of a public offering and purchasing the security in the offering if such short sale was effected during the restricted period (which, for purposes of the short sale restrictions, generally is the five-day period prior to pricing).⁶

As part of FINRA’s program to monitor for member compliance with Regulation M, FINRA’s Market Regulation Department (the “Market Regulation Department”) reviews members’ over-the-counter (“OTC”) trading and quoting activity for prohibited purchases and/or bids during the applicable restricted period and short sales during the

⁵ A “stabilizing bid” is a bid that is intended to maintain the price of the offered security and is necessary to prevent or retard a decline in the security’s price. A “penalty bid” allows a lead underwriter to reclaim a selling concession paid to a syndicate member if that member’s customers sell their allocated shares in the immediate aftermarket. A “syndicate covering transaction” is generally defined as placing a bid or effecting a purchase to reduce a syndicate short position.

⁶ See Securities Exchange Act Release No. 56206 (August 6, 2007), 72 FR 45094 (August 10, 2007) (File No. S7-20-06) (Short Selling in Connection With a Public Offering; Final Rule).

five-day period prior to pricing the offering. FINRA rules must ensure that FINRA receives pertinent distribution-related information in a timely fashion to facilitate this component of FINRA's Regulation M compliance program.

FINRA's current Regulation M-related rules comprise notice requirements set forth in NASD Rule 2710(b)(10) and (11) and Incorporated NYSE Rule 392 (Notification Requirements for Offerings of Listed Securities), as well as marketplace-specific requirements in the OTCBB and ADF rules. NASD Rule 2710(b)(10) requires members that are acting as manager (or in a similar capacity) of a distribution of unlisted securities that are considered a subject or reference security subject to Rule 101 of Regulation M or an "actively traded" security under Rule 101 of Regulation M to submit a request for an Underwriting Activity Report ("UAR") from the Market Regulation Department. The request for a UAR, which is the mechanism by which FINRA currently receives notice of prospective distributions, must be submitted at the time a registration statement or similar offering document is filed with the Corporate Financing Department, the SEC or other regulatory agency and if not filed with any regulatory agency, at least two business days prior to commencement of the restricted period. Such request must include a copy of the registration statement or similar offering document. If no member is acting as manager, then each member that is a distribution participant or affiliated purchaser shall submit the request for a UAR, unless another member has assumed responsibility for compliance.

NASD Rule 2710(b)(11) requires members that are acting as manager (or in a similar capacity) of a distribution of securities that are listed on a national securities exchange and considered a subject security or reference security subject to Rule 101 of Regulation M or an "actively traded" security under Rule 101 of Regulation M to provide

notice to the Market Regulation Department of the pricing of the distribution, including the date and time of pricing, the offering price and the time the distribution terminated. Such notice must be provided no later than the close of business the day the offering terminates and may be submitted on the UAR.

Incorporated NYSE Rule 392(a) requires that Dual Members provide notice of pricing and related information (including the restricted period, if any, the offering price and the basis for pricing) in connection with an offering of an NYSE-listed security. Incorporated NYSE Rule 392(b) requires that Dual Members provide notice of syndicate covering transactions and penalty and stabilizing bids in connection with an offering of an NYSE-listed security.

FINRA's OTCBB and ADF-related marketplace rules also include certain Regulation M-related requirements. Any member that is a distribution participant or affiliated purchaser in a distribution of an OTCBB-eligible security must provide notice to the Corporate Financing Department of its intention to impose a penalty bid or conduct a syndicate covering transaction pursuant to Rule 104 of Regulation M.⁷

In addition, members are required to withdraw their quotations in the OTCBB (in OTCBB-eligible securities) and the ADF (in NMS stocks) to comply with applicable restricted periods under Regulation M. Specifically, a member that is a distribution participant or affiliated purchaser in a distribution of an OTCBB-eligible security must withdraw its quotations in the offered security⁸ and provide notice to FINRA's

⁷ See NASD Rule 6540(d)(1)(D)(iii).

⁸ See NASD Rule 6540(d)(1)(D)(ii).

Operations Department prior to pricing.⁹ The member must also provide notice to the Market Regulation Department upon the pricing of the distribution.¹⁰ Additionally, members are prohibited from entering stabilizing bids pursuant to Rule 104 of Regulation M in the OTCBB.¹¹

With respect to quotations in the ADF, FINRA's Operations Department may grant excused withdrawal status to a Registered Reporting ADF Market Maker, as defined in NASD Rule 4200A(a)(14), that is a distribution participant or affiliated purchaser in a distribution of an NMS stock in order to comply with the applicable restricted period under Regulation M.¹² A member acting as manager (or in a similar capacity), or any member that is a distribution participant or affiliated purchaser in a distribution that does not have a manager, must notify FINRA's ADF Operations and the Market Regulation Department of a prospective distribution and request a withdrawal of each market maker's quotations.¹³ Members also must submit a written request to ADF Operations and the Market Regulation Department to rescind the market maker's excused withdrawal status and provide notice of the date and time of the pricing of the offering, the offering price, and the time the offering terminated.¹⁴

⁹ See NASD Rule 6540(d)(1)(D)(i).

¹⁰ See NASD Rule 6540(d)(1)(D)(iv).

¹¹ See NASD Rule 6540(d)(1)(D)(ii).

¹² See NASD Rule 4619A(f).

¹³ See NASD Rule 4619A(f)(1).

¹⁴ See NASD Rule 4619A(f)(3).

Proposed New FINRA Rule 5190

To clarify and streamline FINRA’s rules in this area, FINRA is proposing to consolidate and house all Regulation M-related notice requirements in a single rule – proposed new FINRA Rule 5190 (Notification Requirements for Offering Participants). The scope of the current rules and information required would be expanded, as necessary, to impose consistent notice requirements relating to distributions of listed and unlisted securities. The proposed rule change would ensure that FINRA receives from its members pertinent distribution-related information in a timely fashion.

Proposed Rule 5190(c) sets forth the notice requirements applicable to distributions of listed and unlisted securities that are “covered securities” (as that term is defined under Regulation M) subject to a restricted period under Rule 101 or 102 of Regulation M. Specifically, proposed Rule 5190(c)(1)(A) would require members to determine, in accordance with Regulation M, whether a distribution is subject to a one-day or five-day restricted period under Rule 101 of Regulation M, and provide written notice to FINRA of the member’s determination and the basis for such determination.¹⁵ Additionally, pursuant to proposed Rule 5190(c)(1)(A), members would be required to include in the written notice the contemplated date and time of commencement of the restricted period, identifying the distribution participants and affiliated purchasers.

Members would be required to provide such notice no later than the business day

¹⁵ While the proposed rule change would place the onus of determining the applicable restricted period on the member for all distributions, as a practical matter, FINRA would accept notification by a member that the maximum five-day restricted period applies to a prospective distribution, without providing the basis for that determination. If, on the other hand, a member were to assert that a one-day or no restricted period applied to a particular distribution, FINRA would require that the member demonstrate the basis for that determination.

prior to the first complete trading session of the applicable restricted period, unless later notification is necessary under specific circumstances.¹⁶ FINRA notes that where the principal market closes early, e.g., for a holiday, the shortened session would constitute a complete trading session for purposes of the proposed Rule. NASD Rule 2710(b)(10) requires that notice be provided at the time of filing the registration statement. However, for some distributions, particularly shelf offerings, the registration statement may be filed well in advance of commencement of the distribution. As a result, by the time the distribution takes place, the information previously provided by the member could be out-of-date or the ADTV or public float levels could have changed, in which case a different restricted period would apply.

The proposed rule change would eliminate the express requirement under FINRA rules that members request a UAR and would instead permit FINRA to prescribe the form in which notice and the required information must be submitted to FINRA (including, as discussed above, notice of the member's independent determination regarding whether a restricted period applies).¹⁷ The proposed rule change also would

¹⁶ In most instances, FINRA would expect to receive notification within the prescribed time frame, but may permit later notification in limited circumstances. Such determination would be made by the Market Regulation Department on a case-by-case basis. For example, there may be instances where the nature of the transaction has made it impossible to provide timely notice (e.g., a private investment in public equity ("PIPE") offering is commenced and priced on the same day, and thus the member could not have provided notice on the business day prior to the first complete trading session of the applicable restricted period). Current NASD Rule 4619A(f)(1), which sets forth the notice and withdrawal of quotations requirements applicable to ADF participants for purposes of compliance with Regulation M, similarly contemplates later notification where necessary under the specific circumstances.

¹⁷ FINRA will announce the form and method of transmission in a Notice to be published on its Web site. For example, such form could include the request for a UAR in connection with distributions of Nasdaq-listed securities.

eliminate the requirement in NASD Rule 2710(b)(10) that members submit a copy of the registration statement. The Market Regulation Department does not rely on the registration statement in monitoring member quoting and trading activity for purposes of Regulation M compliance. Moreover, FINRA believes that this requirement could potentially suggest that the Regulation M-related requirements are applicable only to registered offerings when, in fact, certain unregistered offerings, e.g., private placements and PIPEs, are subject to Regulation M and FINRA's notice requirements.

Proposed Rule 5190(c)(1)(B) would require that upon pricing a distribution that is subject to a restricted period under Rule 101 of Regulation M, members provide written notice to FINRA and the following information: the security name and symbol, the type of security, the number of shares offered, the offering price, the last sale before the distribution, the pricing basis (e.g., the prior day closing price, a negotiated price, last sale, etc.), the SEC effective date and time, the trade date and the restricted period. Consistent with proposed paragraph (c)(1)(A), members also would be required to identify the distribution participants and affiliated purchasers.

The notice under proposed Rule 5190(c)(1)(B) would be required to be submitted no later than the close of business the next business day following the pricing of the distribution, unless later notification is necessary under specific circumstances. NASD Rule 2710(b)(11) requires that notice of pricing be provided no later than the close of

Additionally, FINRA notes that the Market Regulation Department monitors for purposes of compliance with Regulation M on behalf of the Nasdaq Exchange pursuant to a Regulatory Services Agreement (RSA). The Market Regulation Department will continue to generate UARs on behalf of the Nasdaq Exchange under the RSA to assist firms in determining the applicable restricted period, as well as applicable Nasdaq passive market making limits, under Regulation M with respect to Nasdaq-listed securities pursuant to Nasdaq Exchange rules.

business the day the offering terminates; however, most members immediately provide notice of pricing today. In addition to being consistent with current practice, the proposed rule change would ensure that FINRA gets timely pricing information in instances where a distribution does not terminate for weeks or even months after pricing.

