

OMB APPROVAL

OMB Number: 3235-0045
Expires: June 30, 2010
Estimated average burden
hours per response.....38

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

File No. SR - 2009 - 059

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 2130 (Approval Procedures for Day-Trading Accounts) and 2270 (Day-Trading Risk Disclosure Statement) in the Consolidated FINRA Rulebook

Contact Information

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

First Name Last Name
Title
E-mail
Telephone Fax

Signature

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

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

Date By
(Name)

(Title)

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

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

Add

Remove

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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

Add

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

1. Text of Proposed Rule Change

(a) Pursuant to the provisions of Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),¹ Financial Industry Regulatory Authority, Inc. (“FINRA”) (f/k/a National Association of Securities Dealers, Inc. (“NASD”)) is filing with the Securities and Exchange Commission (“SEC” or “Commission”) a proposed rule change to adopt NASD Rules 2360 (Approval Procedures for Day-Trading Accounts) and 2361 (Day-Trading Risk Disclosure Statement) as FINRA rules in the consolidated FINRA rulebook with minor changes. The proposed rule change would renumber NASD Rule 2360 as FINRA Rule 2130 and NASD Rule 2361 as FINRA Rule 2270 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 by FINRA of the proposed rule change, the corresponding NASD rules will be eliminated from the current FINRA rulebook.

(c) Not applicable.

2. Procedures of the Self-Regulatory Organization

At its meeting on August 16, 2009, the FINRA Board of Governors authorized the filing of the proposed rule change with the SEC. No other action by FINRA is necessary for the filing of the proposed rule change.

FINRA will announce the implementation date of the proposed rule change in a Regulatory Notice to be published no later than 90 days following Commission approval.

¹ 15 U.S.C. 78s(b)(1).

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 a new consolidated rulebook (“Consolidated FINRA Rulebook”),² FINRA is proposing to adopt NASD Rules 2360 and 2361 in the consolidated FINRA rulebook with minor changes, as FINRA Rules 2130 and 2270 respectively.

NASD Rules 2360 and 2361 focus on members’ obligations to disclose to non-institutional customers³ the basic risks of engaging in a “day-trading strategy” and to assess the appropriateness of day-trading strategies for such customers. The rules define a “day-trading strategy” as “an overall trading strategy characterized by the regular transmission by a customer of intra-day orders to effect both purchase and sale transactions in the same security or securities.”⁴ NASD Rule 2360 creates an obligation on members that promote a day-trading strategy regarding account-opening approval

² The current FINRA rulebook consists of (1) FINRA Rules; (2) NASD Rules; and (3) rules incorporated from NYSE (“Incorporated NYSE Rules”) (together, the NASD Rules and Incorporated NYSE Rules are referred to as the “Transitional Rulebook”). While the NASD Rules generally apply to all FINRA members, the Incorporated NYSE Rules apply only to those members of FINRA that are also members of the NYSE (“Dual Members”). The FINRA Rules apply to all FINRA members, unless such rules have a more limited application by their terms. For more information about the rulebook consolidation process, see Information Notice, March 12, 2008 (Rulebook Consolidation Process).

³ For purposes of these rules, the term “non-institutional customer” means a customer that does not qualify as an “institutional account” under NASD Rule 3110(c)(4). See NASD Rule 2360(f); NASD Rule 2361(d). FINRA is proposing to adopt NASD Rule 3110(c)(4) as FINRA Rule 4512(c). See Regulatory Notice 08-25 (May 2008).

⁴ See NASD Rule 2360(e); NASD Rule 2361(c).

procedures for non-institutional customers. NASD Rule 2361 creates an obligation on such members to disclose to non-institutional customers the unique risks of engaging in a day-trading strategy.

