

## OMB APPROVAL

OMB Number: 3235-0045  
Expires: August 31, 2011  
Estimated average burden  
hours per response.....38

Page 1 of 30

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

File No. SR - 2009 - 087

Amendment No. 

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

Initial ☒ Amendment ☐ Withdrawal ☐

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

Rule

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

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

Exhibit 2 Sent As Paper Document ☐Exhibit 3 Sent As Paper Document ☐**Description**

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

Proposed Rule Change to Repeal NASD Rules 2760 and 2780, Incorporated NYSE Rules 2B and 411, and the Interpretation to Incorporated NYSE Rule 411(a)(ii)(5) as Part of the Process of Developing 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**

Add

Remove

View

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

**Exhibit 1 - Notice of Proposed Rule Change**

Add

Remove

View

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

View

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

☐

**Exhibit 3 - Form, Report, or Questionnaire**

Add

Remove

View

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

☐

**Exhibit 4 - Marked Copies**

Add

Remove

View

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

Remove

View

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

Remove

View

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 (“Exchange Act” or “SEA”),<sup>1</sup> 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 repeal NASD Rule 2760 (Offerings “At the Market”), NASD Rule 2780 (Solicitation of Purchases on an Exchange to Facilitate a Distribution of Securities), Incorporated NYSE Rule 2B (No Affiliation between Exchange and any Member Organization), Incorporated NYSE Rule 411 (Erroneous Reports) and the Interpretation to Incorporated NYSE Rule 411(a)(ii)(5) as part of the process of developing a consolidated FINRA rulebook.

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

(b) Not applicable.

(c) Not applicable.

**2. Procedures of the Self-Regulatory Organization**

At its meeting on July 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.

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

---

<sup>1</sup> 15 U.S.C. 78s(b)(1).

(a) Purpose

As part of the process of developing a new consolidated rulebook (“Consolidated FINRA Rulebook”),<sup>2</sup> FINRA is proposing to repeal NASD Rule 2760 (Offerings “At the Market”), NASD Rule 2780 (Solicitation of Purchases on an Exchange to Facilitate a Distribution of Securities), Incorporated NYSE Rule 2B (No Affiliation between Exchange and any Member Organization), Incorporated NYSE Rule 411 (Erroneous Reports) and the Interpretation to Incorporated NYSE Rule 411(a)(ii)(5).<sup>3</sup> The proposed rule change is described in detail below.

**NASD Rule 2760 (Offerings “At the Market”)**

NASD Rule 2760 provides that a member who is participating or who is otherwise financially interested in the primary or secondary distribution of any security which is not admitted to trading on a national securities exchange shall make no representation that such security is being offered to a customer “at the market” or at a price related to the market price, unless the member knows or has reasonable grounds to believe that a market for such security exists other than that made, created, or controlled by the member, or by any person for whom he is acting or with whom he is associated in

---

<sup>2</sup> 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).

<sup>3</sup> For convenience, Incorporated NYSE Rules generally are referred to as NYSE Rules.

such distribution, or by any person controlled by, controlling or under common control with the member.

When Rule 2760 was adopted,<sup>4</sup> its requirements duplicated those set forth in the SEC's early version of SEA Rule 15c1-8 (designated at the time of its adoption as Rule MC8).<sup>5</sup> Today, SEA Rule 15c1-8 is identical to its predecessor Rule MC8 except that it also applies to municipal securities dealers.<sup>6</sup> NASD Rule 2760 remains unchanged since its inception.

FINRA is proposing to delete NASD Rule 2760 from the FINRA rulebook because it duplicates SEA Rule 15c1-8. SEA Rule 15c1-8 explicitly makes it a manipulative, deceptive, or other fraudulent device or contrivance under Section 15(c) of the Exchange Act for a broker or dealer or municipal securities dealer who is participating or otherwise financially interested in the primary or secondary distribution of any security which is not admitted to trading on a national securities exchange to make a representation to a customer that a security is being offered "at the market" unless certain conditions (identical to those required by NASD Rule 2760) are satisfied. FINRA

---

<sup>4</sup> Rule 2760, formerly designated as Section 16 in Article III of the Rules of Fair Practice, was adopted in 1939 as part of FINRA's original rulebook. See Certificate of Incorporation and By-Laws, Rules of Fair Practice and Code of Procedure for Handling Trade Practice Complaints of National Association of Securities Dealers, Inc. (August 8, 1939).

<sup>5</sup> See Securities Exchange Act Release No. 1330 (August 4, 1937).