Finally, proposed Rule 5190(c)(1)(C) would require that members provide written notice of the cancellation or postponement of any distribution for which prior notice of commencement of the restricted period has been provided to FINRA. Members would be required to provide such notice immediately upon the cancellation or postponement of the distribution.

Proposed Rule 5190(c)(2) would require that any member that is an issuer or selling security holder in a distribution of any security that is a covered security subject to a restricted period under Rule 102 of Regulation M comply with the notice requirements of proposed Rule 5190(c)(1), unless another member has assumed responsibility in writing for compliance therewith. The proposed provision would ensure that FINRA receives notice of any distribution in which a member is participating as an issuer or selling security holder, to the extent that notice of such distribution has not already been provided under proposed Rule 5190.

Proposed Rule 5190(d) sets forth the notice requirements applicable to distributions of listed and unlisted securities that are considered “actively traded” securities and thus are not subject to a restricted period under Rule 101 of Regulation M.¹⁸ In connection with such distributions, pursuant to proposed Rule 5190(d)(1),

¹⁸ The exclusion for “actively traded securities” removes from Rule 101 of Regulation M securities with an ADTV value of at least \$1 million where the

members would be required to provide written notice to FINRA of the member's determination that no restricted period applies and the basis for such determination. Proposed Rule 5190(d)(1) would require that such notice be provided at least one business day prior to the pricing of the distribution, unless later notification is necessary under specific circumstances.

Proposed Rule 5190(d)(2) would require that upon pricing a distribution of a security that is considered "actively traded" under Rule 101 of Regulation M, members provide written notice to FINRA and the same pricing-related information that would be required under proposed paragraph (c)(1)(B) (discussed above). Also consistent with proposed paragraph (c)(1)(B), proposed Rule 5190(d)(2) would require members to identify the distribution participants and affiliated purchasers, and provide the required notice no later than the close of business the next business day following the pricing of the distribution, unless later notification is necessary under specific circumstances.¹⁹

Under paragraphs (c)(1) and (d) of proposed Rule 5190, a member acting as manager (or in a similar capacity) of the distribution would have the obligation to submit the requisite notice to FINRA. However, if no member is acting as manager (or in a similar capacity), then each member that is a distribution participant or affiliated purchaser would be required to provide notice to FINRA, unless another FINRA member has assumed responsibility in writing for compliance with the notice requirement. This is

issuer's common equity securities have a public float value of at least \$150 million.

¹⁹ FINRA notes that a member that is an issuer or selling security holder in a distribution of an actively traded security that is subject to a restricted period under Rule 102 of Regulation M would be required to comply with the notice requirements under proposed Rule 5190(c)(2).

consistent with the current approach under NASD Rule 2710(b)(10).²⁰

Finally, proposed Rule 5190(e) would require members to provide notice to FINRA of penalty bids or syndicate covering transactions in connection with an offering of an OTC Equity Security. Members would be required to provide notice to FINRA of their intention to conduct such activity, prior to imposing the penalty bid or engaging in the first syndicate covering transaction, as well as pertinent information, such as identification of the security and its symbol and the date such activity will occur. In addition, members would be required to subsequently confirm such activity within one business day of completion, including identification of the security and its symbol, the total number of shares and the date(s) of such activity. The proposed provision is substantially similar to NASD Rule 6540(d)(1)(D)(iii). By including these notice requirements in proposed Rule 5190, the proposed rule change would clarify that they apply to distributions of all OTC Equity Securities and are not limited to distributions of OTCBB-eligible securities.

In light of the foregoing, FINRA is proposing to delete paragraphs (b)(10) and (11) from NASD Rule 2710 and Incorporated NYSE Rule 392 in its entirety. The notice requirements of NASD Rule 2710(b)(10) and (11) and Incorporated NYSE Rule 392(a) largely would be incorporated in proposed Rule 5190. Because Incorporated NYSE Rule 392(b) is specific to the NYSE marketplace, FINRA is not proposing that these requirements become part of the Consolidated FINRA Rulebook.

²⁰ Members would be required to update the notice required under the proposed Rule, as necessary (e.g., a manager would update the notice where distribution participants are added after commencement of the restricted period).

Proposed Amendments to Marketplace Rules

FINRA also is proposing to clarify the scope and application of the Regulation M-related requirements that are in the current OTCBB and ADF marketplace rules.²¹

FINRA is proposing to adopt new FINRA Rule 6470 (Withdrawal of Quotations in an OTC Equity Security in Compliance with SEC Regulation M), which would (1) require a member that is a distribution participant, affiliated purchaser, selling security holder or issuer in a distribution of an OTC Equity Security that is a covered security subject to Rule 101 or Rule 102 of Regulation M to withdraw all quotations in the security during the restricted period; and (2) prohibit the entry of stabilizing bids for the OTC Equity Security pursuant to Rule 104 of Regulation M. Proposed Rule 6470 is substantially similar to NASD Rule 6540(d)(1)(D)(ii) and would clarify that the requirements apply not only to OTCBB-eligible securities, but to all OTC Equity Securities quoted in any inter-dealer quotation system (i.e., OTCBB and Pink Sheets). Thus, under the proposed rule change, the Regulation M-related provisions would be deleted from the OTCBB rules (specifically, paragraphs (d)(1)(D), (E) and (F) would be deleted from NASD Rule 6540) and comparable requirements would be housed in either proposed Rule 5190, as discussed above, or proposed Rule 6470.

Second, FINRA is proposing to make certain conforming changes to the Regulation M-related rules applicable to the ADF. Specifically, FINRA is proposing to

²¹ On May 23, 2008, FINRA filed proposed rule change SR-FINRA-2008-021, in which FINRA proposes, among other things, to adopt NASD Marketplace Rules 4200A, 4619A and 6540 as FINRA Rules 6220, 6275 and 6540, respectively, and the NASD Rule 6600 Series as the FINRA Rule 6400 Series, without material change, in the Consolidated FINRA Rulebook. Assuming Commission approval of SR-FINRA-2008-021 prior to the approval of this proposed rule change, FINRA will amend this filing, as necessary, to reflect such approval.

amend NASD Rule 4619A(f) to conform to the language and structure of proposed Rule 6470. Thus, a Registered Reporting ADF Market Maker that is a distribution participant, affiliated purchaser, selling security holder or issuer in a distribution of an NMS stock that is a covered security subject to Rule 101 or 102 of Regulation M would be required to request an excused withdrawal of its quotations in the ADF in the offered security. FINRA believes that it is more appropriate to impose such obligation on the member that is posting the quotation, rather than require the manager of the distribution to do so on behalf of each member. FINRA also is proposing to amend NASD Rule 4200A, which sets forth the definitions applicable to the ADF rules, to make technical and conforming changes such as adding necessary references to Regulation M and deleting definitions that are currently not used in the ADF rules.

FINRA believes that the proposed rule change will significantly improve the clarity of the current rules and enhance the information FINRA receives, which will better enable FINRA to monitor member OTC quoting and trading for purposes of Regulation M compliance.

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,²² which requires, among other things, that FINRA rules must be designed to prevent fraudulent and manipulative acts and practices, to promote

²² 15 U.S.C. 78o-3(b)(6).

just and equitable principles of trade, and, in general, to protect investors and the public interest. The rules being adopted as part of the Consolidated FINRA Rulebook previously have been found to meet the statutory requirements, and FINRA believes that those rules have since proven effective in achieving the statutory mandates. In addition, FINRA believes that the proposed rule change will significantly improve the clarity of FINRA's current Regulation M-related rules and enhance FINRA's ability to monitor member OTC quoting and trading for purposes of Regulation M compliance.

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.²³

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.

²³ 15 U.S.C. 78s(b)(2).

9. Exhibits

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

Exhibit 5. Text of proposed rule change.

EXHIBIT 1

SECURITIES AND EXCHANGE COMMISSION

(Release No. 34- ; File No. SR-FINRA-2008-039)

Self-Regulatory Organizations: Financial Industry Regulatory Authority, Inc.; Notice of Filing of Proposed Rule Change to Adopt FINRA Rules 5110 (Corporate Financing Rule), 5190 (Notification Requirements for Offering Participants) and 6470 (Withdrawal of Quotations in an OTC Equity Security in Compliance with SEC Reg M) 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 (1) adopt NASD Rule 2710, without material change except for paragraphs (b)(10) and (11), as a FINRA rule in the consolidated FINRA rulebook; and (2) clarify and streamline the notice and other requirements in FINRA rules relating to Regulation M under the Act (including paragraphs (b)(10) and (11) of NASD Rule 2710 and paragraph (a) of Incorporated NYSE Rule 392). The proposed rule change would renumber NASD Rule 2710 as FINRA Rule 5110 and adopt new FINRA Rules 5190 and 6470 in the consolidated FINRA rulebook.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

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

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 (1) adopt NASD Rule 2710 as FINRA Rule 5110, with the exception of paragraphs (b)(10) and (11); (2) adopt new FINRA Rule 5190, which would house the Regulation M-related notice requirements applicable to members participating in securities offerings (including paragraphs (b)(10) and (11) of NASD Rule 2710 and paragraph (a) of Incorporated NYSE Rule 392); (3) adopt new FINRA Rule 6470, which would house certain Regulation M-related requirements that are currently in the OTC Bulletin Board ("OTCBB") rules and would

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).

apply to all OTC Equity Securities;⁴ and (4) make conforming amendments to the Regulation M-related rules applicable to the Alternative Display Facility (“ADF”).

Corporate Financing Rule

NASD Rule 2710 (Corporate Financing Rule), except paragraphs (b)(10) and (11) (which are discussed below), regulates the underwriting terms and arrangements of most public offerings, including shelf offerings, of securities sold through FINRA members. The Rule requires members to file with FINRA’s Corporate Financing Department (the “Corporate Financing Department”) information regarding initial public offerings and certain secondary offerings and to submit pertinent documentation, including registration statements. The Corporate Financing Department reviews this information prior to commencement of the offering to determine whether the underwriting compensation and other terms and arrangements meet the requirements of applicable FINRA rules. Members are required to receive the Corporate Financing Department’s opinion of no-objections to the offering terms prior to participating in the offering.