NASD Rule 2360 prohibits a member promoting a day-trading strategy from opening an account for a non-institutional customer unless, prior to opening the account, the member has furnished a risk disclosure statement (as described in NASD Rule 2361) and has (1) approved the customer's account for a day-trading strategy and prepared a record setting forth the basis for the approval; or (2) obtained from the customer a written agreement stating that the customer does not intend to use the account for engaging in a day-trading strategy. The rule further requires that, in order to approve a customer's account for a day-trading strategy, a member must have reasonable grounds to make a determination that a day-trading strategy is appropriate for the customer.⁵

NASD Rule 2361 requires members that promote a day-trading strategy to deliver to their non-institutional customers, prior to opening an account for such customers, a risk disclosure statement, as specified in paragraph (a) of the rule (the "Disclosure Statement").⁶ In addition, members that promote a day-trading strategy must post the Disclosure Statement on their Web sites in a clear and conspicuous manner. The

⁵ In making such determination, the rule requires a member to exercise reasonable diligence to ascertain the essential facts relative to the customer, including investment objectives, investment and trading experience and knowledge, financial situation, tax status, employment status, marital status, number of dependents and age.

⁶ The rule provides that, in lieu of the disclosure statement specified in the rule, a member may use an alternative disclosure statement, provided that it is substantially similar to the specified disclosure statement and is approved by FINRA's Advertising Department prior to use. See NASD Rule 2361(b).

Disclosure Statement includes seven specific points, described in more detail in the statement itself, addressing the following factors that a customer should consider before engaging in day-trading, as follows:

- (1) Day trading can be extremely risky.
- (2) Be cautious of claims of large profits from day trading.
- (3) Day trading requires knowledge of securities markets.
- (4) Day trading requires knowledge of a firm's operations.
- (5) Day trading will generate substantial commissions, even if the per trade cost is low.
- (6) Day trading on margin or short selling may result in losses beyond your initial investment.
- (7) Potential Registration Requirements (i.e., persons providing investment advice for others or managing securities accounts for others may need to register as an investment adviser or broker or dealer; such activities also may trigger state registration requirements).

Although these rules define “day-trading strategy,” neither defines “promoting a day-trading strategy.” NASD Rule 2360 does provide, however, that a firm will not be deemed to be “promoting a day-trading strategy” solely by engaging in the following activities:

- (1) promoting efficient execution services or lower execution costs based on multiple trades;
- (2) providing general investment research or advertising the high quality or prompt availability of such general research; and
- (3) having a Web site that provides general financial information or news or that allows the multiple entry of intra-day purchases and sales of the same securities.⁷

⁷ See NASD Rule 2360(g).

Additional guidance regarding as to what constitutes “promoting a day-trading strategy” can be found in the SEC Order approving the adoption of NASD Rule 2360 and 2361 (the “2000 SEC Approval Order”) and FINRA’s Notice announcing SEC approval of the rules (the “2000 FINRA Notice”).⁸ For example, the 2000 FINRA Notice provides:

A member will be subject to the day-trading rules if it affirmatively promotes day-trading activities or strategies through advertising, training seminars, or direct outreach programs. For instance, a firm generally will be subject to the new rules if its advertisements address the benefits of day trading, rapid-fire trading, or momentum trading, or encourages persons to trade or profit like a professional trader. A firm also will be subject to the new rules if it promotes its day-trading services through a third party. Moreover, the fact that many of a firm’s customers are engaging in a day-trading strategy will be relevant in determining whether a firm has promoted itself in this way.⁹

The 2000 SEC Approval Order and the 2000 FINRA Notice also describe a process by which a member may submit an advertisement to FINRA’s Advertising Department for review and guidance on whether the content of the advertisement constitutes “promoting a day-trading strategy.”¹⁰

⁸ See Securities Exchange Act Release No. 43021 (July 10, 2000), 65 FR 44082 (July 17, 2000) (Approval Order; File No. SR-NASD-99-41); Notice to Members 00-62 (September 2000) (announcing SEC approval of Rules 2360 and 2361).

⁹ See 2000 FINRA Notice. See also 2000 SEC Approval Order, 65 FR at 44082-83.

¹⁰ See 2000 SEC Approval Order, 65 FR at 44083; 2000 FINRA Notice at note 2.