<sup>6</sup> See Securities Exchange Act Release No. 12468 (May 20, 1976), 41 FR 22820 (June 7, 1976) (Regulation of Municipal Securities Professionals and Transactions in Municipal Securities). FINRA Rule 0150(b) (Application of Rules to Exempted Securities Except Municipal Securities) provides that FINRA's rules do not apply to transactions in, and business activities relating to, municipal securities.

believes the SEA rule appropriately protects investors without duplication by NASD Rule 2760. Therefore, FINRA considers the transfer of NASD Rule 2760 to the Consolidated FINRA Rulebook to be unnecessary.

**NASD Rule 2780 (Solicitation of Purchases on an Exchange to Facilitate a Distribution of Securities)**

NASD Rule 2780 became effective in 1939, and its text has not been changed since its adoption. The rule essentially incorporated verbatim into the NASD rulebook SEA Rule 10b-2 (formerly Rule GB2), which was adopted by the SEC in 1937 to “eliminate the practice of stimulating exchange activity in securities which are the subject of distribution.”<sup>7</sup>

The rule prohibits a member that participates or is otherwise financially interested in a primary or secondary distribution of a security from paying or offering to pay compensation to another person for soliciting a purchase of any security of the issuer on a national securities exchange or for purchasing any such security for an account other than that of the member. The rule further prohibits a member from (1) selling or offering to sell or deliver such security where the member engaged in the aforementioned prohibited conduct or (2) causing the purchase or sale of such security by engaging in the prohibited conduct. Finally, the rule does not apply to any salary paid by a member to a person whose ordinary duties include the solicitation of orders on a national securities exchange, as long as the salary represents ordinary compensation and is not paid in whole or in part for the inducement of a purchase or sale of the security that is subject to the distribution of which the member is participating or financially interested.

---

<sup>7</sup> See Securities Exchange Act Release No. 1330 (August 4, 1937).

The SEC rescinded SEA Rule 10b-2 in 1993 finding, among other things, that it was duplicative of other provisions of the federal securities laws that more effectively address manipulative practices. More specifically, the SEC noted that the general antifraud provisions, including Section 17(a) of the Securities Act and Sections 9(a), 10(b) and 15(c) of the Exchange Act and Rule 10b-5 thereunder proscribe manipulative practices effected on and off exchanges, and had been found to apply to the practices covered by SEA Rule 10b-2.<sup>8</sup> The SEC also noted in particular that SEA Rule 10b-6 addressed the manipulative activity covered by SEA Rule 10b-2. SEA Rule 10b-6 was the predecessor to current Regulation M. That regulation, among other things, prohibits underwriters, broker-dealers and other distribution participants, during a restricted period prior to the completion of their participation in a distribution of securities, from directly or indirectly bidding for, purchasing, or attempting to induce any person to bid for or purchase the offered security absent an available exception. Regulation M is designed to prohibit activities that could artificially influence the market for the offered security, including for example, supporting an IPO price by creating the perception of scarcity of IPO stock or creating the perception of aftermarket demand. Thus, FINRA believes that the conduct covered by Regulation M and NASD Rule 2780 are very similar.

In considering the provisions of NASD Rule 2780 today, FINRA sees no significant utility to the rule in light of the applicable federal securities laws and FINRA Rules 2010 (Standards of Commercial Honor and Principles of Trade) and 2020 (Use of Manipulative, Deceptive or Other Fraudulent Devices). Because the manipulative

---

<sup>8</sup> See Securities Exchange Act Release No. 32100 (April 2, 1993), 58 FR 18145 (April 8, 1993).

conduct contemplated by NASD Rule 2780 can be reached by Regulation M, the federal securities laws referenced above and FINRA Rules 2010 and 2020, FINRA proposes that the provisions of NASD Rule 2780 not be adopted into the Consolidated FINRA Rulebook and be deleted.

**NYSE Rule 2B (No Affiliation between Exchange and any Member Organization)**

NYSE Rule 2B was adopted as part of the merger between the NYSE and Archipelago Holdings, Inc. The rule provides that, without prior SEC approval, the Exchange or any entity with which it is affiliated shall not, directly or indirectly, acquire or maintain an ownership interest in a member organization. In addition, the rule states that a member organization shall not be or become an affiliate<sup>9</sup> of the Exchange, or an affiliate of any affiliate of the Exchange; provided, however, that, if a director of an affiliate of a member organization serves as a director of NYSE Euronext, this fact shall not cause such member organization to be an affiliate of the Exchange, or an affiliate of an affiliate of the Exchange. The rule further provides that nothing in the rule shall prohibit a member organization from acquiring or holding an equity interest in NYSE Euronext that is permitted by the ownership limitations contained in the certificate of incorporation of NYSE Euronext.<sup>10</sup> There is no comparable NASD rule.

