FINRA

Financial Industry Regulatory Authority

November 22, 2013

Elizabeth M. Murphy
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: File No. SR-FINRA-2013-037 - Response to Comments

Dear Ms. Murphy:

As a courtesy to commenters, attached is Amendment No.1 to the above-referenced proposed rule change that was filed with the Securities and Exchange Commission earlier today. The Amendment includes FINRA's response to the comments raised.

If you have any questions, please contact me at (202) 728-8363.

Best regards,

Racquel Russell
Associate General Counsel

Attachment

1735 K Street, NW
Washington, DC
20006-1506

t 202 728 8000
www.finra.org

OMB APPROVAL

OMB Number: 3235-0045
Estimated average burden
hours per response.....38

Required fields are shown with yellow backgrounds and asterisks.

Page 1 of * 30

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

File No.* SR - 2013 - * 037

Amendment No. (req. for Amendments *) 1

Filing 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) *
☐	☑	☐	☑	☐	☐

Pilot ☐

Extension of Time Period for Commission Action * ☐

Notice of proposed change pursuant to the Payment, Clearing, and Settlement Act of 2010

Security-Based Swap Submission pursuant to the Securities Exchange Act of 1934

Description

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 action.

First Name * Racquel Last Name * Russell

Title * Associate General Counsel

E-mail * racquel.russell@finra.org

Telephone * (202) 728-8363 Fax (202) 728-8264

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.

Date 11/22/2013

By Stephanie M. Dumont

(Name *)

(Title *)

Senior Vice President and Director of Capital Markets Policy

Stephanie Dumont

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.

Required fields are shown with yellow backgrounds and asterisks.

SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

For complete Form 19b-4 instructions please refer to the EFFS 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 1A- Notice of Proposed Rule Change, Security-Based Swap Submission, or Advance Notice by Clearing Agencies

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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, security-based swap submission, or advance notice being deemed not properly filed. See also Rule 0-3 under the Act (17 CFR 240.0-3)

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

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Exhibit Sent As Paper Document

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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 3 - Form, Report, or Questionnaire

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Exhibit Sent As Paper Document

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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 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 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

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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 the Proposed Rule Change

(a) Pursuant to the provisions of Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act" or "Exchange Act"),[1] Financial Industry Regulatory Authority, Inc. ("FINRA") is filing with the Securities and Exchange Commission ("SEC" or "Commission") Amendment No. 1 to SR-FINRA-2013-037, which proposed a rule change to amend FINRA Rule 5131 (New Issue Allocations and Distributions) to allow members to rely on written representations from certain accounts to comply with FINRA Rule 5131(b) related to spinning. As described herein, Amendment No. 1 to SR-FINRA-2013-037 proposes a clarifying modification to the proposed exception regarding the eligibility of an unaffiliated private fund with a control person of the fund's investment adviser that also is a beneficial owner in the fund.

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

(b) Not applicable.

(c) Not applicable.

2. Procedures of the Self-Regulatory Organization

At its meeting on February 15, 2012, 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 effective date of the proposed rule change in a Regulatory Notice to be published no later than 60 days following Commission approval. The effective date will be no later than 120 days following Commission approval.

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[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

On August 23, 2013, FINRA filed SR-FINRA-2013-037, a proposed rule change to amend FINRA Rule 5131 to provide a limited exception to allow members to rely on written representations from certain accounts in complying with FINRA Rule 5131(b) ("the spinning provision").[2]

Rule 5131 addresses abuses in the allocation and distribution of "new issues"[3] and paragraph (b) prohibits the practice of "spinning," which refers to an underwriter's allocation of new issue shares to executive officers and directors of a company as an inducement to award the underwriter with investment banking business, or as consideration for investment banking business previously awarded.

The spinning provision generally provides that no member or person associated with a member may allocate shares of a new issue to any account in which an executive officer or director of a public company[4] or a covered non-public company,[5] or a person

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2 See Securities Exchange Act Release No. 70312 (September 4, 2013), 78 FR 55322 (September 10, 2013) (Notice of Filing File No. SR-FINRA-2013-037) ("Original Proposal"). The comment period closed on October 1, 2013.