Proposed FINRA Rule 2130

The proposed rule change would transfer NASD Rule 2360 with the following minor changes into the Consolidated FINRA Rulebook as FINRA Rule 2130. First, the proposed rule change would add Supplementary Material to clarify the concept of “promoting a day-trading strategy,” based on guidance provided in the 2000 FINRA Notice and the 2000 SEC Approval Order, as follows:

.01 Promoting a Day-Trading Strategy.

(a) A member shall be deemed to be “promoting a day-trading strategy” if it affirmatively endorses a “day-trading strategy,” as defined in paragraph (e) of this Rule, through advertising, its Web site, training seminars or direct outreach programs. For example, a member generally shall be deemed to be “promoting a day-trading strategy” if its advertisements address the benefits of day trading, rapid-fire trading, or momentum trading, or encourage persons to trade or profit like a professional trader. A member also shall be deemed to be “promoting a day-trading strategy” if it promotes its day-trading services through a third party. Moreover, the fact that many of a member’s customers are engaging in a day-trading strategy will be relevant in determining whether a member has promoted itself in this way.¹¹

Second, the proposed rule change would add Supplementary Material, based on guidance provided in the 2000 SEC Approval Order and the 2000 FINRA Notice, to codify the process by which a member may submit advertising materials to FINRA’s Advertising Department for review and guidance on whether the content of the advertisement constitutes “promoting a day-trading strategy,” as follows:

¹¹ To enhance the readability of the rule, the proposed rule change would relocate paragraph (g) of Rule 2360 regarding those activities that would not constitute “promoting a day-trading strategy,” as paragraph (b) to this new Supplementary Material .01.

.02 Review by FINRA’s Advertising Department. A member may submit its advertisements to FINRA’s Advertising Department for review and guidance on whether the content of the advertisement constitutes “promoting a day-trading strategy” for purposes of this Rule.

Third, the proposed rule change would add Supplementary Material to alert members of additional FINRA rules specifically addressing day-trading, including the rule addressing the Disclosure Statement (further discussed below) and rules regarding margin requirements.

Finally, the proposal would make minor changes to the rule to update cross-references and format.

Proposed FINRA Rule 2270

The proposed rule change would transfer NASD Rule 2361 with the following minor changes into the Consolidated FINRA Rulebook as FINRA Rule 2270.

First, the proposed rule change would slightly modify the rule’s existing provisions regarding form of delivery of documents. Currently, the rule provides that the disclosure statements may be provided to individuals either “in writing or electronically.” Because in some circumstances electronic documents may be considered a form of “writing,” the proposal would amend the text to clarify that the documents may be provided “in paper or electronic form.”

Second, to comport with its recommendations regarding NASD Rule 2360, the proposed rule change would add a statement to Rule 2270 that the term “promoting a day-trading strategy” shall have the meaning as provided in FINRA Rule 2130.

Third, the proposed rule change would add Supplementary Materials similar to those proposed to be added to FINRA Rule 2130, as discussed above, to codify the

process for review of advertising materials by FINRA's Advertising Department and alert members of additional FINRA rules specifically addressing day-trading.

Finally, the proposed rule change would make minor changes to the rule to update cross-references and format.

As noted above, FINRA will announce the implementation date of the proposed rule change in a Regulatory Notice to be published no later than 90 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,¹² which requires, among other things, that FINRA rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. FINRA continues to believe that the required approval process for day-trading accounts serves to protect investors engaged in day-trading activities, and the requisite disclosures in the Disclosure Statement increase investors' understanding of the risks associated with day trading. FINRA believes that the proposed rule change will provide greater clarity regarding these requirements.

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.

¹² 15 U.S.C. 78o-3(b)(6).

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.¹³

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

Not applicable.

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

Not applicable.

9. **Exhibits**

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

Exhibit 5. Text of the proposed rule change.

¹³ 15 U.S.C. 78s(b)(2).

EXHIBIT 1

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34- ; File No. SR-FINRA-2009-059)

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of Proposed Rule Change to Adopt NASD Rules 2360 and 2361 into the Consolidated Rulebook as FINRA Rules 2130 and 2270

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 to adopt NASD Rules 2360 (Approval Procedures for Day-Trading Accounts) and 2361 (Day-Trading Risk Disclosure Statement) as FINRA rules in the consolidated FINRA rulebook with minor changes. The proposed rule change would renumber NASD Rule 2360 as FINRA Rule 2130 and NASD Rule 2361 as FINRA Rule 2270 in the consolidated FINRA rulebook.