The rule was adopted to address concerns by the SEC regarding the potential for unfair competition and conflicts of interest between an exchange's self-regulatory

---

<sup>9</sup> The rule provides that the term "affiliate" shall have the meaning specified in SEA Rule 12b-2. See 17 CFR 240.12b-2.

<sup>10</sup> See Securities Exchange Act Release No. 55293 (February 14, 2007), 72 FR 8033 (February 22, 2007) (Approval Order; File No. NYSE-2006-120) (Amendments to Rule 2B relating to the combination of NYSE Group, Inc. and Euronext N.V.).

obligations and its commercial interests that could exist if an exchange were to otherwise become affiliated with one of its members, as well as the potential for unfair competitive advantage that the affiliated member could have by virtue of informational or operational advantages, or the ability to receive preferential treatment.<sup>11</sup>

The NYSE has subsequently amended its version of Rule 2B in response to concerns by the SEC regarding certain other of its affiliate relationships.<sup>12</sup> FINRA did not make conforming amendments to its version of Rule 2B since the NYSE's changes addressed specific arrangements between the NYSE and its affiliates in its capacity as an exchange.

FINRA is proposing to delete NYSE Rule 2B from the FINRA rulebook. This rule specifically addresses relationships between the Exchange and its affiliates. The SEC's concerns regarding potential conflicts of interest and unfair competitive advantage in affiliate relationships between an exchange and a member are not applicable to FINRA because it does not operate as an exchange. As such, FINRA considers the transfer of NYSE Rule 2B to the Consolidated FINRA Rulebook to be unnecessary.

#### **NYSE Rule 411 (Erroneous Reports)**

NYSE Rule 411 addresses three separate issues. First, paragraph (a) of the rule addresses situations where a member has rendered a report that differs from the terms of an executed trade. Second, paragraph (b)(1) sets forth a member's obligations when

---

<sup>11</sup> See Securities Exchange Act Release No. 53382 (February 27, 2006), 71 FR 11251 (March 6, 2006) (Approval Order; File No. SR-NYSE-2005-77).

<sup>12</sup> See Securities Exchange Act Release No. 59011 (November 24, 2008), 73 FR 73360 (December 2, 2008) (Approval Order; File No. SR-NYSE-2008-122). See also e.g., Securities Exchange Act Release No. 59281 (January 22, 2009), 74 FR 5014 (January 28, 2009) (Approval Order; File No. SR-NYSE-2008-120).

handling separate odd-lot orders. Third, paragraph (b)(2) requires members to record securities transactions in accounts no later than settlement date. Each of these provisions is discussed separately below.

(1) NYSE Rule 411(a): Erroneous Reports

NYSE Rule 411(a)(i) provides that the price and size of an “actual auction market trade” are binding, notwithstanding that the customer has received an erroneous report with respect to the terms of the trade.<sup>13</sup> Because some customers may not want corrected reports offered by a member that has rendered an erroneous report, the rule includes two alternative approaches in cases where the wrong price and/or size has been reported to the customer.<sup>14</sup> Under the first alternative, the customer may take the actual terms of the auction market trade, and the trade clears and settles in accordance with the terms of the auction market trade. Under the second alternative, the customer may treat the terms of the erroneous report as though they were the terms of the actual auction market trade, provided certain conditions are met, and the member may treat the erroneous report as an erroneous trade, assuming any losses or paying any profit to the New York Stock Exchange Foundation.<sup>15</sup> NYSE Rule 411(a)(iii) provides that a report is not binding and must be rescinded if an order was not actually executed but was erroneously reported as

---

<sup>13</sup> See NYSE Information Memo 01-38 (November 6, 2001).

<sup>14</sup> NYSE members and member organizations must always accept a corrected report. See NYSE Information Memo 02-07 (February 5, 2002).

<sup>15</sup> The NYSE has adopted an Interpretation to paragraph (a)(ii)(5) regarding the calculation of profits in these circumstances. Although the interpretation relates to NYSE Rule 411(a)(ii)(5), this Interpretation appears in the Transitional Rulebook and in NYSE’s Rulebook under NYSE Rule 410. FINRA is proposing to delete the Interpretation and not include it in the Consolidated FINRA Rulebook.

having been executed. An order that was executed, but was erroneously reported as not having been executed, is binding. Finally, NYSE Rule 411(a)(iv) includes a provision addressing erroneous reports by floor brokers involving “not held” orders.