FINRA is proposing to adopt NASD Rule 2710 as FINRA Rule 5110 in the Consolidated FINRA Rulebook. With the exception of the deletion of paragraphs (b)(10) and (11), as discussed below, FINRA is proposing to make only technical non-substantive changes to the Rule, such as replacing references to NASD or the Association with FINRA, and certain conforming changes to references in the Rule to, e.g., the Exchange Act, SEA Rules, the Securities Act and Securities Act Rules.

⁴ NASD Rule 6610(d) defines OTC Equity Security as “any non-exchange-listed security and certain exchange-listed securities that do not otherwise qualify for real-time trade reporting.”

Regulation M-Related Requirements

Background and Discussion of Current FINRA Rules

Regulation M is designed to prevent manipulation by persons with an interest in the outcome of an offering and generally prohibits activities and conduct that could artificially influence the market for an offered security.⁵ In this regard, Regulation M generally prohibits underwriters, broker-dealers, issuers and other persons participating in a distribution from directly or indirectly bidding for or purchasing the offered security (or inducing another person to do so) during the “restricted period,” which commences on the later of either one or five business days prior to the determination of the offering price or such time that a person becomes a distribution participant. For purposes of determining whether a one or five-day or no restricted period applies under Regulation M, the SEC has adopted a dual standard of world-wide average daily trading volume (“ADTV”) and public float value. Regulation M also governs certain market activities, usually undertaken by the managing underwriter or underwriting group (i.e., stabilizing bids, syndicate covering transactions and penalty bids)⁶ in connection with an offering and requires that notice of such activity be provided to the relevant self-regulatory organization or, in the case of stabilizing bids, the market where the stabilizing bid is to be posted. Finally, Regulation M generally prohibits any person from selling short a

⁵ See Securities Exchange Act Release No. 38067 (December 20, 1996), 62 FR 520 (January 3, 1997) (File No. S7-11-96) (Anti-Manipulation Rules Concerning Securities Offerings; Final Rules).

⁶ A “stabilizing bid” is a bid that is intended to maintain the price of the offered security and is necessary to prevent or retard a decline in the security’s price. A “penalty bid” allows a lead underwriter to reclaim a selling concession paid to a syndicate member if that member’s customers sell their allocated shares in the immediate aftermarket. A “syndicate covering transaction” is generally defined as placing a bid or effecting a purchase to reduce a syndicate short position.

security that is the subject of a public offering and purchasing the security in the offering if such short sale was effected during the restricted period (which, for purposes of the short sale restrictions, generally is the five-day period prior to pricing).⁷

As part of FINRA's program to monitor for member compliance with Regulation M, FINRA's Market Regulation Department (the "Market Regulation Department") reviews members' over-the-counter ("OTC") trading and quoting activity for prohibited purchases and/or bids during the applicable restricted period and short sales during the five-day period prior to pricing the offering. FINRA rules must ensure that FINRA receives pertinent distribution-related information in a timely fashion to facilitate this component of FINRA's Regulation M compliance program.

FINRA's current Regulation M-related rules comprise notice requirements set forth in NASD Rule 2710(b)(10) and (11) and Incorporated NYSE Rule 392 (Notification Requirements for Offerings of Listed Securities), as well as marketplace-specific requirements in the OTCBB and ADF rules. NASD Rule 2710(b)(10) requires members that are acting as manager (or in a similar capacity) of a distribution of unlisted securities that are considered a subject or reference security subject to Rule 101 of Regulation M or an "actively traded" security under Rule 101 of Regulation M to submit a request for an Underwriting Activity Report ("UAR") from the Market Regulation Department. The request for a UAR, which is the mechanism by which FINRA currently receives notice of prospective distributions, must be submitted at the time a registration statement or similar offering document is filed with the Corporate Financing Department, the SEC or other

⁷ See Securities Exchange Act Release No. 56206 (August 6, 2007), 72 FR 45094 (August 10, 2007) (File No. S7-20-06) (Short Selling in Connection With a Public Offering; Final Rule).

regulatory agency and if not filed with any regulatory agency, at least two business days prior to commencement of the restricted period. Such request must include a copy of the registration statement or similar offering document. If no member is acting as manager, then each member that is a distribution participant or affiliated purchaser shall submit the request for a UAR, unless another member has assumed responsibility for compliance.

NASD Rule 2710(b)(11) requires members that are acting as manager (or in a similar capacity) of a distribution of securities that are listed on a national securities exchange and considered a subject security or reference security subject to Rule 101 of Regulation M or an “actively traded” security under Rule 101 of Regulation M to provide notice to the Market Regulation Department of the pricing of the distribution, including the date and time of pricing, the offering price and the time the distribution terminated. Such notice must be provided no later than the close of business the day the offering terminates and may be submitted on the UAR.

Incorporated NYSE Rule 392(a) requires that Dual Members provide notice of pricing and related information (including the restricted period, if any, the offering price and the basis for pricing) in connection with an offering of an NYSE-listed security.

Incorporated NYSE Rule 392(b) requires that Dual Members provide notice of syndicate covering transactions and penalty and stabilizing bids in connection with an offering of an NYSE-listed security.

FINRA’s OTCBB and ADF-related marketplace rules also include certain Regulation M-related requirements. Any member that is a distribution participant or affiliated purchaser in a distribution of an OTCBB-eligible security must provide notice to the Corporate Financing Department of its intention to impose a penalty bid or conduct

a syndicate covering transaction pursuant to Rule 104 of Regulation M.⁸

In addition, members are required to withdraw their quotations in the OTCBB (in OTCBB-eligible securities) and the ADF (in NMS stocks) to comply with applicable restricted periods under Regulation M. Specifically, a member that is a distribution participant or affiliated purchaser in a distribution of an OTCBB-eligible security must withdraw its quotations in the offered security⁹ and provide notice to FINRA's Operations Department prior to pricing.¹⁰ The member must also provide notice to the Market Regulation Department upon the pricing of the distribution.¹¹ Additionally, members are prohibited from entering stabilizing bids pursuant to Rule 104 of Regulation M in the OTCBB.¹²

With respect to quotations in the ADF, FINRA's Operations Department may grant excused withdrawal status to a Registered Reporting ADF Market Maker, as defined in NASD Rule 4200A(a)(14), that is a distribution participant or affiliated purchaser in a distribution of an NMS stock in order to comply with the applicable restricted period under Regulation M.¹³ A member acting as manager (or in a similar capacity), or any member that is a distribution participant or affiliated purchaser in a distribution that does not have a manager, must notify FINRA's ADF Operations and the

⁸ See NASD Rule 6540(d)(1)(D)(iii).

⁹ See NASD Rule 6540(d)(1)(D)(ii).

¹⁰ See NASD Rule 6540(d)(1)(D)(i).

¹¹ See NASD Rule 6540(d)(1)(D)(iv).

¹² See NASD Rule 6540(d)(1)(D)(ii).

¹³ See NASD Rule 4619A(f).

Market Regulation Department of a prospective distribution and request a withdrawal of each market maker's quotations.¹⁴ Members also must submit a written request to ADF Operations and the Market Regulation Department to rescind the market maker's excused withdrawal status and provide notice of the date and time of the pricing of the offering, the offering price, and the time the offering terminated.¹⁵

Proposed New FINRA Rule 5190

To clarify and streamline FINRA's rules in this area, FINRA is proposing to consolidate and house all Regulation M-related notice requirements in a single rule – proposed new FINRA Rule 5190 (Notification Requirements for Offering Participants). The scope of the current rules and information required would be expanded, as necessary, to impose consistent notice requirements relating to distributions of listed and unlisted securities. The proposed rule change would ensure that FINRA receives from its members pertinent distribution-related information in a timely fashion.

Proposed Rule 5190(c) sets forth the notice requirements applicable to distributions of listed and unlisted securities that are “covered securities” (as that term is defined under Regulation M) subject to a restricted period under Rule 101 or 102 of Regulation M. Specifically, proposed Rule 5190(c)(1)(A) would require members to determine, in accordance with Regulation M, whether a distribution is subject to a one-day or five-day restricted period under Rule 101 of Regulation M, and provide written notice to FINRA of the member's determination and the basis for such determination.¹⁶

¹⁴ See NASD Rule 4619A(f)(1).

¹⁵ See NASD Rule 4619A(f)(3).

¹⁶ While the proposed rule change would place the onus of determining the applicable restricted period on the member for all distributions, as a practical

Additionally, pursuant to proposed Rule 5190(c)(1)(A), members would be required to include in the written notice the contemplated date and time of commencement of the restricted period, identifying the distribution participants and affiliated purchasers.

Members would be required to provide such notice no later than the business day prior to the first complete trading session of the applicable restricted period, unless later notification is necessary under specific circumstances.¹⁷ FINRA notes that where the principal market closes early, e.g., for a holiday, the shortened session would constitute a complete trading session for purposes of the proposed Rule. NASD Rule 2710(b)(10) requires that notice be provided at the time of filing the registration statement. However, for some distributions, particularly shelf offerings, the registration statement may be filed well in advance of commencement of the distribution. As a result, by the time the distribution takes place, the information previously provided by the member could be out-of-date or the ADTV or public float levels could have changed, in which case a different restricted period would apply.

matter, FINRA would accept notification by a member that the maximum five-day restricted period applies to a prospective distribution, without providing the basis for that determination. If, on the other hand, a member were to assert that a one-day or no restricted period applied to a particular distribution, FINRA would require that the member demonstrate the basis for that determination.

¹⁷ In most instances, FINRA would expect to receive notification within the prescribed time frame, but may permit later notification in limited circumstances. Such determination would be made by the Market Regulation Department on a case-by-case basis. For example, there may be instances where the nature of the transaction has made it impossible to provide timely notice (e.g., a private investment in public equity (“PIPE”) offering is commenced and priced on the same day, and thus the member could not have provided notice on the business day prior to the first complete trading session of the applicable restricted period). Current NASD Rule 4619A(f)(1), which sets forth the notice and withdrawal of quotations requirements applicable to ADF participants for purposes of compliance with Regulation M, similarly contemplates later notification where necessary under the specific circumstances.

