Room, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. 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–BATS–2008–005 and should be submitted on or before October 22, 2008.

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

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–23041 Filed 9–30–08; 8:45 am]

BILLING CODE 8011–01–P

[14] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–58643; File Nos. SR–FINRA–2008–021; SR–FINRA–2008–022; SR–FINRA–2008–026; SR–FINRA–2008–028 and SR–FINRA–2008–029]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Order Approving Proposed Rule Change, as Modified by Amendment No. 1, Relating to the Adoption of NASD Rules 4000 Through 10000 Series and the 12000 Through 14000 Series as FINRA Rules in the New Consolidated FINRA Rulebook; Order Approving Proposed Rule Change Relating to the Membership Waive-In Process for Certain New York Stock Exchange Members; Order Approving Proposed Rule Change, as Modified by Amendment No. 1, To Adopt the FINRA Rule 0100 Series (General Standards) in the Consolidated FINRA Rulebook; Order Approving Proposed Rule Change To Adopt FINRA Rule 2010 (Standards of Commercial Honor and Principles of Trade), FINRA Rule 2020 (Use of Manipulative, Deceptive or Other Fraudulent Devices), and FINRA Rule 5150 (Fairness Opinions) in the Consolidated FINRA Rulebook; and Order Approving Proposed Rule Change, as Modified by Amendment No. 1, To Repeal NASD Rule 1130 and Incorporated Rules 405A, 440F, 440G and 447 as Part of the Process of Developing the Consolidated FINRA Rulebook

September 25, 2008.

I. Introduction

On May 23, 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'' or ''Exchange''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change to adopt the following NASD rules (which are part of the existing FINRA rulebook) as FINRA rules into a new consolidated rulebook (''Consolidated FINRA Rulebook''): The 4000 through 10000 Series and the 12000 through 14000 Series (collectively, the ''Marketplace and Procedural Rules Proposal''). The Marketplace and Procedural Rules Proposal, as modified by Amendment No. 1, was published for comment in the **Federal Register** on July 23, 2008.[3] The Commission received no comments on the Marketplace and Procedural Rules Proposal. This order approves the Marketplace and Procedural Rules Proposal, as modified by Amendment No. 1.

On May 23, 2008, FINRA filed with the Commission, pursuant to Section 19(b)(1) of the Act and Rule 19b–4 thereunder, a proposed rule change relating to the membership waive-in process for certain New York Stock Exchange LLC (''NYSE'') members (''Waive-In Firms Proposal''). The Waive-In Firms Proposal was published for comment in the **Federal Register** on July 28, 2008.[4] The Commission received no comments on the Waive-In Firms Proposal. This order approves the Waive-In Firms Proposal.

On June 13, 2008, FINRA filed with the Commission, pursuant to Section 19(b)(1) of the Act and Rule 19b–4 thereunder, a proposed rule change to adopt FINRA Rule 2010 (Standards of Commercial Honor and Principles of Trade), FINRA Rule 2020 (Use of Manipulative, Deceptive or Other Fraudulent Devices), and FINRA Rule 5150 (Fairness Opinions) in the Consolidated FINRA Rulebook (collectively, the ''Ethical Conduct and Fairness Opinion Rules Proposal''). The Ethical Conduct and Fairness Opinion Rules Proposal was published for comment in the **Federal Register** on July 10, 2008.[5] The Commission received no comments on this proposed rule change. This order approves the Ethical Conduct and Fairness Opinion Rules Proposal.

On June 16, 2008, FINRA filed with the Commission, pursuant to Section 19(b)(1) of the Act and Rule 19b–4 thereunder, a proposed rule change to adopt the FINRA Rule 0100 Series (General Standards) in the Consolidated FINRA Rulebook (''General Standards Proposal''). The General Standards Proposal, as modified by Amendment No. 1, was published for comment in the **Federal Register** on August 7, 2008.[6] The Commission received no comments on the General Standards Proposal. This order approves the General Standards Proposal as modified by Amendment No. 1.

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

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 58176 (July 16, 2008), 73 FR 42844 (July 23, 2008) (SR–FINRA–2008–021) (''Release No. 34–58176'').

[4] *See* Securities Exchange Act Release No. 58206 (July 22, 2008), 73 FR 43808 (July 28, 2008) (SR–FINRA–2008–022).

[5] *See* Securities Exchange Act Release No. 58095 (July 3, 2008), 73 FR 39751 (July 10, 2008) (SR–FINRA–2008–028).