(2) NYSE Rule 411(b)(1): “Bunching” Odd-Lot Orders

NYSE Rule 411(b)(1) includes two separate provisions regarding the aggregation of multiple odd-lot orders. First, the rule prohibits a member from combining orders given by different customers to buy or sell odd-lots of the same stock into a round-lot order without the prior approval of the customers. Second, the rule states that when a customer “gives, either for his own account, for various accounts in which he has an actual monetary interest, or for accounts over which such person is exercising investment discretion, buy or sell odd-lot orders which aggregate 100 shares or more,” the member may not accept the orders unless they are, as far as possible, consolidated into round lots, except that orders marked “long” need not be consolidated with selling orders marked “short.” An exception from the consolidation requirement is available once per trading day by a person exercising investment discretion over multiple accounts if the odd-lot orders, in the aggregate, total fewer than 300 shares.

(3) NYSE Rule 411(b)(2): Recording of Transactions in Accounts

NYSE Rule 411(b)(2) requires that transactions in securities be recorded in accounts no later than settlement date. The rule originally was intended to ensure that interest was properly posted for each transaction and required that transactions be recorded and interest be computed as of settlement date.<sup>16</sup> The NYSE amended the rule into its current form in 1982 to remove the language regarding the calculation of interest and to permit firms to record securities transactions at any time prior to settlement date.<sup>17</sup>

FINRA is proposing not to incorporate NYSE Rule 411 or the Interpretation to NYSE Rule 411(a)(ii)(5) into the Consolidated FINRA Rulebook. The provisions in the rule related to erroneous reports are specific to the NYSE marketplace, and certain of the provisions relate solely to transactions by floor brokers. Paragraph (b)(1), which is related to the “bunching” of odd-lot orders, is similarly focused on the NYSE marketplace, which maintains a separate system for the execution of odd-lot orders.<sup>18</sup> Because FINRA does not maintain a marketplace, a rule addressing the aggregation of orders for execution is unnecessary.<sup>19</sup> Finally, FINRA is proposing that NYSE Rule

---

<sup>16</sup> See Securities Exchange Act Release No. 18644 (April 14, 1982), 47 FR 17701 (April 23, 1982) (Notice of Filing; File No. SR-NYSE-82-7).

<sup>17</sup> See Securities Exchange Act Release No. 18778 (May 28, 1982), 47 FR 24900 (June 8, 1982) (Approval Order; File No. SR-NYSE-82-7).

<sup>18</sup> See NYSE Rule 124 (Odd-Lot Orders). FINRA did not incorporate NYSE Rule 124 into the Transitional Rulebook because it is solely concerned with the NYSE marketplace.

<sup>19</sup> Although FINRA does not have a rule addressing the bunching of odd-lot orders, FINRA’s trade reporting rules have separate reporting requirements for round-lot and odd-lot transactions. In addition, the aggregation of individual executions (both round-lot and odd-lot executions) for trade reporting purposes is prohibited. See, e.g., FINRA Rules 6282(f), 6380A(f), 6380B(h).

411(b)(2) not be included in the Consolidated FINRA Rulebook because the rule is duplicative of existing SEC recordkeeping requirements and longstanding SEC guidance.<sup>20</sup>

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,<sup>21</sup> which requires, among other things, that FINRA rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. FINRA believes that the proposed rule change would streamline and improve FINRA's rulebook by eliminating rules that are duplicative of federal rules and regulations and provisions that are specific to the NYSE and its marketplace.

**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.

---

<sup>20</sup> See 17 CFR 240.17a-3(a)(3); see also Securities Exchange Act Release No. 10756 (April 26, 1974) ("Transactions involving the purchase and sale of securities should be posted to the customer's ledger accounts . . . no later than settlement date.").

<sup>21</sup> 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.<sup>22</sup>

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.

---

<sup>22</sup> 15 U.S.C. 78s(b)(2).

EXHIBIT 1

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34- ; File No. SR-FINRA-2009-087

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of Proposed Rule Change to Repeal NASD Rules 2760 and 2780, Incorporated NYSE Rules 2B and 411, and the Interpretation to Incorporated NYSE Rule 411(a)(ii)(5) as Part of the Process of Developing the Consolidated FINRA Rulebook

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on , Financial Industry Regulatory Authority, Inc. (“FINRA”) 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 repeal NASD Rule 2760 (Offerings “At the Market”), NASD Rule 2780 (Solicitation of Purchases on an Exchange to Facilitate a Distribution of Securities), Incorporated NYSE Rule 2B (No Affiliation between Exchange and any Member Organization), Incorporated NYSE Rule 411 (Erroneous Reports) and the Interpretation to Incorporated NYSE Rule 411(a)(ii)(5) as part of the process of developing a consolidated FINRA rulebook.

