

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-68037; File No. SR-FINRA-2012-045)

October 11, 2012

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change to Amend NASD Rule 2711 and Incorporated NYSE Rule 472 to Conform with the Requirements of the Jumpstart Our Business Startups Act and Related Changes

I. Introduction

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 28, 2012, Financial Industry Regulatory Authority, Inc. (“FINRA”) (f/k/a National Association of Securities Dealers, Inc. (“NASD”)) filed with the Securities and Exchange Commission (“SEC” or “Commission”) the proposed rule change as described in Items I, II, and III below, which Items have substantially been prepared by FINRA. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons and to approve the proposed rule change on an accelerated basis.

II. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

FINRA is proposing to amend NASD Rule 2711 (Research Analysts and Research Reports) to conform with the requirements of the Jumpstart Our Business Startups Act (“JOBS Act”)³ and make certain additional changes to quiet period restrictions consistent with the policies underlying the JOBS Act. The proposed rule

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ Pub. L. No. 112-106, 126 Stat. 306.

change also makes conforming amendments to Incorporated NYSE Rule 472 (Communications With The Public).

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.

III. 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

The JOBS Act was signed into law on April 5, 2012. Among other things, the JOBS Act is intended to help facilitate capital formation for "emerging growth companies" ("EGCs") by improving the information flow about EGCs to investors. To that end, Section 105(b) of the JOBS Act amended Section 15D of the Act to prohibit the Commission or any national securities association from adopting or maintaining any rule or regulation in connection with an initial public offering ("IPO") of an EGC that:

- restricts, based on functional role, which associated persons of a broker, dealer, or member of a national securities association, may arrange for communications between an analyst and a potential investor; or

- restricts a securities analyst from participating in any communication with the management of an EGC that is also attended by any other associated person of a broker, dealer, or member of a national securities association whose functional role is other than as a securities analyst.

Section 105(d) further prohibits the Commission or any national securities association from adopting or maintaining any rule or regulation that prohibits a broker or dealer from publishing or distributing any research report or making a public appearance, with respect to the securities of an EGC either:

- within any prescribed period of time following the IPO date of the EGC; or
- within any prescribed period of time prior to the expiration date of any agreement between the broker, dealer, or member of a national securities association and the EGC or its shareholders that restricts or prohibits the sale of securities held by the EGC or its shareholders after the IPO date.

These provisions became effective upon signature of the President on April 5, 2012. On August 22, 2012, the SEC's Division of Trading and Markets provided guidance on these provisions in the form of Frequently Asked Questions ("FAQs").⁴ FINRA is amending the applicable provisions of NASD Rule 2711 to conform with the JOBS Act and SEC staff guidance with regard to the applicable JOBS Act provisions.⁵

Arranging and Participating in Communications

⁴ These FAQs are available at <http://www.sec.gov/divisions/marketreg/tmjjobsact-researchanalystsfaq.htm>.

⁵ FINRA notes that the SEC staff guidance interprets the JOBS Act provisions as applicable to Incorporated NYSE Rule 472 to the same extent as NASD Rule 2711. As such, the proposed rule change makes corresponding amendments to Incorporated NYSE Rule 472.

NASD Rule 2711(c)(4)⁶ prohibits a research analyst from participating “in efforts to solicit investment banking business,” including any “pitches” for investment banking business or other communications with companies for the purpose of soliciting investment banking business. The FAQs interpret the JOBS Act to now allow, in connection with an IPO of an EGC, research analysts to attend meetings with issuer management that are also attended by investment banking personnel, including pitch meetings, but not “engage in otherwise prohibited conduct in such meetings,” including “efforts to solicit investment banking business.” The FAQs further explain that a research analyst that attends a pitch meeting “could, for example, introduce themselves, outline their research program and the types of factors that the analyst would consider in his or her analysis of a company, and ask follow-up questions to better understand a factual statement made by the [EGC]’s management.” Accordingly, the proposed rule change creates an exception to NASD Rule 2711(c)(4) to reflect this guidance regarding the application of the JOBS Act.⁷

The FAQs state that under Section 105(b) of the JOBS Act, an associated person of a broker-dealer, including investment banking personnel, may arrange communications between research analysts and investors in connection with an IPO of an EGC. As an example, the FAQs state that an investment banker could forward a list of clients to a research analyst that the analyst could, “at his or her own discretion and with appropriate controls, contact.” The FAQs acknowledge that FINRA does not have a rule that directly prohibits this activity and further states that such activity, without more,

⁶ See also Incorporated NYSE Rule 472(b)(5).