3 The term "new issue" has the same meaning as in Rule 5130(i)(9).

4 A "public company" is any company that is registered under Section 12 of the Exchange Act or files periodic reports pursuant to Section 15(d) thereof. See Rule 5131(e)(1).

5 The term "covered non-public company" means any non-public company satisfying the following criteria: (i) income of at least $1 million in the last fiscal year or in two of the last three fiscal years and shareholders' equity of at least $15 million; (ii) shareholders' equity of at least $30 million and a two-year operating history; or (iii) total assets and total revenue of at least $75 million in the latest fiscal year or in two of the last three fiscal years. See Rule 5131(e)(3).

materially supported[6] by such executive officer or director, has a beneficial interest[7] if such public company or covered non-public company has certain current, recent or anticipated investment banking relationships with the member.

Rule 5131.02 (Annual Representation) provides that, for the purposes of the spinning provision, a member may rely on a written representation obtained within the prior 12 months from the beneficial owner(s) of an account, or a person authorized to represent the beneficial owner(s), as to whether such beneficial owner(s) is an executive officer or director or person materially supported by an executive officer or director and if so, the company on whose behalf such executive officer or director serves. Therefore, to comply with the spinning provision, firms typically issue questionnaires to their customers to ascertain whether any of the persons covered by the spinning provision have a beneficial interest in the account.

Under the spinning provision, whether an account in which an executive officer or director of a company (or person materially supported by such executive officer or director) has a beneficial interest will be eligible to purchase shares of a new issue will depend upon whether the company is a current, recent or prospective investment banking client of the firm, as set forth in the rule. Where an executive officer or director of a company (or a person materially supported by such executive officer or director) has a beneficial interest in an account, a member must also be able to identify the company on whose behalf such executive officer or director serves to determine whether the company

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6 "Material support" means directly or indirectly providing more than 25% of a person's income in the prior calendar year. Persons living in the same household are deemed to be providing each other with material support. See Rule 5131(e)(6).

7 The term "beneficial interest" has the same meaning as in Rule 5130(i)(1).

is a current, recent or prospective investment banking client of the firm under the rule; if the member is unable to obtain such information, it has to resort to restricting new issue allocations to all such accounts, which is not the intended purpose of the rule.

The spinning provision went into effect on September 26, 2011 and, since then, FINRA has received feedback from industry participants that obtaining the information necessary to ensure compliance with the rule, and eligibility for the de minimis exception, has proved difficult.[8] In particular, FINRA understands that members (and their customers) have had difficulty obtaining, tracking and aggregating information from funds regarding indirect beneficial owners, such as participants in a fund of funds ("FOF"), for use in determining an account's eligibility for the de minimis exception and that this has resulted in compliance difficulties and restrictions, including in situations where the ability of an underwriter to confer any meaningful financial benefit to a particular investor by allocating new issue shares to the account is impracticable.[9]

Thus, in the Original Proposal, FINRA proposed a limited exception from the spinning provision, subject to a set of conditions, designed to ensure that the important protections of Rule 5131(b) continue to be preserved, while offering meaningful relief for members and investors in situations where spinning abuse is not likely. Specifically, the Original Proposal provided that members may rely upon a written representation obtained within the prior 12 months from a person authorized to represent an account that does not

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8 Among other exceptions, Rule 5131(b)(2) provides a de minimis exception for new issue allocations to any account in which the beneficial interests of executive officers and directors of a company subject to the rule, and persons materially supported by such executive officers and directors, do not exceed in the aggregate 25% of such account.

9 For example, members have noted that broker-dealers normally do not know the identity of the beneficial owners of the FOFs invested in the account.

look through to the beneficial owners of a fund invested in the account, provided that such fund:

- is a "private fund" as defined in the Investment Advisers Act of 1940;
- is managed by an investment adviser;
- has assets greater than $50 million;
- owns less than 25% of the account and is not a fund in which a single investor has a beneficial interest of 25% or more;
- is "unaffiliated" with the account in that the private fund's investment adviser does not have a control person in common with the account's investment adviser; and
- was not formed for the specific purpose of investing in the account.