[6] *See* Securities Exchange Act Release No. 58245 (July 29, 2008), 73 FR 46106 (August 7, 2008) (SR–FINRA–2008–026).

On June 16, 2008, FINRA filed with the Commission, pursuant to Section 19(b)(1) of the Act and Rule 19b–4 thereunder, a proposed rule change to repeal NASD Rule 1130 and Incorporated NYSE Rules NYSE 405A, 440F, 440G and 477 as part of the process of developing the Consolidated FINRA Rulebook (collectively, the ''Miscellaneous Rules Proposal''). The Miscellaneous Rules Proposal, as modified by Amendment No. 1, was published for comment in the **Federal Register** on August 4, 2008.[7] The Commission received no comments on the Miscellaneous Rules Proposal. This order approves the Miscellaneous Rules Proposal, as modified by Amendment No. 1.

II. Description

On July 30, 2007, the NASD and NYSE Regulation, Inc. (''NYSE Regulation''), a wholly-owned subsidiary of NYSE, consolidated their member firm regulation operations into a combined organization, FINRA.[8] As part of the transaction, FINRA incorporated into its existing rulebook, comprised of NASD rules, certain NYSE rules related to member firm conduct (''Incorporated NYSE Rules''). Consequently, the current FINRA rulebook consists of two sets of rules: (1) NASD rules; and (2) the Incorporated NYSE Rules (together referred to as the ''Transitional Rulebook''). Following the consolidation of NASD and NYSE Regulation into FINRA, FINRA established a process to develop the Consolidated FINRA Rulebook. During this process, FINRA members generally will be subject to both the Consolidated FINRA Rulebook, as it becomes populated with rules filed with and approved by the Commission, and the Transitional Rulebook. As the Consolidated FINRA Rulebook expands with Commission-approved FINRA rules, the Transitional Rulebook will be reduced by the elimination of those rules, or sections thereof, that address the same subject matter. Therefore, when the Consolidated FINRA Rulebook is complete, the Transitional Rulebook will have been eliminated in its entirety. The proposed rule changes would incorporate various rules into the Consolidated FINRA Rulebook, eliminate certain Incorporated NYSE Rules, and apply the consolidated FINRA rules to the NYSE firms admitted pursuant to IM–1013–1 (''Waive-In Firms'').

III. Discussion and Commission's Findings

After careful review, the Commission finds that the Marketplace and Procedural Rules Proposal, as amended, the Waive-In Firms Proposal, the General Standards Proposal, as amended, the Ethical Conduct and Fairness Opinion Rules Proposal, and the Miscellaneous Rules Proposal, as amended, are consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities association.[9] In particular, the Commission finds that these proposed rule changes are consistent with Section 15A(b)(6) of the Act,[10] 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. In addition, for purposes of the Marketplace and Procedural Rules Proposal, the Commission finds that this proposed rule change is consistent with Section 15A(b)(5) of the Act,[11] which requires, among other things, that FINRA rules provide for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility or system that FINRA operates and controls.

The Commission notes that FINRA will announce the implementation date of the proposed rule changes in a *Regulatory Notice* to be published no later than 60 days following Commission approval. The discussion below does not review every detail of each of the proposed rule changes, but focuses on the most significant rules and policy issues considered by the Commission in reviewing the proposals.

A. Marketplace and Procedural Rules Proposal (SR–FINRA–2008–021)

The Marketplace and Procedural Rules Proposal will transfer from the Transitional Rulebook to the Consolidated FINRA Rulebook the NASD Rule 4000 through 14000 Series, with the exception of the Rule 11000 Series (Uniform Practice Code). The proposed rule change generally will transfer these rules into the Consolidated FINRA Rulebook in their entirety with certain non-material changes, including: Replacing references to NASD or the Association with FINRA; renumbering and relocating certain rules, or sections thereof, to effectuate a new organizational framework; and making certain other non-substantive and conforming changes. Additionally, the Marketplace and Procedural Rules Proposal will reserve Rule Series 0100 through 5000 for future transfers and amendments to member conduct rules relating to requirements such as the member application processes and associated person registration, transactions with customers, supervision, communications and disclosures, and financial responsibility. Further, with the exception of the arbitration and meditation procedures, the Consolidated FINRA Rulebook will no longer contain Interpretive Materials (''IMs''). The IMs will become stand-alone rules or will be integrated into existing rule text or moved to a ''Supplementary Material'' section at the end of a rule. The ''Supplementary Material'' will set forth the same type of legally binding guidance and additional information that IMs provide presently and will be filed with the Commission.