The proposed rule change would eliminate the express requirement under FINRA rules that members request a UAR and would instead permit FINRA to prescribe the form in which notice and the required information must be submitted to FINRA (including, as discussed above, notice of the member's independent determination regarding whether a restricted period applies).¹⁸ The proposed rule change also would eliminate the requirement in NASD Rule 2710(b)(10) that members submit a copy of the registration statement. The Market Regulation Department does not rely on the registration statement in monitoring member quoting and trading activity for purposes of Regulation M compliance. Moreover, FINRA believes that this requirement could potentially suggest that the Regulation M-related requirements are applicable only to registered offerings when, in fact, certain unregistered offerings, e.g., private placements and PIPEs, are subject to Regulation M and FINRA's notice requirements.

Proposed Rule 5190(c)(1)(B) would require that upon pricing a distribution that is subject to a restricted period under Rule 101 of Regulation M, members provide written notice to FINRA and the following information: the security name and symbol, the type of security, the number of shares offered, the offering price, the last sale before the distribution, the pricing basis (e.g., the prior day closing price, a negotiated price, last

¹⁸ FINRA will announce the form and method of transmission in a Notice to be published on its Web site. For example, such form could include the request for a UAR in connection with distributions of Nasdaq-listed securities.

Additionally, FINRA notes that the Market Regulation Department monitors for purposes of compliance with Regulation M on behalf of the Nasdaq Exchange pursuant to a Regulatory Services Agreement (RSA). The Market Regulation Department will continue to generate UARs on behalf of the Nasdaq Exchange under the RSA to assist firms in determining the applicable restricted period, as well as applicable Nasdaq passive market making limits, under Regulation M with respect to Nasdaq-listed securities pursuant to Nasdaq Exchange rules.

sale, etc.), the SEC effective date and time, the trade date and the restricted period.

Consistent with proposed paragraph (c)(1)(A), members also would be required to identify the distribution participants and affiliated purchasers.

The notice under proposed Rule 5190(c)(1)(B) would be required to be submitted no later than the close of business the next business day following the pricing of the distribution, unless later notification is necessary under specific circumstances. NASD Rule 2710(b)(11) requires that notice of pricing be provided no later than the close of business the day the offering terminates; however, most members immediately provide notice of pricing today. In addition to being consistent with current practice, the proposed rule change would ensure that FINRA gets timely pricing information in instances where a distribution does not terminate for weeks or even months after pricing.

Finally, proposed Rule 5190(c)(1)(C) would require that members provide written notice of the cancellation or postponement of any distribution for which prior notice of commencement of the restricted period has been provided to FINRA. Members would be required to provide such notice immediately upon the cancellation or postponement of the distribution.

Proposed Rule 5190(c)(2) would require that any member that is an issuer or selling security holder in a distribution of any security that is a covered security subject to a restricted period under Rule 102 of Regulation M comply with the notice requirements of proposed Rule 5190(c)(1), unless another member has assumed responsibility in writing for compliance therewith. The proposed provision would ensure that FINRA receives notice of any distribution in which a member is participating as an issuer or selling security holder, to the extent that notice of such distribution has not already been

provided under proposed Rule 5190.

Proposed Rule 5190(d) sets forth the notice requirements applicable to distributions of listed and unlisted securities that are considered “actively traded” securities and thus are not subject to a restricted period under Rule 101 of Regulation M.¹⁹ In connection with such distributions, pursuant to proposed Rule 5190(d)(1), members would be required to provide written notice to FINRA of the member’s determination that no restricted period applies and the basis for such determination. Proposed Rule 5190(d)(1) would require that such notice be provided at least one business day prior to the pricing of the distribution, unless later notification is necessary under specific circumstances.

Proposed Rule 5190(d)(2) would require that upon pricing a distribution of a security that is considered “actively traded” under Rule 101 of Regulation M, members provide written notice to FINRA and the same pricing-related information that would be required under proposed paragraph (c)(1)(B) (discussed above). Also consistent with proposed paragraph (c)(1)(B), proposed Rule 5190(d)(2) would require members to identify the distribution participants and affiliated purchasers, and provide the required notice no later than the close of business the next business day following the pricing of the distribution, unless later notification is necessary under specific circumstances.²⁰

¹⁹ The exclusion for “actively traded securities” removes from Rule 101 of Regulation M securities with an ADTV value of at least \$1 million where the issuer’s common equity securities have a public float value of at least \$150 million.

²⁰ FINRA notes that a member that is an issuer or selling security holder in a distribution of an actively traded security that is subject to a restricted period under Rule 102 of Regulation M would be required to comply with the notice requirements under proposed Rule 5190(c)(2).

Under paragraphs (c)(1) and (d) of proposed Rule 5190, a member acting as manager (or in a similar capacity) of the distribution would have the obligation to submit the requisite notice to FINRA. However, if no member is acting as manager (or in a similar capacity), then each member that is a distribution participant or affiliated purchaser would be required to provide notice to FINRA, unless another FINRA member has assumed responsibility in writing for compliance with the notice requirement. This is consistent with the current approach under NASD Rule 2710(b)(10).²¹

Finally, proposed Rule 5190(e) would require members to provide notice to FINRA of penalty bids or syndicate covering transactions in connection with an offering of an OTC Equity Security. Members would be required to provide notice to FINRA of their intention to conduct such activity, prior to imposing the penalty bid or engaging in the first syndicate covering transaction, as well as pertinent information, such as identification of the security and its symbol and the date such activity will occur. In addition, members would be required to subsequently confirm such activity within one business day of completion, including identification of the security and its symbol, the total number of shares and the date(s) of such activity. The proposed provision is substantially similar to NASD Rule 6540(d)(1)(D)(iii). By including these notice requirements in proposed Rule 5190, the proposed rule change would clarify that they apply to distributions of all OTC Equity Securities and are not limited to distributions of OTCBB-eligible securities.

In light of the foregoing, FINRA is proposing to delete paragraphs (b)(10) and

²¹ Members would be required to update the notice required under the proposed Rule, as necessary (e.g., a manager would update the notice where distribution participants are added after commencement of the restricted period).

(11) from NASD Rule 2710 and Incorporated NYSE Rule 392 in its entirety. The notice requirements of NASD Rule 2710(b)(10) and (11) and Incorporated NYSE Rule 392(a) largely would be incorporated in proposed Rule 5190. Because Incorporated NYSE Rule 392(b) is specific to the NYSE marketplace, FINRA is not proposing that these requirements become part of the Consolidated FINRA Rulebook.

Proposed Amendments to Marketplace Rules

FINRA also is proposing to clarify the scope and application of the Regulation M-related requirements that are in the current OTCBB and ADF marketplace rules.²²

FINRA is proposing to adopt new FINRA Rule 6470 (Withdrawal of Quotations in an OTC Equity Security in Compliance with SEC Regulation M), which would (1) require a member that is a distribution participant, affiliated purchaser, selling security holder or issuer in a distribution of an OTC Equity Security that is a covered security subject to Rule 101 or Rule 102 of Regulation M to withdraw all quotations in the security during the restricted period; and (2) prohibit the entry of stabilizing bids for the OTC Equity Security pursuant to Rule 104 of Regulation M. Proposed Rule 6470 is substantially similar to NASD Rule 6540(d)(1)(D)(ii) and would clarify that the requirements apply not only to OTCBB-eligible securities, but to all OTC Equity Securities quoted in any inter-dealer quotation system (i.e., OTCBB and Pink Sheets). Thus, under the proposed rule change, the Regulation M-related provisions would be deleted from the OTCBB

²² On May 23, 2008, FINRA filed proposed rule change SR-FINRA-2008-021, in which FINRA proposes, among other things, to adopt NASD Marketplace Rules 4200A, 4619A and 6540 as FINRA Rules 6220, 6275 and 6540, respectively, and the NASD Rule 6600 Series as the FINRA Rule 6400 Series, without material change, in the Consolidated FINRA Rulebook. Assuming Commission approval of SR-FINRA-2008-021 prior to the approval of this proposed rule change, FINRA will amend this filing, as necessary, to reflect such approval.

rules (specifically, paragraphs (d)(1)(D), (E) and (F) would be deleted from NASD Rule 6540) and comparable requirements would be housed in either proposed Rule 5190, as discussed above, or proposed Rule 6470.

Second, FINRA is proposing to make certain conforming changes to the Regulation M-related rules applicable to the ADF. Specifically, FINRA is proposing to amend NASD Rule 4619A(f) to conform to the language and structure of proposed Rule 6470. Thus, a Registered Reporting ADF Market Maker that is a distribution participant, affiliated purchaser, selling security holder or issuer in a distribution of an NMS stock that is a covered security subject to Rule 101 or 102 of Regulation M would be required to request an excused withdrawal of its quotations in the ADF in the offered security. FINRA believes that it is more appropriate to impose such obligation on the member that is posting the quotation, rather than require the manager of the distribution to do so on behalf of each member. FINRA also is proposing to amend NASD Rule 4200A, which sets forth the definitions applicable to the ADF rules, to make technical and conforming changes such as adding necessary references to Regulation M and deleting definitions that are currently not used in the ADF rules.

FINRA believes that the proposed rule change will significantly improve the clarity of the current rules and enhance the information FINRA receives, which will better enable FINRA to monitor member OTC quoting and trading for purposes of Regulation M compliance.

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.

2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,²³ 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 rules being adopted as part of the Consolidated FINRA Rulebook previously have been found to meet the statutory requirements, and FINRA believes that those rules have since proven effective in achieving the statutory mandates. In addition, FINRA believes that the proposed rule change will significantly improve the clarity of FINRA's current Regulation M-related rules and enhance FINRA's ability to monitor member OTC quoting and trading for purposes of Regulation M compliance.

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

²³ 15 U.S.C. 78o-3(b)(6).

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 insert SR-FINRA-2008-039 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 insert SR-FINRA-2008-039. 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-2008-039 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.²⁴

Florence Harmon
Acting Secretary

²⁴ 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 Rule 5110
(marked to show changes from NASD Rule 2710; NASD Rule 2710 to be deleted in
its entirety from the Transitional Rulebook)**

* * * * *

5000. SECURITIES OFFERING AND TRADING STANDARDS AND

PRACTICES

5100. SECURITIES OFFERINGS, UNDERWRITING AND COMPENSATION

[2710] 5110. Corporate Financing Rule — Underwriting Terms and Arrangements

(a) Definitions

For purposes of this Rule, the following terms shall have the meanings stated below. The definitions in NASD Rule 2720 are incorporated herein by reference.

(1) through (3) No Change.