The Original Proposal also required that, to be eligible for the exception, the unaffiliated private fund may not have a beneficial owner that also is a control person of such fund's investment adviser.

The Commission received two comment letters in response to the Original Proposal.[10] Both commenters strongly support the adoption of the proposed amendment and stated that the proposed rule would ease the tracking burden for allocations to accounts that do not raise the concerns the spinning rule is designed to address, while also preserving the efficacy of the rule.[11] However, the commenters also suggest certain

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10 See Letter from Stuart J. Kaswell, Executive Vice President & Managing Director, General Counsel, Managed Funds Association, to Elizabeth M. Murphy, Secretary, SEC, dated September 30, 2013 ("MFA letter"), and letter from William G. Mulligan, CEO, Cordium U.S., to Elizabeth M. Murphy, Secretary, SEC, dated October 1, 2013 ("Cordium letter").

11 See Cordium letter and MFA letter.

modifications that they believe improve the usefulness of the proposed exception without compromising the objectives of the rule.[12]

Both commenters asked that FINRA eliminate the proposed condition that the unaffiliated private fund must not have a beneficial owner that also is a control person of such fund's investment adviser.[13] The commenters noted that it is not uncommon for an FOF to have an investor that is both a beneficial owner of the FOF and a control person of such fund's investment adviser.[14] One commenter noted that investment in the fund by a control person serves the purpose of aligning the interests of a control person with the interests of the fund's investors and, therefore, is a practice that institutional investors often require from fund managers.[15] The other commenter stated that this condition does not further the purposes of the spinning rule and recommended eliminating this aspect of the proposal.[16]

As an alternative, one commenter recommended that, rather than excluding funds with a beneficial owner that also is a control person of the investment adviser, the proposal instead should be amended to provide that a member may rely upon a written representation obtained within the prior 12 months from a person authorized to represent an account that does not look through to the beneficial owners of a fund invested in the account (other than a beneficial owner that is a control person of the investment adviser

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12 See Cordium letter. See also MFA letter.

13 See Cordium letter and MFA letter.

14 See Cordium letter and MFA letter.

15 See MFA letter.

16 See Cordium letter.

to such private fund), subject to the other proposed conditions.[17] FINRA agrees with this comment and, therefore, is proposing an amendment to delete the proposed condition that the unaffiliated private fund must not have a beneficial owner that also is a control person of such fund's investment adviser and to, instead, include language substantially similar to that suggested by the commenter.[18]

Under the revised formulation, a member may rely upon a written representation obtained within the prior 12 months from a person authorized to represent an account that does not look through to the beneficial owners of any unaffiliated private fund invested in the account, except for beneficial owners that are control persons of the investment adviser to such private fund,[19] where the remaining conditions of the exception are met. Therefore, where a beneficial owner also is a control person of the FOF's adviser, a member must ascertain whether such person is a covered person based upon the standards set forth in Rule 5131(b). If a member obtains a written representation from an account that a beneficial owner in an unaffiliated private fund is a control person of such fund's investment adviser, but is not a covered person under the spinning provision, an allocation to such account would still be eligible for the proposed exception, if the conditions, as amended, are met. If a beneficial owner in an unaffiliated private fund is

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17 See MFA letter.

18 See MFA letter.

19 FINRA believes that a beneficial owner of an FOF that also is a control person of the FOF's investment adviser may have the ability to determine into which funds (accounts) the FOF will be invested and that extending the exception to such persons is not consistent with the purposes of the spinning provision. Moreover, control persons of a fund's investment adviser are more readily identifiable. For instance, with respect to a private fund identified on Schedule D of the Form ADV of the fund's investment adviser, control persons of the adviser are also identified in the Form ADV.

both a control person and a covered person under the spinning provision, a new issue allocation to such covered persons would be impermissible, unless such allocation is permitted under another exception (e.g., the de minimis exception).[20]

