

burden on competition 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*

The Exchange neither solicited nor received comments on the proposal.

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

Because the foregoing rule does not (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, provided that the self-regulatory organization has given the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change or such shorter time as designated by the Commission, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>16</sup> and Rule 19b-4(f)(6) thereunder.<sup>17</sup> At any time within 60 days of the filing of such proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

**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-CBOE-2008-89 on the subject line.

*Paper Comments*

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

All submissions should refer to File Number SR-CBOE-2008-89. 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 the CBOE. 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-CBOE-2008-89 and should be submitted on or before September 19, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>18</sup>

**Florence E. Harmon,**

*Acting Secretary.*

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**SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-58421; File No. SR-FINRA-2008-025]

**Self Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Order Approving Proposed Rule Change Relating to the Adoption of NASD Rule 2790 as FINRA Rule 5130 (Restrictions on the Purchase and Sale of Initial Public Offerings) in the Consolidated FINRA Rulebook**

August 25, 2008.

**I. Introduction**

On June 12, 2008, the Financial Industry Regulatory Authority, Inc. ("FINRA") (f/k/a National Association of Securities Dealers, Inc. ("NASD")) filed with the Securities and Exchange Commission ("Commission"), 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> a proposal to adopt NASD Rule 2790 (Restrictions on the Purchase and Sale of Initial Equity Public Offerings) ("Rule") as FINRA Rule 5130 in the consolidated FINRA rulebook, with only minor changes. This proposal was published for comment in the **Federal Register** on July 16, 2008.<sup>3</sup> The Commission received one comment on the proposal.<sup>4</sup> This order approves this proposed rule change.

**II. Description of the Proposed Rule Change**

As part of the process of developing the new consolidated rulebook (the "Consolidated FINRA Rulebook"),<sup>5</sup> FINRA proposed to adopt the Rule as FINRA Rule 5130 in the Consolidated FINRA Rulebook with only minor changes. The Rule is designed to protect the integrity of the initial public offering ("IPO") process by ensuring that FINRA member firms make bona fide public offerings of securities at the offering price, such firms do not withhold

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

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

<sup>3</sup> Securities Exchange Act Release No. 58134 (Jul. 10, 2008), 73 FR 40892 (Jul. 16, 2008) (SR-FINRA-2008-025).

<sup>4</sup> See submission via SEC WebForm from Dan Mayfield, President, Sanderlin Securities, dated July 24, 2008.

<sup>5</sup> The current FINRA rulebook consists of two sets of rules: (1) NASD rules and (2) rules incorporated from NYSE ("Incorporated NYSE Rules") (together referred to as the "Transitional Rulebook"). The Incorporated NYSE Rules apply only to those members of FINRA that are also members of the NYSE ("Dual Members"). Dual Members also must comply with NASD rules. For more information regarding the rulebook consolidation process, see *FINRA Information Notice* March 12, 2008 (Rulebook Consolidation Process).

<sup>16</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>17</sup> 17 CFR 240.19b-4(f)(6).

<sup>18</sup> 17 CFR 200.30-3(a)(12).

securities in a public offering for their own benefit or use such securities to reward persons who are in a position to direct future business to firms, and industry insiders, including FINRA member firms and their associated persons, do not take advantage of their insider position to purchase new issues for their own benefit at the expense of public customers. Because of these controls, FINRA believes that the Rule plays an important part in maintaining investor confidence in the capital raising and IPO process.

The Rule was originally adopted in 2003, replacing NASD IM-2110-1 (the Free-Riding and Withholding Interpretation) in its entirety.<sup>6</sup> The Rule was subject to extensive input from the industry and other interested persons during a four-year rulemaking process, and FINRA believes that there is broad support for it. The Rule provides necessary predictability and certainty in support of capital formation. Based on FINRA's experience, the Rule is achieving its purpose and is significantly easier than NASD IM-2110-1 for FINRA member firms and the investing public to understand and follow. Among other things, FINRA has seen a significant reduction in the number of interpretive and exemptive issues that have arisen with respect to the IPO allocation process since the Rule became effective. There is no Incorporated NYSE Rule equivalent to the Rule.<sup>7</sup>