The text of the proposed rule change is available on FINRA’s Web site at <http://www.finra.org>, at the principal office of FINRA and at the Commission’s Public Reference Room.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

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

In its filing with the Commission, FINRA included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. FINRA has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

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

1. Purpose

As part of the process of developing a new consolidated rulebook ("Consolidated FINRA Rulebook"),³ FINRA is proposing to adopt NASD Rules 2360 and 2361 in the consolidated FINRA rulebook with minor changes, as FINRA Rules 2130 and 2270 respectively.

NASD Rules 2360 and 2361 focus on members' obligations to disclose to non-institutional customers⁴ the basic risks of engaging in a "day-trading strategy" and to

³ The current FINRA rulebook consists of (1) FINRA Rules; (2) NASD Rules; and (3) rules incorporated from NYSE ("Incorporated NYSE Rules") (together, the NASD Rules and Incorporated NYSE Rules are referred to as the "Transitional Rulebook"). While the NASD Rules generally apply to all FINRA members, the Incorporated NYSE Rules apply only to those members of FINRA that are also members of the NYSE ("Dual Members"). The FINRA Rules apply to all FINRA members, unless such rules have a more limited application by their terms. For more information about the rulebook consolidation process, see Information Notice, March 12, 2008 (Rulebook Consolidation Process).

⁴ For purposes of these rules, the term "non-institutional customer" means a customer that does not qualify as an "institutional account" under NASD Rule 3110(c)(4). See NASD Rule 2360(f); NASD Rule 2361(d). FINRA is proposing to adopt NASD Rule 3110(c)(4) as FINRA Rule 4512(c). See Regulatory Notice 08-25 (May 2008).

assess the appropriateness of day-trading strategies for such customers. The rules define a “day-trading strategy” as “an overall trading strategy characterized by the regular transmission by a customer of intra-day orders to effect both purchase and sale transactions in the same security or securities.”⁵ NASD Rule 2360 creates an obligation on members that promote a day-trading strategy regarding account-opening approval procedures for non-institutional customers. NASD Rule 2361 creates an obligation on such members to disclose to non-institutional customers the unique risks of engaging in a day-trading strategy.

NASD Rule 2360 prohibits a member promoting a day-trading strategy from opening an account for a non-institutional customer unless, prior to opening the account, the member has furnished a risk disclosure statement (as described in NASD Rule 2361) and has (1) approved the customer’s account for a day-trading strategy and prepared a record setting forth the basis for the approval; or (2) obtained from the customer a written agreement stating that the customer does not intend to use the account for engaging in a day-trading strategy. The rule further requires that, in order to approve a customer’s account for a day-trading strategy, a member must have reasonable grounds to make a determination that a day-trading strategy is appropriate for the customer.⁶

NASD Rule 2361 requires members that promote a day-trading strategy to deliver to their non-institutional customers, prior to opening an account for such customers, a

⁵ See NASD Rule 2360(e); NASD Rule 2361(c).

⁶ In making such determination, the rule requires a member to exercise reasonable diligence to ascertain the essential facts relative to the customer, including investment objectives, investment and trading experience and knowledge, financial situation, tax status, employment status, marital status, number of dependents and age.

risk disclosure statement, as specified in paragraph (a) of the rule (the “Disclosure Statement”).⁷ In addition, members that promote a day-trading strategy must post the Disclosure Statement on their Web sites in a clear and conspicuous manner. The Disclosure Statement includes seven specific points, described in more detail in the statement itself, addressing the following factors that a customer should consider before engaging in day-trading, as follows:

- (1) Day trading can be extremely risky.
- (2) Be cautious of claims of large profits from day trading.
- (3) Day trading requires knowledge of securities markets.
- (4) Day trading requires knowledge of a firm’s operations.
- (5) Day trading will generate substantial commissions, even if the per trade cost is low.
- (6) Day trading on margin or short selling may result in losses beyond your initial investment.
- (7) Potential Registration Requirements (*i.e.*, persons providing investment advice for others or managing securities accounts for others may need to register as an investment adviser or broker or dealer; such activities also may trigger state registration requirements).

