SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-58532; File No. SR-NASD-2007-041)

September 12, 2008

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc. (f/k/a National Association of Securities Dealers, Inc.); Order Approving Proposed Rule Change, as Modified by Amendment No. 2, to Amend the Minimum Price-Improvement Standards Set Forth in NASD Interpretive Material ("IM") 2110-2

I. Introduction

On June 27, 2007, the National Association of Securities Dealers, Inc. ("NASD") (n/k/a Financial Industry Regulatory Authority, Inc. ("FINRA")) [1] filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[2] and Rule 19b-4 thereunder,[3] a proposed rule change to amend the minimum price-improvement standards set forth in NASD Interpretive Material ("IM") 2110-2. The proposed rule change was published for comment in the Federal Register.[4] The Commission received one commenter letter on the original proposal,[5] to which FINRA responded in a letter to the Commission, dated

1 On July 26, 2007, the Commission approved a proposed rule change filed by the NASD to amend the NASD's Certificate of Incorporation to reflect its name change to Financial Industry Regulatory Authority, Inc., or FINRA, in connection with the consolidation of the member firm regulatory functions of NASD and NYSE Regulation, Inc. See Securities Exchange Act Release No. 56146 (July 26, 2007), 72 FR 42190 (August 1, 2007) (SR-NASD-2007-053).

2 15 U.S.C. 78s(b)(1).

3 17 CFR 240.19b-4.

4 See Securities Exchange Act Release No. 56297 (August 21, 2007), 72 FR 49337 (August 28, 2007) (notice of filing of SR-NASD-2007-041) ("Release No. 34-56297").

5 See Letter to Secretary, Commission, from Jess Haberman, Compliance Director, Fidessa Corp., dated September 5, 2007 ("Fidessa Corp. Letter").

November 1, 2007.[6]

On June 26, 2008, FINRA filed Amendment No. 2 to the proposed rule change to address an inconsistency in the application of the proposed minimum price-improvement provisions identified by the commenter.[7] Amendment No. 2 was published for comment in the Federal Register on July 14, 2008.[8] The Commission received one additional comment letter on the proposed rule change.[9] This order approves the proposed rule change, as modified by Amendment No. 2.

II. Description of the Proposed Rule Change

A. Background

On February 26, 2007, the Commission approved the NASD's proposed rule change[10] that expanded the scope of IM-2110-2[11] (referred to as the Manning Rule) to apply to over-the-counter ("OTC") equity securities.[12] In Release No. 34-55351, the Commission also approved, for both National Market System ("NMS") and OTC equity

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6 See Letter from Andrea Orr, FINRA, to Nancy M. Morris, Secretary, Commission, dated November 1, 2007 ("FINRA Response Letter").

7 On May 20, 2008, FINRA filed Amendment No. 1 to the proposed rule change. Amendment No. 2 superseded and replaced Amendment No. 1.

8 See Securities Exchange Act Release No. 58114 (July 7, 2008), 73 FR 40407 ("Release No. 34-58114").

9 See Letter from from R. Cromwell Coulson, Chief Executive Officer, Pink OTC Markets Inc. ("Pink OTC"), to Secretary, Commission, dated September 3, 2008. ("Pink OTC Letter").

10 See Securities Exchange Act Release No. 55351 (February 26, 2007), 72 FR 9810 (March 5, 2007) (order approving SR-NASD-2005-146) ("Release No. 34-55351").

11 Currently, IM-2110-2 generally prohibits a member from trading for its own account in an exchange-listed security at a price that is equal to or better than an unexecuted customer limit order in that security, unless the member immediately thereafter executes the customer limit order at the price at which it traded for its own account or better.

12 See NASD Rule 6610(d) for definition of "OTC equity security."

securities, the minimum level of price-improvement that a member must provide to trade ahead of an unexecuted customer limit order ("price-improvement standards").

In Release No. 34-55351, the price-improvement standards were modified so that for customer limit orders priced greater than or equal to $1.00 that are at or inside the best inside market, the minimum amount of price improvement required is $0.01. For customer limit orders priced less than $1.00 that are at or inside the best inside market, the minimum amount of price improvement required is the lesser of $0.01 or one-half (1/2) of the current inside spread. For customer limit orders priced outside the best inside market, the member is required to execute the incoming order at a price at or inside the best inside market for the security. For customer limit orders in securities for which there is no published inside market, the minimum amount of price improvement required is $0.01.