The Marketplace and Procedural Rules Proposal also provides that certain rules in the Transitional Rulebook have general application to the entirety of rules that govern FINRA members. These rules, described in greater detail in the Marketplace and Procedural Rules Proposal, will apply to both the Transitional Rulebook and the Consolidated Rulebook.

The Commission believes that the Marketplace and Procedural Rules Proposal is consistent with Section 15A(b)(6) of the Act and would further the objective of the NASD/NYSE Regulation consolidation to create a more efficient regulatory system for firms that are members of both FINRA and NYSE. The Commission believes that the proposed rule change is designed to clarify, harmonize and streamline the Rule 4000 through 14000 Series (not including the 11000 Series) for adoption as FINRA rules in the new Consolidated FINRA Rulebook. The Commission also believes that the proposed rule change is consistent with Section 15A(b)(5) of the Act by providing for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility or system that FINRA operates or controls.

B. Waive-In Firms Proposal (SR–FINRA–2008–022)

As part of the consolidation process, NYSE required that its members also be

[7] *See* Securities Exchange Act Release No. 58244 (July 29, 2008), 73 FR 45258 (August 4, 2008) (SR–FINRA–2008–029).

[8] *See* Securities Exchange Act Release No. 56145 (July 26, 2007); 72 FR 42169 (August 1, 2007) (Order Approving SR–NASD–2007–023).

[9] 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).

[10] 15 U.S.C. 78*o*–3(b)(6).

[11] 15 U.S.C. 78*o*–3(b)(5).

registered FINRA members. Accordingly, FINRA adopted IM–1013–1, which provided an expedited waive-in process for NYSE member organizations to become FINRA members.[12] IM–1013–1 requires these Waive-In Firms to be subject to the Incorporated NYSE Rules, FINRA's By-Laws, the Schedules to the By-Laws, including Schedule A (Assessments and Fees), and the NASD Rule 8000 (Investigations and Sanctions) and Rule 9000 (Code of Procedure) Series, provided that their securities business is limited to permitted floor activities.[13] FINRA proposed to amend IM–1013–1 to add that the Waive-In Firms also will be subject to the consolidated FINRA rules and to remove references to the NASD Rule 8000 and Rule 9000 Series, whose content is being transferred without substantive change to the Consolidated FINRA Rulebook.[14] The amended IM–1013–1 will continue to require that the Waive-In Firms be subject to the Incorporated NYSE Rules until they are eliminated from the Transitional Rulebook and replaced by rules adopted into the FINRA Consolidated Rulebook.

The Commission notes that the proposed rule change would ensure that Waive-In Firms will continue to be subject to FINRA's investigation and disciplinary procedure rules as those rules will be incorporated into the Consolidated FINRA Rulebook. The Commission further notes that the proposed rule change, by subjecting the Waive-In Firms to all the consolidated FINRA rules, also would ensure that Waive-In Firms will continue to be subject to FINRA's regulation throughout the consolidation process, as the Incorporated NYSE Rules are eliminated and replaced by rules adopted into the FINRA Consolidated Rulebook. Thus, the Commission believes that the proposed rule change should minimize the potential for regulatory and jurisdictional gaps during the period that the rule consolidation process occurs. Therefore, because the Waive-In Firms will continue to be subject to FINRA's regulation, the Commission believes that the proposed rule change is consistent with the requirements of the Act, in particular, Section 15A(b)(6),[15] which requires the rules of a national securities association to be designed to prevent fraudulent and manipulative acts and practices, promote just and equitable principles of trade and, in general, to protect investors and the public interest.

C. General Standards Proposal (SR–FINRA–2008–026)

The General Standards proposal will adopt the NASD Rule 0100 Series (General Provisions) as FINRA rules in the Consolidated FINRA Rulebook, with the exception of NASD Rule 0120, which FINRA advises will be addressed at a later date in a separate filing. The NASD Rule 0100 Series governs the adoption, application and interpretation of NASD rules and sets forth certain definitions not contained in the FINRA By-Laws. In addition, these rules address FINRA's delegation of certain responsibilities to its subsidiaries, and its authority and access with respect to its subsidiaries. FINRA is proposing to transfer this rule series as the FINRA Rule 0100 Series, to be renamed as ''General Standards,'' to the Consolidated FINRA Rulebook, with only minor, non-substantive changes. The proposed rule change will not impose any new requirements on FINRA members, but will clarify and streamline these rules for inclusion in the Consolidated FINRA Rulebook. FINRA notes that, notwithstanding their transfer to the Consolidated FINRA Rulebook, these rules of general applicability will apply equally to both the Transitional Rulebook and the Consolidated FINRA Rulebook.[16]

The Commission believes that the General Standards Proposal is consistent with the Act and is appropriate in light of the objective to create a Consolidated FINRA Rulebook. The Commission believes that the proposed rule change is designed to clarify and streamline the Rule 0100 Series for adoption as FINRA rules in the new Consolidated FINRA Rulebook.