Although these rules define “day-trading strategy,” neither defines “promoting a day-trading strategy.” NASD Rule 2360 does provide, however, that a firm will not be deemed to be “promoting a day-trading strategy” solely by engaging in the following activities:

- (1) promoting efficient execution services or lower execution costs based on multiple trades;

⁷ The rule provides that, in lieu of the disclosure statement specified in the rule, a member may use an alternative disclosure statement, provided that it is substantially similar to the specified disclosure statement and is approved by FINRA’s Advertising Department prior to use. See NASD Rule 2361(b).

- (2) providing general investment research or advertising the high quality or prompt availability of such general research; and
- (3) having a Web site that provides general financial information or news or that allows the multiple entry of intra-day purchases and sales of the same securities.⁸

Additional guidance regarding as to what constitutes “promoting a day-trading strategy” can be found in the SEC Order approving the adoption of NASD Rule 2360 and 2361 (the “2000 SEC Approval Order”) and FINRA’s Notice announcing SEC approval of the rules (the “2000 FINRA Notice”).⁹ For example, the 2000 FINRA Notice provides:

A member will be subject to the day-trading rules if it affirmatively promotes day-trading activities or strategies through advertising, training seminars, or direct outreach programs. For instance, a firm generally will be subject to the new rules if its advertisements address the benefits of day trading, rapid-fire trading, or momentum trading, or encourages persons to trade or profit like a professional trader. A firm also will be subject to the new rules if it promotes its day-trading services through a third party. Moreover, the fact that many of a firm’s customers are engaging in a day-trading strategy will be relevant in determining whether a firm has promoted itself in this way.¹⁰

The 2000 SEC Approval Order and the 2000 FINRA Notice also describe a process by which a member may submit an advertisement to FINRA’s Advertising Department for

⁸ See NASD Rule 2360(g).

⁹ See Securities Exchange Act Release No. 43021 (July 10, 2000), 65 FR 44082 (July 17, 2000) (Approval Order; File No. SR-NASD-99-41); Notice to Members 00-62 (September 2000) (announcing SEC approval of Rules 2360 and 2361).

¹⁰ See 2000 FINRA Notice. See also 2000 SEC Approval Order, 65 FR at 44082-83.

review and guidance on whether the content of the advertisement constitutes “promoting a day-trading strategy.”¹¹

Proposed FINRA Rule 2130

The proposed rule change would transfer NASD Rule 2360 with the following minor changes into the Consolidated FINRA Rulebook as FINRA Rule 2130. First, the proposed rule change would add Supplementary Material to clarify the concept of “promoting a day-trading strategy,” based on guidance provided in the 2000 FINRA Notice and the 2000 SEC Approval Order, as follows:

.01 Promoting a Day-Trading Strategy.

(a) A member shall be deemed to be “promoting a day-trading strategy” if it affirmatively endorses a “day-trading strategy,” as defined in paragraph (e) of this Rule, through advertising, its Web site, training seminars or direct outreach programs. For example, a member generally shall be deemed to be “promoting a day-trading strategy” if its advertisements address the benefits of day trading, rapid-fire trading, or momentum trading, or encourage persons to trade or profit like a professional trader. A member also shall be deemed to be “promoting a day-trading strategy” if it promotes its day-trading services through a third party. Moreover, the fact that many of a member’s customers are engaging in a day-trading strategy will be relevant in determining whether a member has promoted itself in this way.¹²

Second, the proposed rule change would add Supplementary Material, based on guidance provided in the 2000 SEC Approval Order and the 2000 FINRA Notice, to codify the process by which a member may submit advertising materials to FINRA’s

¹¹ See 2000 SEC Approval Order, 65 FR at 44083; 2000 FINRA Notice at note 2.