---

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

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.

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"),<sup>3</sup> FINRA is proposing to repeal NASD Rule 2760 (Offerings "At the Market"), NASD Rule 2780 (Solicitation of Purchases on an Exchange to Facilitate a Distribution of Securities), Incorporated NYSE Rule 2B (No Affiliation between Exchange and any Member Organization), Incorporated NYSE Rule 411 (Erroneous

---

<sup>3</sup> 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).

Reports) and the Interpretation to Incorporated NYSE Rule 411(a)(ii)(5).<sup>4</sup> The proposed rule change is described in detail below.

NASD Rule 2760 (Offerings “At the Market”)

NASD Rule 2760 provides that a member who is participating or who is otherwise financially interested in the primary or secondary distribution of any security which is not admitted to trading on a national securities exchange shall make no representation that such security is being offered to a customer “at the market” or at a price related to the market price, unless the member knows or has reasonable grounds to believe that a market for such security exists other than that made, created, or controlled by the member, or by any person for whom he is acting or with whom he is associated in such distribution, or by any person controlled by, controlling or under common control with the member.

When Rule 2760 was adopted,<sup>5</sup> its requirements duplicated those set forth in the SEC’s early version of SEA Rule 15c1-8 (designated at the time of its adoption as Rule MC8).<sup>6</sup> Today, SEA Rule 15c1-8 is identical to its predecessor Rule MC8 except that it

---

<sup>4</sup> For convenience, Incorporated NYSE Rules generally are referred to as NYSE Rules.

<sup>5</sup> Rule 2760, formerly designated as Section 16 in Article III of the Rules of Fair Practice, was adopted in 1939 as part of FINRA’s original rulebook. See Certificate of Incorporation and By-Laws, Rules of Fair Practice and Code of Procedure for Handling Trade Practice Complaints of National Association of Securities Dealers, Inc. (August 8, 1939).

<sup>6</sup> See Securities Exchange Act Release No. 1330 (August 4, 1937).

also applies to municipal securities dealers.<sup>7</sup> NASD Rule 2760 remains unchanged since its inception.

FINRA is proposing to delete NASD Rule 2760 from the FINRA rulebook because it duplicates SEA Rule 15c1-8. SEA Rule 15c1-8 explicitly makes it a manipulative, deceptive, or other fraudulent device or contrivance under Section 15(c) of the Exchange Act for a broker or dealer or municipal securities dealer who is participating or otherwise financially interested in the primary or secondary distribution of any security which is not admitted to trading on a national securities exchange to make a representation to a customer that a security is being offered “at the market” unless certain conditions (identical to those required by NASD Rule 2760) are satisfied. FINRA believes the SEA rule appropriately protects investors without duplication by NASD Rule 2760. Therefore, FINRA considers the transfer of NASD Rule 2760 to the Consolidated FINRA Rulebook to be unnecessary.

NASD Rule 2780 (Solicitation of Purchases on an Exchange to Facilitate a Distribution of Securities)

NASD Rule 2780 became effective in 1939, and its text has not been changed since its adoption. The rule essentially incorporated verbatim into the NASD rulebook SEA Rule 10b-2 (formerly Rule GB2), which was adopted by the SEC in 1937 to

---

<sup>7</sup> See Securities Exchange Act Release No. 12468 (May 20, 1976), 41 FR 22820 (June 7, 1976) (Regulation of Municipal Securities Professionals and Transactions in Municipal Securities). FINRA Rule 0150(b) (Application of Rules to Exempted Securities Except Municipal Securities) provides that FINRA’s rules do not apply to transactions in, and business activities relating to, municipal securities.

“eliminate the practice of stimulating exchange activity in securities which are the subject of distribution.”<sup>8</sup>

The rule prohibits a member that participates or is otherwise financially interested in a primary or secondary distribution of a security from paying or offering to pay compensation to another person for soliciting a purchase of any security of the issuer on a national securities exchange or for purchasing any such security for an account other than that of the member. The rule further prohibits a member from (1) selling or offering to sell or deliver such security where the member engaged in the aforementioned prohibited conduct or (2) causing the purchase or sale of such security by engaging in the prohibited conduct. Finally, the rule does not apply to any salary paid by a member to a person whose ordinary duties include the solicitation of orders on a national securities exchange, as long as the salary represents ordinary compensation and is not paid in whole or in part for the inducement of a purchase or sale of the security that is subject to the distribution of which the member is participating or financially interested.