The rule changes adopted in Release No. 34-55351 initially were scheduled to become effective on July 26, 2007.[13] However, following the filing of the instant proposed rule change, SR-NASD-2007-041, FINRA filed a proposed rule change to delay implementation of the application of IM-2110-2 to OTC equity securities, until 60 days after Commission approval of SR-NASD-2007-041.[14]

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13 See NASD Notice to Members 07-19 (April 2007).

14 See Securities Exchange Act Release No. 56103 (July 19, 2007), 72 FR 40918 (July 25, 2007) (notice of filing and immediate effectiveness of SR-NASD-2007-039). See also Securities Exchange Act Release No. 56822 (November 20, 2007), 72 FR 67326 (November 28, 2007) (notice of filing and immediate effectiveness of SR-FINRA-2007-023); and Securities Exchange Act Release No. 57133 (January 11, 2008), 73 FR 3500 (January 18, 2008) (notice of filing and immediate effectiveness of SR-FINRA-2007-038). Modifications to the price-improvement standards applicable to NMS stocks approved in Release No. 34-55351 became effective on July 26, 2007. See FINRA Member Alert dated June 20, 2007.

B. NASD 2007-041

In SR-NASD-2007-041, FINRA proposed to amend the minimum price-improvement standards set forth in IM-2110-2 to include new tiered standards that vary according to the price of the customer limit order. FINRA proposed to revise the minimum price-improvement standards to address three issues. First, because the minimum price improvement standards are determined based on the lesser of a specified amount ($.01) or one-half (1/2) of the inside spread, the specified amount acts as an "upper limit" on the minimum price improvement requirement. FINRA believed that the specified amount or upper limit on the minimum price improvement requirement (i.e., $.01) is disproportionately high for securities trading below $.01 and that it should vary proportionately with the amount of the limit order price. FINRA proposed that, for customer limit orders priced less than $.01 but greater than or equal to $0.001, the minimum amount of price improvement required would be the lesser of $0.001 or one-half (1/2) of the current inside spread. For customer limit orders priced less than $.001 but greater than or equal to $0.0001, the minimum amount of price improvement required would be the lesser of $0.0001 or one-half (1/2) of the current inside spread. For customer limit orders priced less than $.0001 but greater than or equal to $0.00001, the minimum amount of price improvement required would be the lesser of $0.00001 or one-half (1/2) of the current inside spread.[15] Finally, for customer limit orders priced less

[15] The proposed minimum price-improvement provisions in this proposed rule change do not supersede, alter or otherwise affect any of the minimum pricing increment restrictions under Rule 612 of Regulation NMS. Rule 612 of Regulation NMS prohibits market participants from displaying, ranking, or accepting bids or offers, orders, or indications of interest in any NMS stock priced in an increment smaller than $0.01 if the bid or offer, order, or indication of interest is priced equal to or greater than $1.00 per share. If the bid or offer, order,

than $.00001, the minimum amount of price improvement required would be the lesser of $0.000001 or one-half (1/2) of the current inside spread.[16]

In addition, FINRA proposed that the current minimum price improvement standard for limit orders priced greater than or equal to $1.00 would be $.01, and this standard would apply uniformly to NMS stocks[17] and OTC equity securities. However, given that subpenny quoting and trading is permissible in OTC equity securities priced at or over $1.00 (and therefore subpenny spreads are possible), FINRA believed that the minimum price improvement standard should be adjusted to also include a measure based on the inside spread, consistent with the standards for customer limit orders priced below $1.00. Accordingly, FINRA proposed that for customer limit orders in OTC equity securities priced greater than or equal to $1.00, the minimum amount of price improvement required should be the lesser of $0.01 or one-half (1/2) of the current inside spread.[18]

Finally, FINRA proposed to change the minimum price-improvement standard for limit orders priced outside the inside market. According to FINRA, although trades typically occur at or inside the best inside market, firms may trade proprietarily outside

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or indication of interest in any NMS stock is priced less than $1.00 per share, the minimum pricing increment is $0.0001. See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496 (June 29, 2005) (Regulation NMS Adopting Release).

16 For customer limit orders in securities for which there is no published inside market, the minimum amount of price improvement required would default to the same tiered minimum price improvement standards.