D. Ethical Conduct and Fairness Opinion Rules Proposal (SR–FINRA–2008–028)

FINRA proposed to adopt NASD Rules 2110, 2120, and 2290 as FINRA Rules 2010, 2020, and 5150, respectively, in the Consolidated FINRA Rulebook. The rules, which include the general standards of commercial honor and principles of trade, anti-fraud and manipulation requirements, and disclosure of conflicts of interest in fairness opinions, will be adopted without change, with the exception of re-numbering the rules to reflect the new organizational structure of the Consolidated FINRA Rulebook. As noted above, this proposal does not address the Interpretive Materials (''IMs'') to NASD Rule 2110, which FINRA advises will be considered in a later phase of the rulebook consolidation process. Consequently, the IMs will remain in the Transitional Rulebook. In the process of transferring NASD Rule 2110, which requires adherence to just and equitable principles of trade, FINRA proposed to delete Incorporated NYSE Rule 401(a) and its two accompanying Interpretations because they are subsumed under the general principles of NASD Rule 2110. In addition, FINRA proposed to delete paragraphs (1), (3) and (4) of Incorporated NYSE Rule 435, because they are subsumed under the anti-fraud and manipulation requirements of NASD Rule 2120.[17]

The transfer of NASD Rules 2110 and 2020 to the Consolidated FINRA Rulebook, in addition to the deletion of Incorporated NYSE Rule 401(a), its corresponding Interpretations, and certain provisions of Incorporated NYSE Rule 435, will continue to require FINRA members to adhere to the requirements of the overarching principles of just and equitable trade and the prohibitions against fraudulent and manipulative acts and practices. The Commission believes that the proposed rule change is consistent with the requirements of Section 15A of the Act, and with Section 15A(b)(6) in particular, because the rules to be transferred to the Consolidated FINRA Rulebook are designed to allow FINRA 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.[18] The Commission also believes that it is reasonable for FINRA to transfer to the Consolidated FINRA Rulebook the provisions of NASD Rule 2290, which requires the disclosure of conflicts of interest in connection with fairness opinions and procedures designed to mitigate those conflicts.

E. Miscellaneous Rules Proposal (SR–FINRA–2008–029)

FINRA proposed a rule change to repeal various NASD and Incorporated NYSE Rules to eliminate duplicative provisions and remove requirements

[12] *See* Securities Exchange Act Release No. 56653 (October 12, 2007), 72 FR 59127 (October 18, 2007) (SR–NASD–2007–056).

[13] If a Waive-In Firm wished to expand its business beyond the permitted floor activities indicated in IM–1013–1, it must apply for such business expansion pursuant to NASD Rule 1017 and, upon approval, become subject to all NASD rules in addition to the consolidated FINRA rules and the Incorporated NYSE Rules.

[14] *See* Release No. 34–58176, *supra* note 3.

[15] 15 U.S.C. 78*o*–3(b)(6).

[16] *See* Release No. 34–58176, *supra* note 3.

[17] FINRA also proposed to delete as obsolete paragraphs (6) and (7) of Incorporated NYSE Rule 435, but retained paragraph (5) of this rule.

[18] 15 U.S.C. 78*o*–3.

that are specific to the NYSE marketplace. NASD Rule 1130 (Reliance on Current Membership List) is to be deleted as it is duplicative of Article IV, Section 4 of the FINRA By-Laws. Also, Incorporated NYSE Rules 405A (Non-Managed Fee-Based Account Programs—Disclosure and Monitoring) will be repealed because it is subsumed under NASD Rule 2110's *Notice to Members* 03–68. Further, Incorporated NYSE Rules 440F (Public Short Sale Transactions Effected on the Exchange) and 440G (Transactions in Stocks and Warrants for the Accounts of Members, Allied Members and Member Organizations) will be eliminated because they are specific to the NYSE marketplace and relate solely to exchange transactions. Finally, Incorporated NYSE Rule 477 (Retention of Jurisdiction—Failure to Cooperate) will be repealed because it retains jurisdiction over former members and associated person for initiating disciplinary action, which is also specified under Article IV, Section 6 and Article V, Section 4 of the FINRA By-Laws.