¹² To enhance the readability of the rule, the proposed rule change would relocate paragraph (g) of Rule 2360 regarding those activities that would not constitute “promoting a day-trading strategy,” as paragraph (b) to this new Supplementary Material .01.

Advertising Department for review and guidance on whether the content of the advertisement constitutes “promoting a day-trading strategy,” as follows:

.02 Review by FINRA’s Advertising Department. A member may submit its advertisements to FINRA’s Advertising Department for review and guidance on whether the content of the advertisement constitutes “promoting a day-trading strategy” for purposes of this Rule.

Third, the proposed rule change would add Supplementary Material to alert members of additional FINRA rules specifically addressing day-trading, including the rule addressing the Disclosure Statement (further discussed below) and rules regarding margin requirements.

Finally, the proposal would make minor changes to the rule to update cross-references and format.

Proposed FINRA Rule 2270

The proposed rule change would transfer NASD Rule 2361 with the following minor changes into the Consolidated FINRA Rulebook as FINRA Rule 2270.

First, the proposed rule change would slightly modify the rule’s existing provisions regarding form of delivery of documents. Currently, the rule provides that the disclosure statements may be provided to individuals either “in writing or electronically.” Because in some circumstances electronic documents may be considered a form of “writing,” the proposal would amend the text to clarify that the documents may be provided “in paper or electronic form.”

Second, to comport with its recommendations regarding NASD Rule 2360, the proposed rule change would add a statement to Rule 2270 that the term “promoting a day-trading strategy” shall have the meaning as provided in FINRA Rule 2130.

Third, the proposed rule change would add Supplementary Materials similar to those proposed to be added to FINRA Rule 2130, as discussed above, to codify the process for review of advertising materials by FINRA's Advertising Department and alert members of additional FINRA rules specifically addressing day-trading.

Finally, the proposed rule change would make minor changes to the rule to update cross-references and format.

As noted above, FINRA will announce the implementation date of the proposed rule change in a Regulatory Notice to be published no later than 90 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,¹³ which requires, among other things, that FINRA rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. FINRA continues to believe that the required approval process for day-trading accounts serves to protect investors engaged in day-trading activities, and the requisite disclosures in the Disclosure Statement increase investors' understanding of the risks associated with day trading. FINRA believes that the proposed rule change will provide greater clarity regarding these requirements.

¹³ 15 U.S.C. 78o-3(b)(6).

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

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

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

Written comments were neither solicited nor received.

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

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

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

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

IV. Solicitation of Comments

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

Electronic Comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or

- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-FINRA-2009-059 on the subject line.

Paper Comments:

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

All submissions should refer to File Number SR-FINRA-2009-059. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. 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-2009-059 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁴

Florence E. Harmon

Deputy Secretary

¹⁴ 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.

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Text of Proposed New FINRA Rules (Marked to Show Changes from NASD Rules 2360 and 2361; NASD Rules 2360 and 2361 to be Deleted in Their Entirety from the Transitional Rulebook)

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2000. DUTIES AND CONFLICTS

2100. TRANSACTIONS WITH CUSTOMERS

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[2360]2130. Approval Procedures for Day-Trading Accounts

(a) No member that is promoting a day-trading strategy, directly or indirectly, shall open an account for or on behalf of a non-institutional customer, unless, prior to opening the account, the member has furnished to the customer the risk disclosure statement set forth in Rule 2270[2361] and has:

(1) approved the customer's account for a day-trading strategy in accordance with the procedures set forth in paragraph (b) and prepared a record setting forth the basis on which the member has approved the customer's account; or

(2) received from the customer a written agreement that the customer does not intend to use the account for the purpose of engaging in a day-trading strategy, except that the member may not rely on such agreement if the member knows that the customer intends to use the account for the purpose of engaging in a day-trading strategy.

(b) In order to approve a customer's account for a day-trading strategy, a member shall have reasonable grounds for believing that the day-trading strategy is appropriate for the customer. In making this determination, the member shall exercise reasonable diligence to ascertain the essential facts relative to the customer, including:

(1) Investment objectives;

(2) Investment and trading experience and knowledge (e.g., number of years, size, frequency and type of transactions);

(3) Financial situation, including: estimated annual income from all sources, estimated net worth (exclusive of family residence), and estimated liquid net worth (cash, securities, other);

(4) Tax status;

(5) Employment status (name of employer, self-employed or retired);

(6) Marital status and number of dependents; and

(7) Age.