17 See Rule 600(b)(47) of Regulation NMS for definition of "NMS stock." 17 CFR 242.600(b)(47).

18 Other than the proposed distinction to address permissible subpenny quoting and trading in OTC equity securities priced over $1.00, the proposed price-improvement standards would apply uniformly to NMS stocks and OTC equity securities. See supra note 14.

the best inside market for a variety of reasons, such as where there is little or no depth at the inside market or the inside market is manual or not easily accessible. Under current requirements, such trades could trigger execution obligations with respect to all limit orders priced outside the inside market, no matter how far outside the inside market the limit order is priced. FINRA provided an example that assumed that the best inside market for a security is $.50 to $.51. The member displays a quote to buy at $.49 and also holds a customer limit order to buy priced at $.45. The member's quotation is accessed by another broker-dealer and the member buys at $.49. Under current requirements, the member would be required to fill the customer's purchase order at $.45 because it had not purchased at the inside market of $.50. Stating that it did not believe that this was an appropriate result, FINRA proposed that, where the limit order is priced outside the inside market for the security, the minimum amount of price improvement required must either meet the same tiered minimum price improvement standards set forth above or the member must trade at a price at or inside the best inside market for the security. FINRA believed that this would continue to require an appropriate amount of price improvement for a member to trade ahead of a customer limit order, irrespective of whether the limit order is priced inside or outside the best inside market.

The Commission received one comment letter in response to Release No. 34-56297.[19] The Fidessa Corp. Letter supported the proposed rule change, although the commenter suggested modifying and clarifying the proposal. In this regard, the commenter noted an inconsistency in the application of the proposed minimum price-improvement standards in low-priced securities when the customer limit order and the

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[19] See Fidessa Corp. letter, supra note 5.

proprietary trade fall into different minimum price improvement tiers (e.g., a customer limit order to sell is priced at $1.00 and the proprietary trade is at $.998). The commenter provided an example that assumed that the best inside market for an NMS stock is $.996 to $1.00 and a firm is holding customer limit orders to sell at prices of $.998 and $1.00. If the firm sells for its own account at $.996, only customer limit orders to sell priced below $.998 and from $1.00 up to, but not including, $1.006 would be protected due to the firm's $.996 triggering proprietary trade. As a result, the firm would not have an obligation under IM-2110-2 to protect the more aggressively priced $.998 customer limit order to sell (i.e., the minimum price improvement standard applicable to that order is the lesser of $.01 or one-half (1/2) of the current inside spread ($.002 (1/2 of $.004)), such that the $.996 proprietary trade would only trigger customer limit orders priced less than $.998), but would have an obligation to protect the $1.00 customer limit order to sell (i.e., the minimum price improvement standard applicable to that order is $.01 such that a $.996 proprietary trade would trigger customer limit orders priced at $1.00 up to, but not including, $1.006). The commenter suggested instead that FINRA base the minimum price-improvement standard on the trade price rather than the customer limit order price.

FINRA responded that the commenter's suggested approach could have unintended consequences in its application and would require significant reprogramming by member firms to implement, and therefore initially did not propose any revisions to the proposal.[20] FINRA explained that member firms could choose to provide protection voluntarily for more aggressively priced customer limit orders that fall within gaps.[21]

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20 See FINRA Response Letter, supra note 6.

21 Id.

Subsequently, however, FINRA proposed in Amendment No. 2. to require, and codify, as part of IM-2110-2, that any more aggressively priced customer limit orders also must receive limit order protection. Under Amendment No. 2, firms would be required to protect any more aggressively priced customer limit orders triggered under IM-2110-2, even if those limit orders were not directly triggered by the minimum price improvement standards of IM-2110-2.[22] FINRA explained, however, that it would not mandate any particular order handling procedures or execution priorities among protected orders. Rather, a firm could choose any reasonable methodology for the way in which it executes multiple orders triggered by IM-2110-2, provided that the firm ensures that such methodology is applied consistently and complies with applicable rules and regulations.[23]

Using the example above, once the limit order priced at $1.00 is activated upon the execution of the firm's trade at $.996 (i.e., it is activated because it is within .01 of the price of the firm's trade), a firm may implement a methodology that executes all more aggressively priced customer limit orders first (i.e., the limit order priced at $.998) before executing the limit order priced at $1.00. The proposed requirements would only apply

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22 The Fidessa Corp. Letter also sought clarification on the required price-improvement when the limit order is priced outside the inside market for the security, to which FINRA responded in the FINRA Response Letter that the minimum amount of price improvement required must either meet the same tiered minimum price improvement standards or the member must trade at a price at or inside the best inside market for the security. FINRA stated that firms need only to meet one of the minimum price-improvement options provided for limit orders priced outside the inside market and may do so on a trade-by-trade basis.

23 FINRA further clarified that this statement refers to the firm's methodology for executing multiple orders triggered by IM-2110-2 when their size exceeds the size of the firm's proprietary order that triggered the customer limit order protection obligation. Telephone conference, September 11, 2008, between Stephanie Dumont, Vice President and Director of Capital Markets Policy, FINRA, and Nancy Sanow, Assistant Director, Division of Trading and Markets, Commission.

in the limited circumstance where a firm has a limit order that is protected by IM-2110-2, but more aggressively priced customer limit orders are not protected. Therefore, in the above example, if the firm was only holding a customer limit order to sell of $.998 (and not a customer limit order of $1.00), the $.998 order would not be triggered by the proposed requirements.