The SEC rescinded SEA Rule 10b-2 in 1993 finding, among other things, that it was duplicative of other provisions of the federal securities laws that more effectively address manipulative practices. More specifically, the SEC noted that the general antifraud provisions, including Section 17(a) of the Securities Act and Sections 9(a), 10(b) and 15(c) of the Exchange Act and Rule 10b-5 thereunder proscribe manipulative practices effected on and off exchanges, and had been found to apply to the practices covered by SEA Rule 10b-2.<sup>9</sup> The SEC also noted in particular that SEA Rule 10b-6

---

<sup>8</sup> See Securities Exchange Act Release No. 1330 (August 4, 1937).

<sup>9</sup> See Securities Exchange Act Release No. 32100 (April 2, 1993), 58 FR 18145 (April 8, 1993).

addressed the manipulative activity covered by SEA Rule 10b-2. SEA Rule 10b-6 was the predecessor to current Regulation M. That regulation, among other things, prohibits underwriters, broker-dealers and other distribution participants, during a restricted period prior to the completion of their participation in a distribution of securities, from directly or indirectly bidding for, purchasing, or attempting to induce any person to bid for or purchase the offered security absent an available exception. Regulation M is designed to prohibit activities that could artificially influence the market for the offered security, including for example, supporting an IPO price by creating the perception of scarcity of IPO stock or creating the perception of aftermarket demand. Thus, FINRA believes that the conduct covered by Regulation M and NASD Rule 2780 are very similar.

In considering the provisions of NASD Rule 2780 today, FINRA sees no significant utility to the rule in light of the applicable federal securities laws and FINRA Rules 2010 (Standards of Commercial Honor and Principles of Trade) and 2020 (Use of Manipulative, Deceptive or Other Fraudulent Devices). Because the manipulative conduct contemplated by NASD Rule 2780 can be reached by Regulation M, the federal securities laws referenced above and FINRA Rules 2010 and 2020, FINRA proposes that the provisions of NASD Rule 2780 not be adopted into the Consolidated FINRA Rulebook and be deleted.

NYSE Rule 2B (No Affiliation between Exchange and any Member Organization)

NYSE Rule 2B was adopted as part of the merger between the NYSE and Archipelago Holdings, Inc. The rule provides that, without prior SEC approval, the Exchange or any entity with which it is affiliated shall not, directly or indirectly, acquire or maintain an ownership interest in a member organization. In addition, the rule states

that a member organization shall not be or become an affiliate<sup>10</sup> of the Exchange, or an affiliate of any affiliate of the Exchange; provided, however, that, if a director of an affiliate of a member organization serves as a director of NYSE Euronext, this fact shall not cause such member organization to be an affiliate of the Exchange, or an affiliate of an affiliate of the Exchange. The rule further provides that nothing in the rule shall prohibit a member organization from acquiring or holding an equity interest in NYSE Euronext that is permitted by the ownership limitations contained in the certificate of incorporation of NYSE Euronext.<sup>11</sup> There is no comparable NASD rule.

The rule was adopted to address concerns by the SEC regarding the potential for unfair competition and conflicts of interest between an exchange's self-regulatory obligations and its commercial interests that could exist if an exchange were to otherwise become affiliated with one of its members, as well as the potential for unfair competitive advantage that the affiliated member could have by virtue of informational or operational advantages, or the ability to receive preferential treatment.<sup>12</sup>

The NYSE has subsequently amended its version of Rule 2B in response to concerns by the SEC regarding certain other of its affiliate relationships.<sup>13</sup> FINRA did

---

<sup>10</sup> The rule provides that the term "affiliate" shall have the meaning specified in SEA Rule 12b-2. See 17 CFR 240.12b-2.

<sup>11</sup> See Securities Exchange Act Release No. 55293 (February 14, 2007), 72 FR 8033 (February 22, 2007) (Approval Order; File No. NYSE-2006-120) (Amendments to Rule 2B relating to the combination of NYSE Group, Inc. and Euronext N.V.).

<sup>12</sup> See Securities Exchange Act Release No. 53382 (February 27, 2006), 71 FR 11251 (March 6, 2006) (Approval Order; File No. SR-NYSE-2005-77).