For the reasons discussed above, FINRA proposed to transfer NASD Rule 2790 to the Consolidated FINRA Rulebook in substantially the same form. As part of this transfer, FINRA proposed minor changes to the Rule to reflect the registration of the NASDAQ Stock Market LLC ("NASDAQ") as a national securities exchange. The Rule currently refers to the NASDAQ Global Market because at the time the Rule was adopted, references to the listing standards of a national securities exchange did not include NASDAQ's Global Market. Since NASDAQ completed its registration as a national securities exchange, the references to

the NASDAQ Global Market in the Rule are no longer necessary. In addition, FINRA proposed certain minor, technical changes to the Rule.

FINRA represented that it would announce the effective date of the proposed rule change in a *Regulatory Notice* to be published no later than 60 days following Commission approval of the proposed rule change.

### III. Summary of Comments

The Commission received one comment letter on the proposal.<sup>8</sup> The commenter urged that FINRA amend the proposal to except FINRA members that are not underwriters from the Rule. FINRA has considered the comment and determined that it is not germane to the proposal in that the comment relates to the substantive requirements of the Rule which FINRA did not propose to change other than in minor, technical ways.

### IV. Discussion and Findings

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of the Act, and the rules and regulations thereunder that are applicable to a national securities association.<sup>9</sup> In particular, the Commission believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,<sup>10</sup> which requires, among other things, that FINRA rules be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. The Commission notes that it has previously approved the Rule,<sup>11</sup> and the proposal merely moves the Rule nearly verbatim from the NASD rulebook to the Consolidated FINRA Rulebook. The Commission believes that the move proposed in this filing is primarily ministerial and only aids FINRA members in complying with existing obligations.

### V. Conclusion

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>12</sup> that the proposed rule change (File No. SR-FINRA-2008-025) be, and hereby is, approved.

<sup>8</sup> See Note 4, *supra*.

<sup>9</sup> In approving this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>10</sup> 15 U.S.C. 78o-3(b)(6).

<sup>11</sup> See Note 6, *supra*.

<sup>12</sup> 15 U.S.C. 78s(b)(2).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>13</sup>

**Florence E. Harmon,**

*Acting Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-58413; File No. SR-NYSE Arca-2008-84]

### Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by NYSE Arca, Inc. To Discontinue Its Policy of Requiring Legal Opinions in Connection With Listings of Securities

August 22, 2008.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that, on August 8, 2008, NYSE Arca, Inc. ("NYSE Arca" or the "Exchange") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice and order to solicit comments on the proposal from interested persons.

#### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

NYSE Arca, through its wholly-owned subsidiary NYSE Arca Equities, Inc. ("NYSE Arca Equities"), proposes to discontinue its practice of requiring the delivery of an opinion of counsel in connection with any application to list securities on the Exchange. In lieu thereof, the Exchange will require companies to (i) furnish the Exchange with copies of opinions of counsel filed in connection with recent public offerings or private placements or (ii) if no opinions of counsel exist, provide to the Exchange a certificate of good standing from the company's jurisdiction of incorporation. In addition, the Exchange is discontinuing its policy of requiring an opinion of counsel to the effect that the company is in compliance with all of the Exchange's corporate governance requirements at the time of listing and, in lieu thereof, will require that companies provide a revised form of initial written affirmation evidencing

<sup>13</sup> 17 CFR 200.30-3(a)(12).

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

<sup>27</sup> CFR 240.19b-4.

<sup>6</sup> See Securities Exchange Act Release No. 48701 (October 24, 2003), 68 FR 62126 (October 31, 2003) (Order Approving File No. SR-NASD-99-60); see also NASD Notice to Members 03-79 (December 2003) (SEC Approves New Rule 2790 (Restrictions on the Purchase and Sale of IPOs of Equity Securities); Replaces Free-Riding and Withholding Interpretation).

<sup>7</sup> Incorporated NYSE Rules only apply to FINRA members who are also members of the NYSE. All FINRA members are subject to existing NASD rules. See Note 5, *supra*. Thus, the movement of a rule that existed only the NASD rulebook but was not an Incorporated NYSE Rule into the Consolidated FINRA Rulebook does not create any new obligations for FINRA members.