⁷ A corresponding exception is created for Incorporated NYSE Rule 472(b)(5).

would not constitute conduct by investment banking personnel to directly or indirectly direct a research analyst to engage in sales or marketing efforts related to an investment banking services transaction, in violation of NASD Rule 2711(c)(6).⁸ Accordingly, this JOBS Act provision requires no conforming rule change.

Quiet Periods

Section 105(d) of the JOBS Act expressly permits publication of research and public appearances with respect to the securities of an EGC any time after the IPO of an EGC or prior to the expiration of any lock up agreement. While the JOBS Act refers only to the “expiration” of a lock-up agreement, the FAQs note a SEC staff belief that Congress intended for the JOBS Act provisions to apply equally to the period before a “waiver” or “termination” of a lock-up agreement. Thus, in accordance with SEC staff guidance on this JOBS Act provision, the proposed rule change amends NASD Rule 2711 to eliminate the following quiet periods with respect to an IPO of an EGC:

- NASD Rule 2711(f)(1)(A),⁹ which imposes a 40-day quiet period after an IPO on a member that acts as a manager or co-manager of such IPO;
- NASD Rule 2711(f)(2),¹⁰ which imposes a 25-day quiet period after an IPO on a member that participates as an underwriter or dealer (other than manager or co-manager) of such an IPO; and

⁸ See also Incorporated NYSE Rule 427(b)(6)(ii). In 2003 and 2004, the Commission, self-regulatory organizations, and other regulators instituted settled enforcement actions against 12 broker-dealers to address conflicts of interest between the firms’ research and investment banking functions (“Global Settlement”). As the FAQs point out, firms subject to the Global Settlement should also be mindful of the requirements of that court order as they remain in place.

⁹ See also Incorporated NYSE Rule 472(f)(1).

- NASD Rule 2711(f)(4)¹¹ with respect to the 15-day quiet period applicable to IPO managers and co-managers prior to the expiration, waiver, or termination of a lock-up agreement or any other agreement that such member has entered into with a subject company or its shareholders that restricts or prohibits the sale of securities held by the subject company or its shareholders after the completion of an IPO.

The FAQs note that the JOBS Act makes no reference to quiet periods after a secondary offering or during a period of time after expiration, termination, or waiver of a lock-up agreement. Accordingly, the FAQs note that NASD Rule 2711(f)(1)(B),¹² which imposes a 10-day quiet period on managers and co-managers following a secondary offering and the remaining portion of NASD Rule 2711(f)(4)¹³ relating to quiet periods after the expiration, termination or waiver of a lock up agreement, remain fully in effect. Nonetheless, the FAQs express the SEC staff's belief that the policies underlying the JOBS Act are equally applicable to quiet periods during these other times. FINRA agrees that elimination of those quiet periods would advance the policy objectives of the JOBS Act and therefore has proposed to amend NASD Rule 2711 accordingly.¹⁴

¹⁰ See also Incorporated NYSE Rule 472(f)(3).

¹¹ See also Incorporated NYSE Rule 472(f)(4).

¹² See also Incorporated NYSE Rule 472(f)(2).

¹³ See also Incorporated NYSE Rule 472(f)(4).

¹⁴ A corresponding change is made to Incorporated NYSE Rule 472(f).