As stated above, the commenters noted that it is not uncommon for an FOF to have an investor that is both a beneficial owner of the FOF and a control person of such fund's investment adviser. Therefore, the Original Proposal would not have provided the intended relief for members in many cases where the efficacy of the spinning provision would still be preserved. Thus, instead of eliminating eligibility for the exception for any FOF with a beneficial owner that also is a control person of such fund's investment adviser, the revised proposal would permit a member to avail itself of the exception with respect to other beneficial owners (that are not also control persons of the FOF's investment adviser). FINRA believes that this revision to the proposal strikes the proper balance between members' concerns regarding the difficulty of identifying indirect beneficial owners of an account and preserving the important protections of Rule 5131(b).

One commenter also recommended that FINRA either reduce or eliminate the proposal's condition that, to be eligible under the exception, the unaffiliated private fund must have assets greater than $50 million.[21] This commenter believes that the percentage ownership threshold conditions, which require that the unaffiliated private fund own less than 25% of the account and does not have a single investor with a beneficial interest of

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20 See supra note 8.

21 See Cordium letter.

25% or more, along with the other conditions, are sufficient to ensure that spinning would be unlikely.[22]

FINRA is of the view that the percentage ownership threshold conditions alone are not sufficient to ensure that the protections of the spinning rule are preserved and, therefore, continues to believe that the "assets greater than $50 million" component is an appropriate additional safeguard. Specifically, FINRA believes that this requirement helps ensure a sufficient degree of dilution that would reduce the economic meaningfulness to a potentially covered person of any single IPO allocation, and therefore, does not propose eliminating or reducing this condition at this time.

As noted in Item 2 of this filing, FINRA will announce the effective date of the proposed rule change in a Regulatory Notice to be published no later than 60 days following Commission approval. The effective date will be no later than 120 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,[23] which requires, among other things, that FINRA rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. FINRA believes that the proposed exception and required conditions, as amended, will further these purposes by promoting capital formation and aiding member compliance efforts, while maintaining investor confidence in the capital markets.

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22 See Cordium letter.

23 15 U.S.C. 78o–3(b)(6).

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

FINRA does not believe that the proposed rule change, as amended, will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act in that the proposed rule provides an exception to Rule 5131(b) for accounts with unaffiliated private funds as investors that face special difficulties under the existing exemptions from the rule, and thus reduces differential impacts of the rule, without compromising the objectives of the spinning provision.

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

The Commission published the proposed rule change for comment in the Federal Register on September 10, 2013.[24] The Commission received two comment letters in response to the proposed rule change.[25] A description of the comments and FINRA's response is discussed in Item 3 above.

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.[26]

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

FINRA believes that the proposed exception and required conditions, as amended, will aid member compliance efforts while maintaining investor confidence in the capital markets and preserving the efficacy of the spinning provision. FINRA also notes that this

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24 See Original Proposal.

25 See Cordium letter and MFA letter.

26 15 U.S.C. 78s(b)(2).

proposed Amendment No. 1 is responsive to the comment letters received by the Commission in response to the Original Proposal[27] and further simplifies the operation of the spinning provision for members and other industry participants. Thus, FINRA requests that the Commission find good cause pursuant to Section 19(b)(2) of the Act[28] to accelerate the effectiveness of the proposed rule change, as amended, prior to the 30th day after its publication in the Federal Register.

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

Not applicable.

9. Security-Based Swap Submissions Filed Pursuant to Section 3C of the Act

Not applicable.

10. Advance Notices Filed Pursuant to Section 806(e) of the Payment, Clearing and Settlement Supervision Act

Not applicable.

11. Exhibits

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

Exhibit 4. Text of proposed rule change marking changes from the originally filed proposed rule change.

Exhibit 5. Text of proposed rule change.

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27 See MFA letter. See also Cordium letter.

28 15 U.S.C. 78s(b)(2).