(c) If a member that is promoting a day-trading strategy opens an account for a non-institutional customer in reliance on a written agreement from the customer pursuant to paragraph (a)(2) and, following the opening of the account, knows that the customer is using the account for a day-trading strategy, then the member shall be required to approve the customer's account for a day-trading strategy in accordance with paragraph (a)(1) as soon as practicable, but in no event later than 10 days following the date that such member knows that the customer is using the account for such a strategy.

(d) Any record or written statement prepared or obtained by a member pursuant to this [r]Rule shall be preserved in accordance with NASD Rule 3110(a).

(e) For purposes of this [r]Rule, the following terms shall have the meanings specified below:

(1) [the term] “[d]Day-trading strategy” means an overall trading strategy characterized by the regular transmission by a customer of intra-day orders to effect both purchase and sale transactions in the same security or securities.

[(f)2] [For purposes of this rule, the term] “[n]Non-institutional customer” means a customer that does not qualify as an “institutional account” under NASD Rule 3110(c)(4).

[(g) A firm will not be deemed to be “promoting a day-trading strategy” for purposes of this rule solely by its engaging in the following activities:]

[(1) Promoting efficient execution services or lower execution costs based on multiple trades;]

[(2) Providing general investment research or advertising the high quality or prompt availability of such general research; and]

[(3) Having a Web site that provides general financial information or news or that allows the multiple entry of intra-day purchases and sales of the same securities.]

• • • Supplementary Material: -----

.01 Promoting a Day-Trading Strategy.

(a) A member shall be deemed to be “promoting a day-trading strategy” if it affirmatively endorses a “day-trading strategy,” as defined in paragraph (e) of this Rule, through advertising, its Web site, trading seminars or direct outreach programs. For example, a member generally shall be deemed to be “promoting a day-trading strategy” if

its advertisements address the benefits of day trading, rapid-fire trading, or momentum trading, or encourage persons to trade or profit like a professional trader. A member also shall be deemed to be “promoting a day-trading strategy” if it promotes its day-trading services through a third party. Moreover, the fact that many of a member’s customers are engaging in a day-trading strategy will be relevant in determining whether a member has promoted itself in this way.

(b) A member shall not be deemed to be “promoting a day-trading strategy” solely by its engaging in the following activities: (1) promoting efficient execution services or lower execution costs based on multiple trades; (2) providing general investment research or advertising the high quality or prompt availability of such general research; and (3) having a Web site that provides general financial information or news or that allows the multiple entry of intra-day purchases and sales of the same securities.

.02 Review by FINRA’s Advertising Department. A member may submit its advertisements to FINRA’s Advertising Department for review and guidance on whether the content of the advertisement constitutes “promoting a day-trading strategy” for purposes of this Rule.

.03 Additional Rules Regarding Day Trading. Members should be aware that, in addition to general rules that may apply, FINRA has additional rules that specifically address day trading. See, e.g., Rule 2270 (Day-Trading Risk Disclosure Statement); NASD Rule 2520(f)(8)(B) (Margin Requirements) and Incorporated NYSE Rule 431(f)(8)(B) (Margin Requirements) regarding special margin requirements for day trading.

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2200. COMMUNICATIONS AND DISCLOSURES

2260. Disclosures

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[2361]2270. Day-Trading Risk Disclosure Statement

(a) Except as provided in paragraph (b), no member that is promoting a day-trading strategy, directly or indirectly, shall open an account for or on behalf of a non-institutional customer unless, prior to opening the account, the member has furnished to each customer, individually, in paper or electronic form[writing or electronically], the disclosure statement specified in this paragraph (a). In addition, any member that is promoting a day-trading strategy, directly or indirectly, must post such disclosure statement on the member's Web site in a clear and conspicuous manner.