<sup>13</sup> See Securities Exchange Act Release No. 59011 (November 24, 2008), 73 FR 73360 (December 2, 2008) (Approval Order; File No. SR-NYSE-2008-122). See also e.g., Securities Exchange Act Release No. 59281 (January 22, 2009), 74 FR 5014 (January 28, 2009) (Approval Order; File No. SR-NYSE-2008-120).

not make conforming amendments to its version of Rule 2B since the NYSE's changes addressed specific arrangements between the NYSE and its affiliates in its capacity as an exchange.

FINRA is proposing to delete NYSE Rule 2B from the FINRA rulebook. This rule specifically addresses relationships between the Exchange and its affiliates. The SEC's concerns regarding potential conflicts of interest and unfair competitive advantage in affiliate relationships between an exchange and a member are not applicable to FINRA because it does not operate as an exchange. As such, FINRA considers the transfer of NYSE Rule 2B to the Consolidated FINRA Rulebook to be unnecessary.

NYSE Rule 411 (Erroneous Reports)

NYSE Rule 411 addresses three separate issues. First, paragraph (a) of the rule addresses situations where a member has rendered a report that differs from the terms of an executed trade. Second, paragraph (b)(1) sets forth a member's obligations when handling separate odd-lot orders. Third, paragraph (b)(2) requires members to record securities transactions in accounts no later than settlement date. Each of these provisions is discussed separately below.

(1) NYSE Rule 411(a): Erroneous Reports

NYSE Rule 411(a)(i) provides that the price and size of an "actual auction market trade" are binding, notwithstanding that the customer has received an erroneous report with respect to the terms of the trade.<sup>14</sup> Because some customers may not want corrected reports offered by a member that has rendered an erroneous report, the rule includes two alternative approaches in cases where the wrong price and/or size has been reported to the

---

<sup>14</sup> See NYSE Information Memo 01-38 (November 6, 2001).

customer.<sup>15</sup> Under the first alternative, the customer may take the actual terms of the auction market trade, and the trade clears and settles in accordance with the terms of the auction market trade. Under the second alternative, the customer may treat the terms of the erroneous report as though they were the terms of the actual auction market trade, provided certain conditions are met, and the member may treat the erroneous report as an erroneous trade, assuming any losses or paying any profit to the New York Stock Exchange Foundation.<sup>16</sup> NYSE Rule 411(a)(iii) provides that a report is not binding and must be rescinded if an order was not actually executed but was erroneously reported as having been executed. An order that was executed, but was erroneously reported as not having been executed, is binding. Finally, NYSE Rule 411(a)(iv) includes a provision addressing erroneous reports by floor brokers involving “not held” orders.

(2) NYSE Rule 411(b)(1): “Bunching” Odd-Lot Orders

NYSE Rule 411(b)(1) includes two separate provisions regarding the aggregation of multiple odd-lot orders. First, the rule prohibits a member from combining orders given by different customers to buy or sell odd-lots of the same stock into a round-lot order without the prior approval of the customers. Second, the rule states that when a customer “gives, either for his own account, for various accounts in which he has an actual monetary interest, or for accounts over which such person is exercising investment

---

<sup>15</sup> NYSE members and member organizations must always accept a corrected report. See NYSE Information Memo 02-07 (February 5, 2002).

<sup>16</sup> The NYSE has adopted an Interpretation to paragraph (a)(ii)(5) regarding the calculation of profits in these circumstances. Although the interpretation relates to NYSE Rule 411(a)(ii)(5), this Interpretation appears in the Transitional Rulebook and in NYSE’s Rulebook under NYSE Rule 410. FINRA is proposing to delete the Interpretation and not include it in the Consolidated FINRA Rulebook.

discretion, buy or sell odd-lot orders which aggregate 100 shares or more,” the member may not accept the orders unless they are, as far as possible, consolidated into round lots, except that orders marked “long” need not be consolidated with selling orders marked “short.” An exception from the consolidation requirement is available once per trading day by a person exercising investment discretion over multiple accounts if the odd-lot orders, in the aggregate, total fewer than 300 shares.

(3) NYSE Rule 411(b)(2): Recording of Transactions in Accounts

NYSE Rule 411(b)(2) requires that transactions in securities be recorded in accounts no later than settlement date. The rule originally was intended to ensure that interest was properly posted for each transaction and required that transactions be recorded and interest be computed as of settlement date.<sup>17</sup> The NYSE amended the rule into its current form in 1982 to remove the language regarding the calculation of interest and to permit firms to record securities transactions at any time prior to settlement date.<sup>18</sup>

FINRA is proposing not to incorporate NYSE Rule 411 or the Interpretation to NYSE Rule 411(a)(ii)(5) into the Consolidated FINRA Rulebook. The provisions in the rule related to erroneous reports are specific to the NYSE marketplace, and certain of the provisions relate solely to transactions by floor brokers. Paragraph (b)(1), which is related to the “bunching” of odd-lot orders, is similarly focused on the NYSE

---

<sup>17</sup> See Securities Exchange Act Release No. 18644 (April 14, 1982), 47 FR 17701 (April 23, 1982) (Notice of Filing; File No. SR-NYSE-82-7).