EXHIBIT 1

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34- ; File No. SR-FINRA-2013-037)

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of a Proposed Rule Change to Amend FINRA Rule 5131 (New Issue Allocations and Distributions)

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") filed with the Securities and Exchange Commission ("SEC" or "Commission") and amended on ----------, 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 Amendment No. 1 to SR-FINRA-2013-037, which proposed to amend FINRA Rule 5131 (New Issue Allocations and Distributions) to allow members to rely on written representations from certain accounts to comply with FINRA Rule 5131(b) related to spinning. As described herein, Amendment No. 1 to SR-FINRA-2013-037 proposes a clarifying modification to the proposed exception regarding the eligibility of an unaffiliated private fund where a control person of the fund's investment adviser also is a beneficial owner in the fund.

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1 15 U.S.C. 78s(b)(1).

2 17 CFR 240.19b-4.

The text of the proposed rule change is available on FINRA's website 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

On August 23, 2013, FINRA filed SR-FINRA-2013-037, a proposed rule change to amend FINRA Rule 5131 to provide a limited exception to allow members to rely on written representations from certain accounts in complying with FINRA Rule 5131(b) ("the spinning provision").[3]

Rule 5131 addresses abuses in the allocation and distribution of "new issues"[4] and paragraph (b) prohibits the practice of "spinning," which refers to an underwriter's allocation of new issue shares to executive officers and directors of a company as an

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3 See Securities Exchange Act Release No. 70312 (September 4, 2013), 78 FR 55322 (September 10, 2013) (Notice of Filing File No. SR-FINRA-2013-037) ("Original Proposal"). The comment period closed on October 1, 2013.

4 The term "new issue" has the same meaning as in Rule 5130(i)(9).

inducement to award the underwriter with investment banking business, or as consideration for investment banking business previously awarded.

The spinning provision generally provides that no member or person associated with a member may allocate shares of a new issue to any account in which an executive officer or director of a public company[5] or a covered non-public company,[6] or a person materially supported[7] by such executive officer or director, has a beneficial interest[8] if such public company or covered non-public company has certain current, recent or anticipated investment banking relationships with the member.

Rule 5131.02 (Annual Representation) provides that, for the purposes of the spinning provision, a member may rely on a written representation obtained within the prior 12 months from the beneficial owner(s) of an account, or a person authorized to represent the beneficial owner(s), as to whether such beneficial owner(s) is an executive officer or director or person materially supported by an executive officer or director and if so, the company on whose behalf such executive officer or director serves. Therefore,

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5 A "public company" is any company that is registered under Section 12 of the Exchange Act or files periodic reports pursuant to Section 15(d) thereof. See Rule 5131(e)(1).

6 The term "covered non-public company" means any non-public company satisfying the following criteria: (i) income of at least $1 million in the last fiscal year or in two of the last three fiscal years and shareholders' equity of at least $15 million; (ii) shareholders' equity of at least $30 million and a two-year operating history; or (iii) total assets and total revenue of at least $75 million in the latest fiscal year or in two of the last three fiscal years. See Rule 5131(e)(3).

7 "Material support" means directly or indirectly providing more than 25% of a person's income in the prior calendar year. Persons living in the same household are deemed to be providing each other with material support. See Rule 5131(e)(6).

8 The term "beneficial interest" has the same meaning as in Rule 5130(i)(1).

to comply with the spinning provision, firms typically issue questionnaires to their customers to ascertain whether any of the persons covered by the spinning provision have a beneficial interest in the account.

Under the spinning provision, whether an account in which an executive officer or director of a company (or person materially supported by such executive officer or director) has a beneficial interest will be eligible to purchase shares of a new issue will depend upon whether the company is a current, recent or prospective investment banking client of the firm, as set forth in the rule. Where an executive officer or director of a company (or a person materially supported by such executive officer or director) has a beneficial interest in an account, a member must also be able to identify the company on whose behalf such executive officer or director serves to determine whether the company is a current, recent or prospective investment banking client of the firm under the rule; if the member is unable to obtain such information, it has to resort to restricting new issue allocations to all such accounts, which is not the intended purpose of the rule.