FINRA has requested the Commission to find good cause pursuant to Section 19(b)(2) of the Act¹⁵ for approving the proposed rule change prior to the 30th day after its publication in the Federal Register so that FINRA can implement changes to conform with the JOBS Act, which has been effective since April 5, 2012. The proposed changes to NASD Rules 2711(c)(4), (f)(1)(A), (f)(2), and (f)(4) (with respect to the 15-day quiet period before the expiration, termination or waiver of a lock-up agreement) and the corresponding changes to Incorporated NYSE Rule 472 would be effective as of April 5, 2012. FINRA requests that the proposed changes to NASD Rules 2711(f)(1)(B) and (f)(4) (with respect to the 15-day quiet period after the expiration, termination or waiver of a lock-up agreement) and the corresponding changes to Incorporated NYSE Rule 472, which further the policies underlying the statutory mandates, become effective upon 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,¹⁶ 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 changes to NASD Rules 2711(c)(4),¹⁷ (f)(1)(A),¹⁸

¹⁵ 15 U.S.C. 78s(b)(2).

¹⁶ 15 U.S.C. 78o-3(b)(6).

¹⁷ See also Incorporated NYSE Rule 472(b)(5).

¹⁸ See also Incorporated NYSE Rule 472(f)(1).

(f)(2),¹⁹ and (f)(4)²⁰ (with respect to the 15-day quiet period before the expiration, termination or waiver of a lock-up agreement) and the corresponding changes to Incorporated NYSE Rule 472 conform those rules to statutory mandates. FINRA also believes that the proposed additional changes to NASD Rules 2711(f)(1)(B)²¹ and (f)(4)²² further the policies underlying the statutory mandates by improving information flow to investors with respect to EGCs without sacrificing the reliability of research reports, as the other objectivity safeguards in NASD Rule 2711²³ and SEC Regulation AC²⁴ are effective and will continue to apply.

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

FINRA does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended by the JOBS Act.

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

Written comments were neither solicited nor received.

¹⁹ See also Incorporated NYSE Rule 472(f)(3).

²⁰ See also Incorporated NYSE Rule 472(f)(4).

²¹ See also Incorporated NYSE Rule 472(f)(2).

²² See also Incorporated NYSE Rule 472(f)(4).

²³ See also Incorporated NYSE Rule 472.

²⁴ 17 CFR 242.500-05.

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-2012-045 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-2012-045. 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-2012-045 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

V. Commission's Findings and Order Granting Accelerated Approval of Proposed Rule Change

After careful review of the proposed rule change, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities association.²⁵ In particular, the Commission finds that the proposed rule change is consistent with Section 15A(b)(6) of the Act.²⁶ The proposal primarily reflects the changes imposed on FINRA's rules by Sections 105(b) and 105(d) of the JOBS Act and thus is primarily updating the language of NASD Rule 2711 and Incorporated NYSE Rule 472 to reflect that reality. The one change not expressly mandated by the JOBS Act, removing the quiet periods regarding the secondary offering of the securities of EGCs and after the expiration, termination, or waiver of a lock-up regarding such securities, is consistent with the purpose of the JOBS Act as part of an effort to improve communications with investors regarding EGCs. Furthermore, other safeguards designed to protect the objectivity of research and provide

²⁵ In approving this rule change, the Commission notes that it has considered the proposed rule change's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

²⁶ 15 U.S.C. 78o-3(b)(6).

investors with more useful and reliable information remain in effect, including Regulation AC and the parts of NASD Rule 2711 and Incorporated NYSE Rule 472 not affected by these changes.

In its filing, FINRA has requested that the Commission find good cause for approving the proposed rule change prior to the 30th day after publication in the Federal Register. FINRA cites as the reason for this request is because the changes conforming to the JOBS Act have been effective since April 5, 2012 and the additional proposed changes further the policies underlying the applicable JOBS Act provision.

The Commission finds good cause, pursuant to Section 19(b)(2) of the Act,²⁷ for approving the proposed rule change prior to the 30th day after the date of publication of notice in the Federal Register because the changes required by the JOBS Act have been in effect since April 5, 2012 and the additional proposed changes further the policies underlying the applicable JOBS Act provision.

VI. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act, that the proposed rule change (SR-FINRA-2012-045) be, and hereby is, approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁸

Kevin M. O'Neill

Deputy Secretary

²⁷ 15 U.S.C. 78s(b)(2).

²⁸ 17 CFR 200.30-3(a)(12).