(4) Participating Member(s)

Any [NASD] FINRA member that is participating in a public offering, any associated person of the member, any members of their immediate family, and any affiliate of the member.

(5) Participation or Participating in a Public Offering

Participation in the preparation of the offering or other documents, participation in the distribution of the offering on an underwritten, non-underwritten, or any other basis, furnishing of customer and/or broker lists for

solicitation, or participation in any advisory or consulting capacity to the issuer related to the offering, but not the preparation of an appraisal in a savings and loan conversion or a bank offering or the preparation of a fairness opinion pursuant to SE[C]A Rule 13e-3.

(6) No Change.

(7) Listed Securities

Securities meeting the listing standards to trade on the national securities exchanges identified in [SEC] Securities Act Rule 146, markets registered with the SEC under Section[s] 6 of the Exchange Act, and any offshore market that is a “designated offshore securities market” under Securities Act Rule 902(b) of [SEC] Regulation S.

(8) Derivative Instruments

A derivative instrument is any “eligible OTC derivative instrument” as defined in SE[C]A Rule 3b-13(a)(1), (2) and (3).

(9) No Change.

(10) Required Filing Date

The required filing date shall be the dates provided in [sub]paragraph (b)(4), and for a public offering exempt from filing under [sub]paragraph (b)(7), the required filing date for purposes of [sub]paragraphs (d) and (g) shall be the date the public offering would have been required to be filed with [the NASD] FINRA but for the exemption.

(b) Filing Requirements

(1) General

No member or person associated with a member shall participate in any manner in any public offering of securities subject to this Rule, NASD Rule 2720 or NASD Rule 2810 unless documents and information as specified herein relating to the offering have been filed with and reviewed by [NASD] FINRA.

(2) Means of Filing

Documents or information required by this Rule to be filed with [NASD] FINRA shall be considered to be filed only upon receipt by its Corporate Financing Department.[*]

[* This Department is located at 9509 Key West Avenue, Rockville, Maryland 20850.]

(3) Confidential Treatment

[NASD] FINRA shall accord confidential treatment to all documents and information filed pursuant to this Rule and shall utilize such documents and information solely for the purpose of review to determine compliance with the provisions of applicable [NASD] FINRA [R]ules or for other regulatory purposes deemed appropriate by [NASD] FINRA.

(4) Requirement for Filing

(A) Unless filed by the issuer, the managing underwriter, or another member, a member that anticipates participating in a public offering of securities subject to this Rule shall file with [NASD] FINRA

the documents and information with respect to the offering specified in subparagraphs (5) and (6) below:

(i) no later than one business day after any of such documents are filed with or submitted to:

a. the [Commission] SEC; or

b. No Change.

(ii) No Change.

(B) No sales of securities subject to this Rule shall commence unless:

(i) the documents and information specified in subparagraphs (5) and (6) below have been filed with and reviewed by [NASD] FINRA; and

(ii) [NASD] FINRA has provided an opinion that it has no objections to the proposed underwriting and other terms and arrangements or an opinion that the proposed underwriting and other terms and arrangements are unfair and unreasonable. If [NASD] FINRA's opinion states that the proposed underwriting and other terms and arrangements are unfair and unreasonable, the member may file modifications to the proposed underwriting and other terms and arrangements for further review.

(C) Any member acting as a managing underwriter or in a similar capacity that has been informed of an opinion by [NASD] FINRA, or a determination by the appropriate standing committee of the Board of

Governors, that the proposed underwriting terms and arrangements of a proposed offering are unfair or unreasonable, and the proposed terms and arrangements have not been modified to conform to the standards of fairness and reasonableness, shall notify all other members proposing to participate in the offering of that opinion or determination at a time sufficiently prior to the effective date of the offering or the commencement of sales so the other members will have an opportunity as a result of specific notice to comply with their obligation not to participate in any way in the distribution of a public offering containing arrangements, terms and conditions that are unfair or unreasonable.

(5) Documents to be Filed

(A) The following documents relating to all proposed public offerings of securities that are required to be filed under [sub]paragraph (b)(4) above shall be filed with [NASD] FINRA for review:

(i) No Change.

(ii) Three copies of any proposed underwriting agreement, agreement among underwriters, selected dealers agreement, agency agreement, purchase agreement, letter of intent, consulting agreement, partnership agreement, underwriter's warrant agreement, escrow agreement, and any other document that describes the underwriting or other arrangements in connection with or related to the distribution, and the terms and conditions relating thereto; and any other information or documents that may

be material to or part of the said arrangements, terms and conditions and that may have a bearing on [NASD] FINRA's review;

(iii) No Change.

(iv) Three copies of the final registration statement declared effective by the [Commission] SEC or equivalent final offering document and a list of the members of the underwriting syndicate, if not indicated therein, and one copy of the executed form of the final underwriting documents and any other document submitted to [NASD] FINRA for review.

(B) All documents that are filed with the [Commission] SEC through the [Commission] SEC's Electronic Data Gathering and Retrieval System shall be treated as filed with [NASD] FINRA.

(6) Information Required to be Filed

(A) Any person filing documents with [NASD] FINRA pursuant to subparagraph (4) above shall provide the following information with respect to the offering:

(i) through (ii) No Change.

(iii) a statement of the association or affiliation with any member of any officer or director of the issuer, of any beneficial owner of 5% or more of any class of the issuer's securities, and of any beneficial owner of the issuer's unregistered equity securities that were acquired during the 180-day period immediately

preceding the required filing date of the public offering, except for purchases described in [sub]paragraph (c)(3)(B)(iv) below. This statement must identify:

a. through c. No Change.

(iv) a detailed explanation of any other arrangement entered into during the 180-day period immediately preceding the required filing date of the public offering, which arrangement provides for the receipt of any item of value or the transfer of any warrants, options, or other securities from the issuer to the underwriter and related persons, provided however:

a. information regarding debt securities and derivative instruments not considered an item of value under [subsection] subparagraphs (c)(3)(B)(vi) and (vii) is not required to be filed; and

b. information initially filed in connection with debt securities and derivative instruments acquired or entered into for “fair price” as defined in [subsection] paragraph (a)(9), but not excluded from items of value under [subsection] subparagraph (c)(3)(B)(vi) or (vii), may be limited to a brief description of the transaction (additional information may be required in the review process) and a representation by the member that a registered principal or senior manager on behalf of the

member has determined that the transaction was or (if the pricing terms have not been set) will be entered into at a fair price as defined in [subsection] paragraph (a)(9).

(v) a statement demonstrating compliance with all of the criteria of an exception from underwriting compensation in [sub]paragraph (d)(5) below, when applicable; and

(vi) a detailed explanation and any documents related to:

a. the modification of any information or representation previously provided to [NASD] FINRA or of any item of underwriting compensation including the information required in [sub]paragraph (b)(6)(A)(iii) above with respect to any securities of the issuer acquired subsequent to the required filing date and prior to the effectiveness or commencement of the offering; or

b. any new arrangement that provides for the receipt of any additional item of value by any participating member subsequent to the issuance of an opinion of no objections to the underwriting terms and arrangements by [NASD] FINRA and within 90 days immediately following the date of effectiveness or commencement of sales of the public offering, provided, however, that information filed in connection with debt securities and derivative instruments acquired or entered into for a “fair price” as

defined in [subsection] paragraph (a)(9) may be limited as described in [subsection] paragraph (b)(6)(A)(iv)b.

(vii) any other information required to be filed under this Rule.

(B) Any person filing documents pursuant to [sub]paragraph (b)(5) above shall notify [NASD] FINRA through its electronic filing system that the offering has been declared effective or approved by the [Commission] SEC or other agency no later than one business day following such declaration or approval or that the offering has been withdrawn or abandoned within three business days following the withdrawal or decision to abandon the offering.

(7) Offerings Exempt from Filing

Notwithstanding the provisions of subparagraph (1) above, documents and information related to the following public offerings need not be filed with [NASD] FINRA for review, unless subject to the provisions of NASD Rule 2720. However, it shall be deemed a violation of this Rule or NASD Rule 2810, for a member to participate in any way in such public offerings if the underwriting or other arrangements in connection with the offering are not in compliance with this Rule or NASD Rule 2810, as applicable:

(A) through (B) No Change.

(C) offerings of securities:

(i) registered with the [Commission] SEC on registration statement Forms S-3 or F-3 pursuant to the standards for those

Forms prior to October 21, 1992 and offered pursuant to [SEC] Securities Act Rule 415 [adopted under the Securities Act of 1933, as amended]; or

(ii) of a foreign private issuer incorporated or organized under the laws of Canada or any Canadian province or territory, and is registered with the [Commission] SEC on Form F-10 pursuant to the standards for that Form approved in Securities Act Release No. 6902 (June 21, 1991) and offered pursuant to Canadian shelf prospectus offering procedures;

(D) securities offered pursuant to a redemption standby “firm commitment” underwriting arrangement registered with the [Commission] SEC on Forms S-3, F-3 or F-10 (only with respect to Canadian issuers);

(E) financing instrument-backed securities which are rated by a nationally recognized statistical rating organization in one of its four (4) highest generic rating categories; [and]

(F) exchange offers of securities where:

(i) No Change.

(ii) the company issuing securities qualifies to register securities with the [Commission] SEC on registration statement Forms S-3, F-3, or F-10, pursuant to the standards for those Forms as set forth in subparagraphs (C)(i) and (ii) of this paragraph; and

(G) No Change.

(8) Exempt Offerings

Notwithstanding the provisions of subparagraph (1) above, the following offerings are exempt from this Rule, NASD Rule 2720, and NASD Rule 2810.

Documents and information relating to the following offerings need not be filed for review:

(A) securities exempt from registration with the [Commission] SEC pursuant to the provisions of Sections 4(1), 4(2) or 4(6) of the Securities Act [of 1933, as amended], or pursuant to Securities Act Rule 504 if the securities are “restricted securities” under [SEC] Securities Act Rule 144(a)(3), Securities Act Rule 505, or Securities Act Rule 506 [adopted under the Securities Act of 1933, as amended];

(B) securities which are defined as “exempt securities” in Section 3(a)(12) of the Exchange Act, as amended;

(C) securities of “open-end” investment companies as defined in Section 5(a)(1) of the Investment Company Act [of 1940] and securities of any “closed-end” investment company as defined in Section 5(a)(2) of [that] the Investment Company Act that:

(i) makes periodic repurchase offers pursuant to Rule 23c-3(b) under of the Investment Company Act [of 1940]; and

(ii) offers its shares on a continuous basis pursuant to Securities Act Rule 415(a)(1)(xi) [under the Securities Act of 1933.];

(D) variable contracts as defined in NASD Rule 2820(b)(1);

(E) No Change.