The spinning provision went into effect on September 26, 2011 and, since then, FINRA has received feedback from industry participants that obtaining the information necessary to ensure compliance with the rule, and eligibility for the de minimis exception, has proved difficult.[9] In particular, FINRA understands that members (and their customers) have had difficulty obtaining, tracking and aggregating information from funds regarding indirect beneficial owners, such as participants in a fund of funds

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[9] Among other exceptions, Rule 5131(b)(2) provides a de minimis exception for new issue allocations to any account in which the beneficial interests of executive officers and directors of a company subject to the rule, and persons materially supported by such executive officers and directors, do not exceed in the aggregate 25% of such account.

("FOF"), for use in determining an account's eligibility for the de minimis exception and that this has resulted in compliance difficulties and restrictions, including in situations where the ability of an underwriter to confer any meaningful financial benefit to a particular investor by allocating new issue shares to the account is impracticable.[10]

Thus, in the Original Proposal, FINRA proposed a limited exception from the spinning provision, subject to a set of conditions, designed to ensure that the important protections of Rule 5131(b) continue to be preserved, while offering meaningful relief for members and investors in situations where spinning abuse is not likely. Specifically, the Original Proposal provided that members may rely upon a written representation obtained within the prior 12 months from a person authorized to represent an account that does not look through to the beneficial owners of a fund invested in the account, provided that such fund:

- is a "private fund" as defined in the Investment Advisers Act of 1940;
- is managed by an investment adviser;
- has assets greater than $50 million;
- owns less than 25% of the account and is not a fund in which a single investor has a beneficial interest of 25% or more;
- is "unaffiliated" with the account in that the private fund's investment adviser does not have a control person in common with the account's investment adviser; and
- was not formed for the specific purpose of investing in the account.

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10 For example, members have noted that broker-dealers normally do not know the identity of the beneficial owners of the FOFs invested in the account.

The Original Proposal also required that, to be eligible for the exception, the unaffiliated private fund may not have a beneficial owner that also is a control person of such fund's investment adviser.

The Commission received two comment letters in response to the Original Proposal.[11] Both commenters strongly support the adoption of the proposed amendment and stated that the proposed rule would ease the tracking burden for allocations to accounts that do not raise the concerns the spinning rule is designed to address, while also preserving the efficacy of the rule.[12] However, the commenters also suggest certain modifications that they believe improve the usefulness of the proposed exception without compromising the objectives of the rule.[13]

Both commenters asked that FINRA eliminate the proposed condition that the unaffiliated private fund must not have a beneficial owner that also is a control person of such fund's investment adviser.[14] The commenters noted that it is not uncommon for an FOF to have an investor that is both a beneficial owner of the FOF and a control person of such fund's investment adviser.[15] One commenter noted that investment in the fund by a control person serves the purpose of aligning the interests of a control person with

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13 See Cordium letter. See also MFA letter.

14 See Cordium letter and MFA letter.

15 See Cordium letter and MFA letter.

the interests of the fund's investors and, therefore, is a practice that institutional investors often require from fund managers.[16] The other commenter stated that this condition does not further the purposes of the spinning rule and recommended eliminating this aspect of the proposal.[17]

As an alternative, one commenter recommended that, rather than excluding funds with a beneficial owner that also is a control person of the investment adviser, the proposal instead should be amended to provide that a member may rely upon a written representation obtained within the prior 12 months from a person authorized to represent an account that does not look through to the beneficial owners of a fund invested in the account (other than a beneficial owner that is a control person of the investment adviser to such private fund), subject to the other proposed conditions.[18] FINRA agrees with this comment and, therefore, is proposing an amendment to delete the proposed condition that the unaffiliated private fund must not have a beneficial owner that also is a control person of such fund's investment adviser and to, instead, include language substantially similar to that suggested by the commenter.[19]

Under the revised formulation, a member may rely upon a written representation obtained within the prior 12 months from a person authorized to represent an account that does not look through to the beneficial owners of any unaffiliated private fund invested in the account, except for beneficial owners that are control persons of the investment

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16 See MFA letter.