The Commission notes that the deletion of these rules will eliminate duplicative provisions covered by other rules in the Consolidated FINRA Rulebook and remove unnecessary requirements that are specific to the NYSE marketplace. In eliminating duplicative and unnecessary rules, the proposed rule change should further the objectives of Section 15A(b)(6) of the Act,[19] which requires 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.

Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[20] that the Marketplace and Procedural Rules Proposal (SR–FINRA–2008–021), as modified by Amendment No. 1; the Waive-In Firms Proposal (SR–FINRA–2008–022); the General Standards Proposal (SR–FINRA–2008–026), as modified by Amendment No. 1; the Ethical Conduct and Fairness Opinion Rules Proposal (SR–FINRA–2008–028); and the Miscellaneous Rules Proposal (SR–FINRA–2008–029), as modified by Amendment No. 1, be, and hereby are, approved.

[19] 15 U.S.C. 78*o*–3(b)(6).

[20] 15 U.S.C. 78s(b)(2).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[21]

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–23040 Filed 9–30–08; 8:45 am]

BILLING CODE 8011–01–P

[21] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–58648; File No. SR–FINRA–2008–044]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of Proposed Rule Change Relating to the Supervision of Market Letters

September 25, 2008.

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 September 4, 2008, Financial Industry Regulatory Authority, Inc. (''FINRA'') (f/k/a National Association of Securities Dealers, Inc. (''NASD'')) filed with the Securities and Exchange Commission (''Commission'' or ''SEC'') the proposed rule change as described in Items I, II, and III below, which Items have been substantially prepared by FINRA.[3] 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 amend NASD Rules 2210 (Communications with the Public) and 2211 (Institutional Sales Material and Correspondence) and Incorporated New York Stock Exchange (''NYSE'') Rule 472 (Communications with the Public) to address the supervision of market letters.[4] Among other things, the proposed rule change would amend the definition of ''sales literature'' in NASD Rule 2210 to exclude market letters that qualify as ''correspondence'' and would define ''correspondence'' in NASD Rule 2211 to include market letters distributed by a member to one or more of its existing retail customers and fewer than 25 prospective retail customers within any 30 calendar-day period.

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

* * * * *

NASD Rules

2200. COMMUNICATIONS WITH CUSTOMERS AND THE PUBLIC

2210. Communications with the Public

(a) Definitions. For purposes of this Rule and any interpretation thereof, ''communications with the public'' consist of:

(1) No Change.

(2) ''Sales Literature.'' Any written or electronic communication, other than an advertisement, independently prepared reprint, institutional sales material and correspondence, that is generally distributed or made generally available to customers or the public, including circulars, research reports, [market letters,] performance reports or summaries, form letters, telemarketing scripts, seminar texts, reprints (that are not independently prepared reprints) or excerpts of any other advertisement, sales literature or published article, and press releases concerning a member's products or services.

(3) through (6) No Change.

(b) through (e) No Change.

* * * * *

2211. Institutional Sales Material and Correspondence

(a) Definitions

For purposes of Rule 2210, this Rule, and any interpretation thereof:

(1) ''Correspondence'' consists of any written letter or electronic mail message *and any market letter* distributed by a member to:

(A) one or more of its existing retail customers; and

(B) fewer than 25 prospective retail customers within any 30 calendar-day period.

(2) through (4) No Change.

(5) ''Market Letter'' means any written communication excepted from the definition of ''research report'' pursuant to Rule 2711(a)(9)(A).

(b) through (e) No Change.

* * * * *

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

[2] 17 CFR 240.19b–4.

[3] Items include non-substantive edits discussed during a September 24, 2008 telephone call between Philip Shaikun, Associate Vice President and Associate General Counsel, FINRA; Haimera Workie, Branch Chief, Office of Chief Counsel, Division of Trading and Markets, SEC; and Timothy Cornell, Attorney, Office of Chief Counsel, Division of Trading and Markets, SEC.

[4] The FINRA rulebook currently includes (1) NASD Rules and (2) rules incorporated from NYSE (''Incorporated NYSE Rules''). While the NASD Rules generally apply to all FINRA members, the Incorporated NYSE Rules apply only to members of both FINRA and the NYSE, referred to as Dual Members.