(F) offerings of municipal securities as defined in Section 3(a)(29) of the Exchange Act;

(G) tender offers made pursuant to SEC Regulation 14D [adopted] under the Exchange Act;

(H) through (I) No Change.

(J) securities registered with the [Commission] SEC in connection with a merger or acquisition transaction or other similar business combination, except for offerings required to be filed pursuant to subparagraph (9)(I) below.

(9) Offerings Required to be Filed

Documents and information relating to all other public offerings including, but not limited to, the following must be filed with [NASD] FINRA for review:

(A) direct participation programs as defined in NASD Rule 2810(d)(2);

(B) through (C) No Change.

(D) securities exempt from registration with the [Commission] SEC pursuant to Section 3(a)(11) of the Securities Act [of 1933, as amended];

(E) securities exempt from registration with the [Commission] SEC pursuant to Securities Act Rule 504 [adopted under the Securities Act of 1933, as amended], unless the securities are “restricted securities” under [SEC] Securities Act Rule 144(a)(3);

(F) securities offered by a bank, savings and loan association, or common carrier even though such offering may be exempt from registration with the [Commission] SEC;

(G) securities offered pursuant to SEC Regulation A under the Securities Act or SEC Regulation B [adopted] under the Securities Act [of 1933, as amended];

(H) exchange offers that are exempt from registration with the [Commission] SEC under Sections 3(a)(4), 3(a)(9), or 3(a)(11) of the Securities Act [of 1933] (if a member's participation involves active solicitation activities) or registered with the [Commission] SEC (if a member is acting as dealer-manager) (collectively "exchange offers"), except for exchange offers exempt from filing pursuant to subparagraph (7)(F) above that are not subject to filing by subparagraph (9)(I) below;

(I) through (J) No Change.

[(10) Request for Underwriting Activity Report]

[Notwithstanding the availability of an exemption from filing under subparagraph (b)(7) of this Rule, a member acting as a manager (or in a similar capacity) of a distribution of a publicly traded subject or reference security that is subject to SEC Rule 101 or an "actively-traded" security under SEC Rule 101 (except for a security listed on a national securities exchange) shall submit a request to the Market Regulation Department for an Underwriting Activity Report with respect to the subject and/or reference security in order to facilitate compliance with SEC Rules 101, 103, or 104, and other distribution-related

NASD Rules. The request shall be submitted at the time a registration statement or similar offering document is filed with the Corporate Financing Department, the SEC, or other regulatory agency or, if not filed with any regulatory agency, at least two (2) business days prior to the commencement of the restricted period under SEC Rule 101. The request shall include a copy of the registration statement or similar offering document (if not previously submitted pursuant to subparagraph (b)(5) of this Rule). If no member is acting as managing underwriter of such distribution, each member that is a distribution participant or an affiliated purchaser shall submit a request for an Underwriting Activity Report, unless another member has assumed responsibility for compliance with this subparagraph. For purposes of subparagraphs (b)(10) and (11), SEC Rules 100, 101, 103, and 104 are rules of the Commission adopted under Regulation M and the following terms shall have the meanings as defined in SEC Rule 100: “distribution,” “distribution participant,” “reference security,” “restricted period,” and “subject security.”]

[(11) Submission of Pricing Information]

[A member acting as a manager (or in a similar capacity) of a distribution of securities that are listed on a national securities exchange and considered a subject security or reference security that is subject to SEC Rule 101 or an “actively-traded” security under SEC Rule 101 or a distribution of any other securities that are considered “actively-traded” under SEC Rule 101 shall provide written notice to the Market Regulation Department of NASD, no later than the close of business the day the offering terminates, that includes the date and time

of the pricing of the offering, the offering price, and the time the offering terminated, which notice may be submitted on the Underwriting Activity Report.]

(c) Underwriting Compensation and Arrangements

(1) through (2) No Change.

(3) Items of Value

(A) For purposes of determining the amount of underwriting compensation received or to be received by the underwriter and related persons pursuant to [sub]paragraph (c)(2) above, the following items and all other items of value received or to be received by the underwriter and related persons in connection with or related to the distribution of the public offering, as determined pursuant to paragraph (d) below shall be included:

(i) through (xii) No Change.

(xiii) compensation, including expense reimbursements, paid to any member in connection with a proposed public offering that was not completed, unless the member does not participate in the revised public offering.[.]

(B) Notwithstanding [sub]paragraph (c)(3)(A) above, the following shall not be considered an item of value:

(i) expenses customarily borne by an issuer, such as printing costs; SEC, “blue sky” and other registration fees; [NASD] FINRA filing fees; and accountant’s fees, whether or not paid through a participating member;

(ii) through (iv) No Change.

(v) securities acquired by an investment company
registered under the Investment Company Act [of 1940];

(vi) through (vii) No Change.

**(d) Determination of Whether Items of Value Are Included In Underwriting
Compensation**

(1) Pre-Offering Compensation

All items of value received and all arrangements entered into for the future receipt of an item of value by the underwriter and related persons during the period commencing 180 days immediately preceding the required filing date of the registration statement or similar document pursuant to [sub]paragraph (b)(4) above until the date of effectiveness or commencement of sales of the public offering will be considered to be underwriting compensation in connection with the public offering.

(2) Undisclosed and Post-Offering Compensation

All items of value received and all arrangements entered into for the future receipt of an item of value by any participating member that are not disclosed to [NASD] FINRA prior to the date of effectiveness or commencement of sales of a public offering, including items of value received subsequent to the public offering, are subject to post-offering review to determine whether such items of value are, in fact, underwriting compensation for the public offering.

(3) Date of Receipt of Securities

Securities of the issuer acquired by the underwriter and related persons will be considered to be received for purposes of [sub]paragraphs (d)(1) and (d)(5) as of the date of the:

(A) through (C) No Change.

(4) Definitions

For purposes of [sub]paragraph (d)(5) below, the following terms will have the meanings stated below.

(A) through (E) No Change.

(5) Exceptions From Underwriting Compensation

Notwithstanding [sub]paragraph (d)(1) above, the following items of value are excluded from underwriting compensation (but are subject to the lock-up restriction in [sub]paragraph (g)(1) below), provided that the member does not condition its participation in the public offering on an acquisition of securities under an exception and any securities purchased are purchased at the same price and with the same terms as the securities purchased by all other investors.

(A) Purchases and Loans by Certain Entities — Securities of the issuer purchased in a private placement or received as compensation for a loan or credit facility before the required filing date of the public offering pursuant to [sub]paragraph (b)(4) above by certain entities if:

(i) each entity:

a. either:

1. through 3. No Change.

4. is a bank as defined in Section 3(a)(6) of the Exchange Act or is a foreign bank that has been granted an exemption under this Rule; and

b. is a separate and distinct legal person from any member and is not registered as a broker[/]-dealer;

c. through e. No Change.

(ii) all entities related to each member in acquisitions that qualify for this exception do not acquire more than 25% of the issuer's total equity securities during the review period in [sub]paragraph (d)(1), calculated immediately following the transaction.

(B) Investments In and Loans to Certain Issuers — Securities of the issuer purchased in a private placement or received as compensation for a loan or credit facility before the required filing date of the public offering pursuant to [sub]paragraph (b)(4) above by certain entities if:

(i) each entity:

a. No Change.

b. is a separate and distinct legal person from any member and is not registered as a broker[/]-dealer;

c. through d. No Change.

(ii) through (iv) No Change.

(C) Private Placements With Institutional Investors — Securities of the issuer purchased in, or received as placement agent compensation

for, a private placement before the required filing date of the public offering pursuant to [sub]paragraph (b)(4) above if:

(i) through (ii) No Change.

(iii) underwriters and related persons did not, in the aggregate, purchase or receive as placement agent compensation more than 20% of the “total offering” (excluding purchases by any entity qualified under [sub]paragraph (d)(5)(A) above).

(D) Acquisitions and Conversions to Prevent Dilution — Securities of the issuer if:

(i) the securities were acquired as the result of:

a. a right of pre-emption that was granted in connection with securities that were purchased either:

1. in a private placement and the securities are not deemed by [NASD] FINRA to be underwriting compensation; or

2. No Change.

b. No Change.

c. the conversion of securities that have not been deemed by [NASD] FINRA to be underwriting compensation; and

(ii) through (iv) No Change.

(E) Purchases Based On A Prior Investment History — Purchases of securities of the issuer if:

(i) No Change.

(ii) an initial purchase of securities of the issuer was made at least two years and a second purchase was made more than 180 days before the required filing date of the public offering pursuant to [sub]paragraph (b)(4) above.

(e) Valuation of Non-Cash Compensation

For purposes of determining the value to be assigned to securities received as underwriting compensation, the following criteria and procedures shall be applied.

(1) Limitation on Securities Received Upon Exercise or Conversion of Another Security

An underwriter and related person may not receive a security (including securities in a unit), a warrant for a security, or a security convertible into another security as underwriting compensation in connection with a public offering unless:

(A) No Change.

(B) the security can be accurately valued, as required by [sub]paragraph (f)(2)(I) below.

(2) No Change.

(3) Valuation of Securities That Have an Exercise or Conversion Price

Options, warrants or convertible securities that have an exercise or conversion price (“warrants”) shall have a compensation value based on the following formula:

(A) through (C) No Change.

(D) multiplied by the number of securities underlying the warrants;

(E) through (G) No Change.

(H) provided, however, that, notwithstanding [sub]paragraph (e)(4) below, such warrants shall have a compensation value of at least .2% of the offering proceeds for each amount of securities that is up to 1% of the securities being offered to the public (excluding securities subject to an overallotment option).

(4) Valuation Discount For Securities With a Longer Resale

Restriction

A lower value equal to 10% of the calculated value shall be deducted for each 180-day period that the securities or underlying securities are restricted from sale or other disposition beyond the 180-day period of the lock-up restriction required by [sub]paragraph (g)(1) below. The transfers permitted during the lock-up restriction by subparagraphs (g)(2)(A)(iii) [–] through (iv) are not available for such securities.