17 See Cordium letter.

18 See MFA letter.

19 See MFA letter.

adviser to such private fund,[20] where the remaining conditions of the exception are met. Therefore, where a beneficial owner also is a control person of the FOF's adviser, a member must ascertain whether such person is a covered person based upon the standards set forth in Rule 5131(b). If a member obtains a written representation from an account that a beneficial owner in an unaffiliated private fund is a control person of such fund's investment adviser, but is not a covered person under the spinning provision, an allocation to such account would still be eligible for the proposed exception, if the conditions, as amended, are met. If a beneficial owner in an unaffiliated private fund is both a control person and a covered person under the spinning provision, a new issue allocation to such covered persons would be impermissible, unless such allocation is permitted under another exception (e.g., the de minimis exception).[21]

As stated above, the commenters noted that it is not uncommon for an FOF to have an investor that is both a beneficial owner of the FOF and a control person of such fund's investment adviser. Therefore, the Original Proposal would not have provided the intended relief for members in many cases where the efficacy of the spinning provision would still be preserved. Thus, instead of eliminating eligibility for the exception for any FOF with a beneficial owner that also is a control person of such fund's investment adviser, the revised proposal would permit a member to avail itself of the exception with

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20 FINRA believes that a beneficial owner of an FOF that also is a control person of the FOF's investment adviser may have the ability to determine into which funds (accounts) the FOF will be invested and that extending the exception to such persons is not consistent with the purposes of the spinning provision. Moreover, control persons of a fund's investment adviser are more readily identifiable. For instance, with respect to a private fund identified on Schedule D of the Form ADV of the fund's investment adviser, control persons of the adviser are also identified in the Form ADV.

21 See supra note 9.

respect to other beneficial owners (that are not also control persons of the FOF's investment adviser). FINRA believes that this revision to the proposal strikes the proper balance between members' concerns regarding the difficulty of identifying indirect beneficial owners of an account and preserving the important protections of Rule 5131(b).

One commenter also recommended that FINRA either reduce or eliminate the proposal's condition that, to be eligible under the exception, the unaffiliated private fund must have assets greater than $50 million.[22] This commenter believes that the percentage ownership threshold conditions, which require that the unaffiliated private fund own less than 25% of the account and does not have a single investor with a beneficial interest of 25% or more, along with the other conditions, are sufficient to ensure that spinning would be unlikely.[23]

FINRA is of the view that the percentage ownership threshold conditions alone are not sufficient to ensure that the protections of the spinning rule are preserved and, therefore, continues to believe that the "assets greater than $50 million" component is an appropriate additional safeguard. Specifically, FINRA believes that this requirement helps ensure a sufficient degree of dilution that would reduce the economic meaningfulness to a potentially covered person of any single IPO allocation, and therefore, does not propose eliminating or reducing this condition at this time.

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22 See Cordium letter.

23 See Cordium letter.

FINRA will announce the effective date of the proposed rule change in a Regulatory Notice to be published no later than 60 days following Commission approval. The effective date will be no later than 120 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,[24] 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 exception and required conditions, as amended, will further these purposes by promoting capital formation and aiding member compliance efforts, while maintaining investor confidence in the capital markets.

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

FINRA does not believe that the proposed rule change, as amended, will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act in that the proposed rule provides an exception to Rule 5131(b) for accounts with unaffiliated private funds as investors that face special difficulties under the existing exemptions from the rule, and thus reduces differential impacts of the rule, without compromising the objectives of the spinning provision.

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

The Commission published the proposed rule change for comment in the Federal Register on September 10, 2013.[25] The Commission received two comment letters in

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24 15 U.S.C. 78o–3(b)(6).

25 See Original Proposal.

response to the proposed rule change.[26] A description of the comments and FINRA's response is discussed in Item A above.

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

FINRA has requested that the Commission find good cause pursuant to Section 19(b)(2) of the Act[27] for approving the proposed rule change prior to the 30th day after publication in the Federal Register. The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to FINRA and, in particular, the requirements of Section 15A of the Act and the rules and regulations thereunder. The Commission finds good cause for approving the proposed rule change prior to the 30th day after the date of publication of notice of filing thereof in that accelerated approval will aid member compliance efforts while maintaining investor confidence in the capital markets and preserving the efficacy of the spinning provision.