Day-Trading Risk Disclosure Statement

You should consider the following points before engaging in a day-trading strategy. For purposes of this notice, a “day-trading strategy” means an overall trading strategy characterized by the regular transmission by a customer of intra-day orders to effect both purchase and sale transactions in the same security or securities.

Day trading can be extremely risky. Day trading generally is not appropriate for someone of limited resources and limited investment or trading experience and low risk tolerance. You should be prepared to lose all of the funds that you use for day trading. In particular, you should not fund day-trading activities with retirement savings, student loans, second mortgages, emergency funds, funds set aside for purposes such as education or home ownership, or funds required to meet your living expenses. Further, certain evidence indicates that an investment of less than \$50,000 will significantly

impair the ability of a day trader to make a profit. Of course, an investment of \$50,000 or more will in no way guarantee success.

Be cautious of claims of large profits from day trading. You should be wary of advertisements or other statements that emphasize the potential for large profits in day trading. Day trading can also lead to large and immediate financial losses.

Day trading requires knowledge of securities markets. Day trading requires in-depth knowledge of the securities markets and trading techniques and strategies. In attempting to profit through day trading, you must compete with professional, licensed traders employed by securities firms. You should have appropriate experience before engaging in day trading.

Day trading requires knowledge of a firm's operations. You should be familiar with a securities firm's business practices, including the operation of the firm's order execution systems and procedures. Under certain market conditions, you may find it difficult or impossible to liquidate a position quickly at a reasonable price. This can occur, for example, when the market for a stock suddenly drops, or if trading is halted due to recent news events or unusual trading activity. The more volatile a stock is, the greater the likelihood that problems may be encountered in executing a transaction. In addition to normal market risks, you may experience losses due to system failures.

Day trading will generate substantial commissions, even if the per trade cost is low. Day trading involves aggressive trading, and generally you will pay commissions on each trade. The total daily commissions that you pay on your trades will add to your losses or significantly reduce your earnings. For instance, assuming that a trade costs \$16

and an average of 29 transactions are conducted per day, an investor would need to generate an annual profit of \$111,360 just to cover commission expenses.

Day trading on margin or short selling may result in losses beyond your initial investment. When you day trade with funds borrowed from a firm or someone else, you can lose more than the funds you originally placed at risk. A decline in the value of the securities that are purchased may require you to provide additional funds to the firm to avoid the forced sale of those securities or other securities in your account. Short selling as part of your day-trading strategy also may lead to extraordinary losses, because you may have to purchase a stock at a very high price in order to cover a short position.

Potential Registration Requirements. Persons providing investment advice for others or managing securities accounts for others may need to register as either an “Investment Adviser[Advisor]” under the Investment Advisers[Advisors] Act of 1940 or as a “Broker” or “Dealer” under the Securities Exchange Act of 1934. Such activities may also trigger state registration requirements.

(b) In lieu of providing the disclosure statement specified in paragraph (a), a member that is promoting a day-trading strategy may provide to the customer, individually, in paper or electronic form [writing or electronically], prior to opening the account, and post on its Web site, an alternative disclosure statement, provided that:

(1) The alternative disclosure statement shall be substantially similar to the disclosure statement specified in paragraph (a); and

(2) The alternative disclosure statement shall be filed with FINRA’s[the Association’s] Advertising Department (Department) for review at least 10 days

prior to use (or such shorter period as the Department may allow in particular circumstances) for approval and, if changes are recommended by FINRA[the Association], shall be withheld from use until any changes specified by FINRA[the Association] have been made or, if expressly disapproved, until the alternative disclosure statement has been refiled for, and has received, FINRA[Association] approval. The member must provide with each filing the anticipated date of first use.

(c) For purposes of this [r]Rule, the following terms shall have the meanings specified below:

(1) [term] “[d]Day-trading strategy” shall have the meaning provided in Rule [2360]2130(e).

(([d]2) [For purposes of this Rule, the term] “[n]Non-institutional customer” means a customer that does not qualify as an “institutional account” under NASD Rule 3110(c)(4).

(3) “Promoting a day-trading strategy” shall have the meaning provided in Rule 2130.01.

• • • Supplementary Material: -----

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