(5) Valuation of Items of Value Acquired in Connection with a Fair Price Derivative or Debt Transaction

Any debt or derivative transaction acquired or entered into at a “fair price” as defined in [subsection] paragraph (a)(9) and item of value received in or receivable in the settlement, exercise or other terms of such debt or derivative transaction shall not have a compensation value for purposes of determining

underwriting compensation. If the actual price for the debt or derivative security is not a fair price, compensation will be calculated pursuant to this [subsection] paragraph (e) or based on the difference between the fair price and the actual price.

(f) Unreasonable Terms and Arrangements

(1) General

No member or person associated with a member shall participate in any manner in a public offering of securities after any arrangement proposed in connection with the public offering, or the terms and conditions relating thereto, has been determined to be unfair or unreasonable pursuant to this Rule or inconsistent with any By-Law or any [R]rule or regulation of [NASD] FINRA.

(2) Prohibited Arrangements

Without limiting the foregoing, the following terms and arrangements, when proposed in connection with a public offering of securities, shall be unfair and unreasonable.

(A) through (D) No Change.

(E) Any “tail fee” arrangement granted to the underwriter and related persons that has a duration of more than two years from the date the member’s services are terminated, in the event that the offering is not completed in accordance with the agreement between the issuer and the underwriter and the issuer subsequently consummates a similar transaction, except that a member may demonstrate on the basis of

information satisfactory to [NASD] FINRA that an arrangement of more than two years is not unfair or unreasonable under the circumstances.

(F) through (G) No Change.

(H) The terms or the exercise of the terms of an agreement for the receipt by the underwriter and related persons of underwriting compensation consisting of any option, warrant or convertible security that:

(i) No Change.

(ii) is not in compliance with [sub]paragraph (e)(1) above;

(iii) through (vii) No Change.

(I) through (J) No Change.

(K) The receipt by a member or person associated with a member, pursuant to an agreement entered into at any time before or after the effective date of a public offering of warrants, options, convertible securities or units containing such securities, of any compensation or expense reimbursement in connection with the exercise or conversion of any such warrant, option, or convertible security in any of the following circumstances:

(i) through (iii) No Change.

(iv) the exercise or conversion of the warrants, options or convertible securities is not solicited by the underwriter or related person, provided however, that any request for exercise or conversion will be presumed to be unsolicited unless the customer

states in writing that the transaction was solicited and designates in writing the broker[/]-dealer to receive compensation for the exercise or conversion.

(L) For a member to participate with an issuer in the public distribution of a non-underwritten issue of securities if the issuer hires persons primarily for the purpose of distributing or assisting in the distribution of the issue, or for the purpose of assisting in any way in connection with the underwriting, except to the extent in compliance with SEC[A] Rule 3a4-1 and applicable state law.

(M) For a member or person associated with a member to participate in a public offering of real estate investment trust securities, as defined in NASD Rule 2340(c)(4), unless the trustee will disclose in each annual report distributed to investors pursuant to Section 13(a) of the Exchange Act a per share estimated value of the trust securities, the method by which it was developed, and the date of the data used to develop the estimated value.

(g) Lock-Up Restriction on Securities

(1) Lock-Up Restriction

In any public equity offering, other than a public equity offering by an issuer that can meet the requirements in subparagraph[s] (b)(7)(C)(i) or (ii) any common or preferred stock, options, warrants, and other equity securities of the issuer, including debt securities convertible to or exchangeable for equity securities of the issuer, that are unregistered and acquired by an underwriter and

related person during 180 days prior to the required filing date, or acquired after the required filing date of the registration statement and deemed to be underwriting compensation by [NASD] FINRA, and securities excluded from underwriting compensation pursuant to [sub]paragraph (d)(5) above, shall not be sold during the offering, or sold, transferred, assigned, pledged, or hypothecated, or be the subject of any hedging, short sale, derivative, put, or call transaction that would result in the effective economic disposition of the securities by any person for a period of 180 days immediately following the date of effectiveness or commencement of sales of the public offering, except as provided in [sub]paragraph (g)(2) below.

(2) Exceptions to Lock-Up Restriction

Notwithstanding [sub]paragraph (g)(1) above, the following shall not be prohibited:

(A) the transfer of any security:

(i) No Change.

(ii) to any member participating in the offering and the officers or partners thereof, if all securities so transferred remain subject to the lock-up restriction in [sub]paragraph (g)(1) above for the remainder of the time period;

(iii) through (iv) No Change.

(v) that is not an item of value under subparagraphs

(c)(3)(B)(iii) [-] through (vii) above;

(vi) that is eligible for the limited filing requirement in [sub]paragraph (b)(6)(A)(iv)b₂ and has not been deemed to be underwriting compensation under the Rule;

(vii) that was previously but is no longer subject to the lock-up restriction in [sub]paragraph (g)(1) above in connection with a prior public offering (or a lock-up restriction in the predecessor rule), provided that if the prior restricted period has not been completed, the security will continue to be subject to such prior restriction until it is completed; or

(viii) that was acquired subsequent to the issuer's initial public offering in a transaction exempt from registration under [SEC] Securities Act Rule 144A; or

(B) the exercise or conversion of any security, if all securities received remain subject to the lock-up restriction in [sub]paragraph (g)(1) above for the remainder of the time period.

(h) Proceeds Directed to a Member

(1) Compliance With NASD Rule 2720

No member shall participate in a public offering of an issuer's securities where more than 10% of the net offering proceeds, not including underwriting compensation, are intended to be paid to participating members, unless the price at which an equity issue or the yield at which a debt issue is to be distributed to the public is established pursuant to NASD Rule 2720(c)(3).

(2) Disclosure

All offerings included within the scope of [sub]paragraph (h)(1) shall disclose in the underwriting or plan of distribution section of the registration statement, offering circular or other similar document that the offering is being made pursuant to the provisions of this subparagraph and, where applicable, the name of the member acting as qualified independent underwriter, and that such member is assuming the responsibilities of acting as a qualified independent underwriter in pricing the offering and conducting due diligence.

(3) Exception From Compliance

The provisions of subparagraphs (h)(1) and (2) shall not apply to:

(A) an offering otherwise subject to the provisions of NASD Rule 2720;

(B) an offering of securities exempt from registration with the [Commission] SEC under Section 3(a)(4) of the Securities Act [of 1933];

(C) No Change.

(D) an offering of securities subject to NASD Rule 2810, unless the net offering proceeds are intended to be paid to the above persons for the purpose of repaying loans, advances or other types of financing utilized to acquire an interest in a pre-existing company.

(i) Non-Cash Compensation

(1) Definitions

The terms “compensation,” “non-cash compensation” and “offeror” as used in this [Section (d)] paragraph (i) [of this Rule] shall have the following meanings:

(A) through (C) No Change.

(2) Restrictions on Non-Cash Compensation

In connection with the sale and distribution of a public offering of securities, no member or person associated with a member shall directly or indirectly accept or make payments or offers of payments of any non-cash compensation, except as provided in this provision. Non-cash compensation arrangements are limited to the following:

(A) through (B) No Change.

(C) Payment or reimbursement by offerors in connection with meetings held by an offeror or by a member for the purpose of training or education of associated persons of a member, provided that:

(i) associated persons obtain the member's prior approval to attend the meeting and attendance by a member's associated persons is not conditioned by the member on the achievement of a sales target or any other incentives pursuant to a non-cash compensation arrangement permitted by [sub]paragraph (d)(2)(D);

(ii) through (iii) No Change.

(iv) the payment or reimbursement by the issuer or affiliate of the issuer is not conditioned by the issuer or an affiliate of the issuer on the achievement of a sales target or any other non-cash compensation arrangement permitted by [sub]paragraph (d)(2)(D).

(D) No Change.

(E) Contributions by a non-member company or other member to a non-cash compensation arrangement between a member and its associated persons, provided that the arrangement meets the criteria in [sub]paragraph (d)(2)(D).

A member shall maintain records of all non-cash compensation received by the member or its associated persons in arrangements permitted by subparagraphs (d)(2)(C) [-] through (E). The records shall include: the names of the offerors, non-members or other members making the non-cash compensation contributions; the names of the associated persons participating in the arrangements; the nature and value of non-cash compensation received; the location of training and education meetings; and any other information that proves compliance by the member and its associated persons with subparagraphs (d)(2)(C) [-] through (E).

(j) Exemptions

Pursuant to the Rule 9600 Series, the appropriate [NASD] FINRA staff, for good cause shown after taking into consideration all relevant factors, may conditionally or unconditionally grant an exemption from any provision of this Rule to the extent that such exemption is consistent with the purposes of the Rule, the protection of investors, and the public interest.

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Text of Proposed New FINRA Rule 5190

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5190. Notification Requirements for Offering Participants

(a) General

This Rule 5190 sets forth the notice requirements applicable to all members participating in offerings of securities for purposes of monitoring compliance with the provisions of SEC Regulation M. In addition to the requirements under this Rule 5190, members also must comply with all applicable rules governing the withdrawal of quotations in accordance with SEC Regulation M.

(b) Definitions

For purposes of this Rule, the following terms shall have the meanings as set forth in Rules 100 and 101 of SEC Regulation M: “actively traded,” “affiliated purchaser,” “covered security,” “distribution,” “distribution participant,” “offering price,” “penalty bid,” “restricted period,” “selling security holder,” and “syndicate covering transaction.”

(c) Notice Relating to Distributions of Securities Subject to a Restricted Period Under SEC Regulation M

(1) A member acting as a manager (or in a similar capacity) of a distribution of any security that is a covered security subject to a restricted period under Rule 101 of SEC Regulation M shall provide written notice to FINRA, in such form as specified by FINRA, of the following:

(A) the member’s determination as to whether a one-day or five-day restricted period applies under Rule 101 of SEC Regulation M and the basis for such determination, including the contemplated date and time of the commencement of the restricted period, the security name and symbol, and identification of the distribution participants and affiliated purchasers,

no later than the business day prior to the first complete trading session of the applicable restricted period, unless later notification is necessary under specific circumstances;

(B) the pricing of the distribution, including the security name and symbol, the type of security, the number of shares offered, the offering price, the last sale before the distribution, the pricing basis, the SEC effective date and time, the trade date, the restricted period, and identification of the distribution participants and affiliated purchasers, no later than the close of business the next business day following the pricing of the distribution, unless later notification is necessary under specific circumstances; and

(C) the cancellation or postponement of any distribution for which prior notification of commencement of the restricted period has been submitted under paragraph (c)(1)(A) above, immediately upon the cancellation or postponement of such distribution.