<sup>18</sup> See Securities Exchange Act Release No. 18778 (May 28, 1982), 47 FR 24900 (June 8, 1982) (Approval Order; File No. SR-NYSE-82-7).

marketplace, which maintains a separate system for the execution of odd-lot orders.<sup>19</sup>

Because FINRA does not maintain a marketplace, a rule addressing the aggregation of orders for execution is unnecessary.<sup>20</sup> Finally, FINRA is proposing that NYSE Rule 411(b)(2) not be included in the Consolidated FINRA Rulebook because the rule is duplicative of existing SEC recordkeeping requirements and longstanding SEC guidance.<sup>21</sup>

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,<sup>22</sup> which requires, among other things, that FINRA rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. FINRA believes that the proposed rule change would streamline and improve

---

<sup>19</sup> See NYSE Rule 124 (Odd-Lot Orders). FINRA did not incorporate NYSE Rule 124 into the Transitional Rulebook because it is solely concerned with the NYSE marketplace.

<sup>20</sup> Although FINRA does not have a rule addressing the bunching of odd-lot orders, FINRA's trade reporting rules have separate reporting requirements for round-lot and odd-lot transactions. In addition, the aggregation of individual executions (both round-lot and odd-lot executions) for trade reporting purposes is prohibited. See, e.g., FINRA Rules 6282(f), 6380A(f), 6380B(h).

<sup>21</sup> See 17 CFR 240.17a-3(a)(3); see also Securities Exchange Act Release No. 10756 (April 26, 1974) ("Transactions involving the purchase and sale of securities should be posted to the customer's ledger accounts . . . no later than settlement date.").

<sup>22</sup> 15 U.S.C. 78o-3(b)(6).

FINRA's rulebook by eliminating rules that are duplicative of federal rules and regulations and provisions that are specific to the NYSE and its marketplace.

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](mailto:rule-comments@sec.gov). Please include File Number SR-FINRA-2009-087 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-2009-087. 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-2009-087 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.<sup>23</sup>

Florence E. Harmon

Deputy Secretary

---

<sup>23</sup> 17 CFR 200.30-3(a)(12).

**EXHIBIT 5**

Exhibit 5 shows the text of the proposed rule change. Proposed deletions are in brackets.

\* \* \* \* \*

**Text of NASD Rules to be Deleted in their  
Entirety from the Transitional Rulebook**

\* \* \* \* \*

**[2760. Offerings “At the Market”]**

Entire text deleted.

\* \* \* \* \*

**[2780. Solicitation of Purchases on an Exchange to Facilitate a Distribution of  
Securities]**

Entire text deleted.

\* \* \* \* \*

**Text of Incorporated NYSE Rules to be Deleted in their  
Entirety from the Transitional Rulebook**

\* \* \* \* \*

**[Rule 2B. No Affiliation between Exchange and any Member Organization]**

Entire text deleted.

\* \* \* \* \*

**[Rule 411. Erroneous Reports]**

Entire text deleted.

\* \* \* \* \*

**Text of Incorporated NYSE Rule Interpretation to Remain in the Transitional  
Rulebook**

\* \* \* \* \*

**Rule 410 Records of Orders**

/01 Pre-time stamping

No change.

/02 Allocations of Block Orders

No change.

[(a)(ii)(5)]

[/01 Erroneous Reports — Reporting Requirements]

[Profits resulting from instances where member organizations are allowed to treat an erroneous report to a non- member as though it were an erroneous trade (whether accruing to Floor members or upstairs trading desks), must be forwarded to the NYSE Foundation. When determining the amount of profit to be remitted, it is permissible to deduct transaction costs (such as clearance charges and Section 31 fees) relating to the particular error transaction. Member organizations must prepare and maintain clear and detailed records documenting how the remitted net profit is calculated.]

[Member organizations are allowed (provided certain conditions are met as described in paragraph (a)(ii) of Rule 411) to treat an erroneous report to a non-member as though it were an erroneous trade if the non-member refuses to accept a correct report.]

\* \* \* \* \*