The Commission received one comment letter in response to Release No. 34-58114.[24] The Pink OTC Letter supported the proposed rule change, as modified by Amendment No. 2, stating that it was necessary to correct the anomalous situation where inferior priced customer limit orders are protected over superior priced limit orders, and that "adoption of SR-NASD-2007-041 without correction of this anomalous situation would disrupt the orderly functioning of the market for OTC Equity Securities."

The Pink OTC Letter also recommended more broadly that the minimum increments of IM-2110-2 be considered as part of an amendment that would mandate minimum quote increment tier sizes for OTC equity securities.[25] The Pink OTC Letter urged that minimum increments for price improvement should mirror minimum quote increment tier sizes established on the Pink Quote interdealer quotation system to create "a level playing field for all market participants and improve investor confidence in the market."

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24 See Pink OTC Letter, supra note 9.

25 Pink OTC attached a study of its 2006 Minimum Quote Increment Tier Pilot Program. ("Pink OTC Pilot Program") According to Pink OTC, the study showed that minimum tier sizes implemented during the Pink OTC Pilot Program did not result in artificial widening of spreads or degradation of market quality.

III. Discussion and Commission's Findings

The Commission has reviewed carefully the proposed rule change, as modified by Amendment No. 2, and the two comment letters it received, and finds that the proposed rule change, as modified by Amendment No. 2, is consistent with the Act and the rules and regulations thereunder applicable to a national securities association, including the provisions of Section 15A(b)(6) of the Act,[26] which requires, among other things, that FINRA rules be designed to promote just and equitable principals of trade, to foster cooperation and coordination with the persons engaged in regulating, clearing, settling, processing transactions in securities, and, in general, to protect investors and the public interest.[27]

The Commission previously approved revisions to IM-2110-2 to apply the Manning Rule to OTC equity securities,[28] and notes that FINRA delayed its implementation pending Commission approval of the instant proposed rule change, as amended.[29]

FINRA's proposal would revise the current price-improvement standards by adding a number of tiers to the minimum price-improvement standard for customer limit orders priced below $.01; adjusting the price-improvement standards to also include a

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26 See 15 U.S.C. 78o-3(b)(6).

27 In approving this proposed rule change, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

28 See Release No. 34-55351, supra note 10.

29 See supra note 13.

measure based on one-half of the current inside spread for customer limit orders in OTC equity securities when such limit orders are priced greater than or equal to $1.00; and changing the price improvement standards for limit orders priced outside the inside market. The Commission believes that these revisions to IM-2110-2 are appropriate and reasonably designed to protect customer limit orders in both NMS stocks and OTC equity securities.

Fidessa Corp. suggested that the minimum price-improvement standards should be based on the security's trade price rather than the limit order price of the customer limit order. The commenter observed that anomalies can occur at the periphery of the minimum price improvement tiers for low-priced securities when the minimum price-improvement requirement is based on the order's price.

In the FINRA Response Letter, FINRA responded that Fidessa Corp.'s proposed alternative approach would address some of the potential anomalies in the application of the proposed rule, but could have unintended consequences in its application and would require significant reprogramming by the firms to implement. Instead, FINRA revised its proposal, in Amendment No. 2, to require firms to institute written policies and procedures to fill those more aggressively priced customer limit orders ahead of other less aggressively priced limit orders covered by the Rule. This approach was supported by Pink OTC.

The Commission believes that the revisions in Amendment No. 2 are reasonably designed to eliminate the anomalies that can occur in the case of limit orders with prices that straddle the proposed minimum price-improvement tiers. Although Pink OTC urged that amendments to IM-2110-2 should be complemented by additional provisions

mandating minimum quote increment tier sizes for OTC equity securities, the Commission considers this recommendation to be beyond the scope of the proposed rule change before it.

Accordingly, the Commission believes that the proposed rule change strikes a reasonable balance between protecting customer limit orders and enhancing the opportunity for investors to receive superior-priced limit order executions in OTC equity securities.

For the reasons described above, the Commission believes that the proposed rule change is consistent with the Act.

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act, that the proposed rule change (SR-NASD-2007-041), as modified by Amendment No. 2, be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[30]

Florence E. Harmon
Acting Secretary

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30 17 CFR 200.30-3(a)(12).