If no member is acting as a manager (or in a similar capacity) of such distribution, then each member that is a distribution participant or affiliated purchaser shall provide the notice required under this paragraph (c)(1), unless another member has assumed responsibility in writing for compliance therewith.

(2) Any member that is an issuer or selling security holder in a distribution of any security that is a covered security subject to a restricted period under Rule 102 of SEC Regulation M shall comply with the notice requirements

of paragraph (c)(1), unless another member has assumed responsibility in writing for compliance therewith.

(d) Notice Relating to Distributions of “Actively Traded” Securities Under SEC Regulation M

A member acting as a manager (or in a similar capacity) of a distribution of any security that is considered an “actively traded” security under Rule 101 of SEC Regulation M shall provide written notice to FINRA, in such form as specified by FINRA, of the following:

(1) the member’s determination that no restricted period applies under Rule 101 of SEC Regulation M and the basis for such determination, including the security name and symbol, at least one business day prior to the pricing of the distribution, unless later notification is necessary under specific circumstances; and

(2) the pricing of the distribution, including the security name and symbol, the type of security, the number of shares offered, the offering price, the last sale before the distribution, the pricing basis, the SEC effective date and time, the trade date, and identification of the distribution participants and affiliated purchasers, no later than the close of business the next business day following the pricing of the distribution, unless later notification is necessary under specific circumstances.

If no member is acting as a manager (or in a similar capacity) of such distribution, then each member that is a distribution participant or an affiliated purchaser shall provide

the notice required under this paragraph (d), unless another member has assumed responsibility in writing for compliance therewith.

(e) Notice of Penalty Bids and Syndicate Covering Transactions in OTC

Equity Securities

A member imposing a penalty bid or engaging in a syndicate covering transaction in connection with an offering of an OTC Equity Security, as defined in NASD Rule 6610, pursuant to Rule 104 of SEC Regulation M shall, unless another member has assumed responsibility in writing for compliance with this paragraph (e), provide written notice to FINRA, in such form as specified by FINRA, of the following:

(1) the member's intention to conduct such activity, prior to imposing the penalty bid or engaging in the first syndicate covering transaction, including identification of the security and its symbol and the date such activity will occur; and

(2) confirmation that the member has imposed a penalty bid or engaged in a syndicate covering transaction, within one business day of completion of such activity, including identification of the security and its symbol, the total number of shares and the date(s) of such activity.

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Text of Proposed New FINRA Rule 6470

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6400. QUOTING AND TRADING IN OTC EQUITY SECURITIES

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6470. Withdrawal of Quotations in an OTC Equity Security in Compliance with SEC Regulation M

(a) A member that is a distribution participant, affiliated purchaser, selling security holder or issuer in a distribution of an OTC Equity Security that is a covered security subject to Rule 101 or 102 of SEC Regulation M and is entering quotations in such security shall, unless another member has assumed responsibility in writing for compliance with this Rule:

(1) withdraw all quotations in the OTC Equity Security to comply with the applicable restricted period under Rule 101 or 102 of SEC Regulation M; and

(2) not enter a stabilizing bid for the OTC Equity Security pursuant to Rule 104 of SEC Regulation M.

(b) For purposes of this Rule, the following terms shall have the meanings as defined in Rule 100 of SEC Regulation M: “affiliated purchaser,” “covered security,” “distribution,” “distribution participant,” “restricted period,” “selling security holder,” and “stabilizing.”

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**Proposed Amendments to NASD Rules
(per SR-FINRA-2008-021, FINRA proposed to adopt NASD Rules 4200A, 4619A and 6540 as FINRA Rules 6220, 6275 and 6540, respectively, in the Consolidated FINRA Rulebook)**

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4000A. NASD ALTERNATIVE DISPLAY FACILITY

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4200A. Definitions

(a) Unless the context requires otherwise, the terms used in the Rule 4000A and Rule 6000A Series shall have the meanings below. Terms not specifically defined below shall have the meaning in NASD's By-Laws and [R]rules and [SEC] Rule 600 of SEC Regulation NMS.

(1) through (15) No Change.

[(16) "SEC Rule 100," "SEC Rule 101," "SEC Rule 103," and "SEC Rule 104" mean the rules adopted by the Commission under Regulation M, and any amendments thereto.]

[(17) "Stabilizing bid" means the terms "stabilizing" or to "stabilize" as defined in SEC Rule 100.]

(18) through (19) redesignated as (16) through (17)

[(20) "Underwriting Activity Report" is a report provided by the Market Regulation Department of NASD in connection with a distribution of securities subject to SEC Rule 101 pursuant to NASD Rule 2710(b)(11).]

(b) For purposes of Rule[s] 4619A[, and 4623A], the following terms shall have the meanings as defined in [SEC] Rule 100 of SEC Regulation M: "affiliated purchaser," "covered security," "distribution," "distribution participant," ["independent bid," "net purchases," "passive market maker," "penalty bid," "reference security,"] "restricted period," and "selling security holder." ["subject security," and "syndicate covering transaction."]

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4619A. Withdrawal of Quotations

(a) through (e) No change.

(f) Excused withdrawal status may be granted by ADF Operations to a Registered Reporting ADF Market Maker that is a distribution participant, [or an] affiliated purchaser, selling security holder or issuer [in order to comply with] of a distribution of a security that is a covered security subject to a restricted period under [SEC] Rule 101 or 102 of SEC Regulation M [under the Act] on the following conditions:

(1) [A member acting as a manager (or in a similar capacity) of a distribution of a security that is a subject security or reference security under Rule 101 and any member that is a distribution participant or an affiliated purchaser in such a distribution that does not have a manager] Such Registered Reporting ADF Market Maker shall, unless another member has assumed responsibility in writing for compliance with this Rule, provide a written [notice] request to FINRA, in such form as specified by FINRA, to withdraw the Registered Reporting ADF Market Maker's quotations, [to ADF Operations and the Market Regulation Department of NASD] no later than the business day prior to the first [entire] complete trading session of the one-day or five-day restricted period under [SEC] Rule 101 or 102 of SEC Regulation M, unless later notification is necessary under the specific circumstances.

[(A) The notice required by subparagraph (f)(1) of this Rule shall be provided by submitting to ADF Operations a written request on behalf of each market maker that is a distribution participant or an affiliated purchaser to withdraw the market maker's quotations.]

[(B) The managing underwriter shall advise each Registered Reporting ADF Market Maker that it has been identified as a distribution

participant or an affiliated purchaser to ADF Operations and that its quotations will be automatically withdrawn, unless a market maker that is a distribution participant (or an affiliated purchaser of a distribution participant) notifies ADF Operations as required by subparagraph (f)(2), below.]

[(2) A Registered Reporting ADF Market Maker that has been identified to ADF Operations as a distribution participant (or an affiliated purchaser of a distribution participant) shall promptly notify ADF Operations and the manager of its intention not to participate in the prospective distribution in order to avoid having its quotations withdrawn.]

[(3)2] [A member acting as a manager (or in a similar capacity) of a distribution subject to subparagraph (f)(1) of this Rule] Such Registered Reporting ADF Market Maker shall submit a written request to [ADF Operations and the Market Regulation Department of NASD] FINRA, in such form as specified by FINRA, to rescind the Registered Reporting ADF Market Maker's excused withdrawal status [of distribution participants and affiliated purchasers], which request shall include the date and time of the pricing of the offering[,] and the offering price, [and the time the offering terminated, and, if not in writing, shall be confirmed in writing] no later than the close of business the [day the offering terminates] next business day following the pricing of the distribution. [The request referenced in this subparagraph may be submitted on the Underwriting Activity Report or by other written means.]

(g) No change.

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6500. OTC BULLETIN BOARD[®] SERVICE

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6540. Requirements Applicable to Market Makers

(a) through (c) No Change.

(d) OTCBB-eligible securities that meet the frequency-of-quotation requirement for the so called “piggyback” exception in SEC Rule 15c2-11(f)(3)(i) are identified in the Service as “active” securities. A member can commence market making in any active security by registering as a market maker through the service designated by NASD that permits OTCBB quotations. In all other instances, a member must follow the procedure contained in this Rule to become qualified as a market maker in a particular OTCBB-eligible security.¹

¹ No Change to footnote text.

(1) Permissible Quotation Entries

(A) through (C) No Change.

[(D) Any member that intends to be a distribution participant in a distribution of securities subject to SEC Rule 101, or is an affiliated purchaser in such distribution, and is entering quotations in an OTCBB-eligible security that is the subject security or reference security of such distribution shall, unless another member has assumed responsibility for compliance with this paragraph:]

[(i) provide written notice to Operations Department prior to the pricing of the distribution that includes the intended date and time of the pricing of the offering;]

[(ii) withdraw all quotations in the OTCBB-eligible security to comply with the applicable restricted period under SEC Rule 101 and not enter a stabilizing bid pursuant to SEC Rule 104 in the OTCBB;]

[(iii) provide written notice to the Corporate Financing Department of FINRA of its intention to impose a penalty bid or to conduct syndicate covering transactions pursuant to SEC Rule 104 prior to imposing the penalty bid or engaging in the first syndicate covering transaction. Such notice shall include information as to the date the penalty bid or first syndicate covering transaction will occur; and]

[(iv) provide written notice to the Market Regulation Department by the close of business on the day the offering terminates that includes the date and time of the pricing of the offering, the offering price, and the time the offering terminated.]

[(E) The written notice required by subparagraphs (d)(1)(D)(i), (iii) and (iv) of this Rule may be submitted on the Underwriting Activity Report provided by the Market Regulation Department.]

[(F) For purposes of subparagraph (d)(1)(D), SEC Rules 100, 101, 103 and 104 are rules of the Commission adopted under Regulation M and

the following terms shall have the meanings as defined in SEC Rule 100:

“affiliated purchaser,” “distribution,” “distribution participant,” “penalty bid,” “reference security,” “restricted period,” “stabilizing,” “subject security,” and “syndicate covering transaction.”]

(2) through (5) No Change.

(e) No Change.

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**Incorporated NYSE Rules to be Deleted In Their Entirety
From the Transitional Rulebook**

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Incorporated NYSE Rules

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[Rule 392. Notification Requirements for Offerings of Listed Securities]

Entire text deleted.

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