Within 45 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 or disapprove such proposed rule change, or

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

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26 See Cordium letter and MFA letter.

27 15 U.S.C. 78s(b)(2).

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-2013-037 on the subject line.

Paper Comments:

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

All submissions should refer to File Number SR-FINRA-2013-037. 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 website (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 website viewing and printing 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-2013-037 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.[28]

Elizabeth M. Murphy

Secretary

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[28] 17 CFR 200.30-3(a)(12).

EXHIBIT 4

Exhibit 4 shows the changes proposed in this Amendment No. 1, with the proposed changes in the original filing shown as if adopted. Proposed additions in this Amendment No. 1 appear underlined; proposed deletions appear in brackets.

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5000. SECURITIES OFFERING AND TRADING STANDARDS AND PRACTICES

5100. SECURITIES OFFERINGS, UNDERWRITING AND COMPENSATION

* * * * *

5131. New Issue Allocations and Distributions

(a) through (e) No Change.

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

.01 No Change.

.02 Written Representations.

(a) No Change.

(b) Indirect Beneficial Owners. For the purposes of Rule 5131(b), a member may rely upon a written representation obtained within the prior 12 months from a person authorized to represent an account that does not look through to the beneficial owners of any unaffiliated private fund invested in the account, except for beneficial owners that are control persons of the investment adviser to such private fund, that such unaffiliated private fund:

(1) is managed by an investment adviser;

(2) has assets greater than $50 million;

(3) owns less than 25% of the account and is not a fund in which a single investor has a beneficial interest of 25% or more; and

[(4) does not have a beneficial owner that also is a control person of such fund's investment adviser; and]

[(5)](4) was not formed for the specific purpose of investing in the account.

An unaffiliated private fund is a "private fund," as defined in Section 202(a)(29) of the Investment Advisers Act, whose investment adviser does not have a control person in common with the investment adviser to the account. A control person of an investment adviser is a person with direct or indirect "control" over the investment adviser, as that term is defined in Form ADV.

(c) No Change.

.03 No Change.

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EXHIBIT 5

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

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5000. SECURITIES OFFERING AND TRADING STANDARDS AND PRACTICES

5100. SECURITIES OFFERINGS, UNDERWRITING AND COMPENSATION

* * * * *

5131. New Issue Allocations and Distributions

(a) through (e) No Change.

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

.01 No Change.

.02 [Annual] Written Representations.

(a) Annual Representation. For the purposes of [paragraph] Rule 5131(b), a member may rely upon a written representation obtained within the prior 12 months from the beneficial owner(s) of the account, or a person authorized to represent the beneficial owner(s) of the account, as to whether such beneficial owner(s) is an executive officer or director or person materially supported by an executive officer or director and if so, the company(ies) on whose behalf such executive officer or director serves.

(b) Indirect Beneficial Owners. For the purposes of Rule 5131(b), a member may rely upon a written representation obtained within the prior 12 months from a person authorized to represent an account that does not look through to the beneficial owners of any unaffiliated private fund invested in the account, except for beneficial owners that are control persons of the investment adviser to such private fund, that such unaffiliated private fund:

(1) is managed by an investment adviser;

(2) has assets greater than $50 million;

(3) owns less than 25% of the account and is not a fund in which a single investor has a beneficial interest of 25% or more; and

(4) was not formed for the specific purpose of investing in the account.

An unaffiliated private fund is a "private fund," as defined in Section 202(a)(29) of the Investment Advisers Act, whose investment adviser does not have a control person in common with the investment adviser to the account. A control person of an investment adviser is a person with direct or indirect "control" over the investment adviser, as that term is defined in Form ADV.

(c) A member may not rely upon any representation that it believes, or has reason to believe, is inaccurate. A member shall maintain a copy of all records and information relating to whether an account is eligible to receive an allocation of the new issue under [paragraph] Rule 5131(b) in its files for at least three years following the member's allocation to that account.

.03 No Change.

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