

been submitted to and approved by the Commission or are in accordance with such rules and regulations as the Commission may have prescribed in respect of such offers which are in effect at the time such offer is made." Section 11(c) provides that, irrespective of the basis of exchange, subsection (a) shall be applicable to any offer of exchange of any security of a registered open-end company for a security of a registered unit investment trust, or to any offer of exchange of any security of a registered unit investment trust for the securities of any other investment company. Although all the proposed exchanges would be at net asset value, the involvement of any registered unit investment trust (such as a Separate Account) requires a prior order of approval of the Commission.

2. The legislative history of Section 11 indicates that the purpose of the provision is to provide the Commission with an opportunity to review the terms of certain offers of exchange to ensure that a proposed offer is not being made "solely for the purpose of exacting additional selling charges." H. Rep. No. 2639, 76th Cong., 2d Sess. 8 (1940). One of the practices Congress sought to prevent through Section 11 was the practice of inducing investors to switch securities so that the promoter could charge investors another sales load. Applicants assert that the proposed offers of exchange involve no possibility of such abuse.

3. Applicants assert that, because the proposed exchange offers for which approval is sought will be based on the relative net asset values or unit values of the interests being exchanged, there is no possibility of the abuse to which Section 11 was directed. Nevertheless, because each of the proposed exchange offers involves a unit investment trust, Section 11(c) makes Section 11(a) inapplicable irrespective of the basis of the exchange. Applicants state that exemptive relief is necessary for Applicants to offer the proposed exchange feature.

4. Applicants note that previous applications under Section 11(a) and orders granting those applications appropriately have focused on sales loads or sales load differentials and administrative fees to be imposed for effecting a proposed exchange. Rule 11a-2, adopted under Section 11 of the 1940 Act, provides blanket Commission approval of certain types of offers of exchange of one variable annuity contract for another, or of one variable life insurance contract for another. Applicants state that adoption of Rule 11a-3 represents the most recent Commission action under Section 11 of

the 1940 Act. As with Rule 11a-2, the focus of the Rule is primarily on sales and administrative charges that would be incurred by investors for effecting exchanges. Applicants submit that the terms of the proposed offer are consistent with Rule 11a-3 because no sales or administrative charge will be incurred as a result of the exchange. Because one investment company involved in the proposed exchange offer is organized as a unit investment trust rather than as a management investment company, Applicants believe that they may not rely upon Rule 11a-3.

#### Class Relief

1. Applicants request that the Order extend to all similarly situated current and affiliated entities, defined previously as Insurance Companies, Separate Accounts and Distributors. Applicants also request that the Order extend to all variable annuity contracts issued by an Insurance Company that are substantially similar to the Contracts and to any share class of any Prudential Mutual Fund for which there are no front-end sales charges or deferred sales charges.

2. Applicants submit that providing class relief is appropriate. Applicants assert that because no front-end or deferred sales charges are applicable and all exchanges will be at relative net asset value, there will be no possibility of the abuses Congress sought to prevent through Section 11. Furthermore, without such exemptive relief, before Participants could be given any additional exchange options, Applicants would have to apply for and obtain additional approval orders. Applicants believe that such additional applications would present no new issues under the 1940 Act not already addressed in the application.

#### Conclusion

For the reasons and upon the facts summarized above, Applicants submit that the proposed exchange offers at net asset value do not involve any of the abuses that Section 11 is designed to prevent and provide a benefit to Participants by expanding exchange privileges under Programs designed to provide a mix of investment options and annuity benefits for retirement savings.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

**Florence E. Harmon,**

*Deputy Secretary.*

[FR Doc. E8-10705 Filed 5-13-08; 8:45 am]

**BILLING CODE 8010-01-P**

## SECURITIES AND EXCHANGE COMMISSION

### Sunshine Act Meetings

**Federal Register** Citation of Previous Announcement: [To be published].

**STATUS:** Open Meeting.

**PLACE:** 100 F Street, NE., Washington, DC.

**DATE AND TIME OF PREVIOUSLY ANNOUNCED MEETING:** May 14, 2008 at 10 a.m.

**CHANGE IN THE MEETING:** Additional Item Date Change.

The following matter will be considered during the 10 a.m. Open Meeting scheduled for Wednesday, May 21, 2008, at 10 a.m., in the Auditorium, Room L-002:

The Commission will consider whether to propose amendments to provide for mutual fund risk/return summary information to be filed with the Commission in interactive data format.

For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact:

The Office of the Secretary at (202) 942-7070.

Dated: May 8, 2008.

**Nancy M. Morris,**  
*Secretary.*

[FR Doc. E8-10720 Filed 5-13-08; 8:45 am]

**BILLING CODE 8010-01-P**

## SECURITIES AND EXCHANGE COMMISSION

### Sunshine Act Meeting

Notice is hereby given, pursuant to the provisions of the Government in the Sunshine Act, Public Law 94-409, that the Securities and Exchange Commission will hold a Closed Meeting on May 15, 2008 at 10 a.m.

Commissioners, Counsel to the Commissioners, the Secretary to the Commission, and recording secretaries will attend the Closed Meeting. Certain staff members who have an interest in the matters also may be present.

The General Counsel of the Commission, or his designee, has certified that, in his opinion, one or more of the exemptions set forth in 5 U.S.C. 552b(c)(3), (5), (7), (9)(B), and (10) and 17 CFR 200.402(a)(3), (5), (7), 9(ii) and (10), permit consideration of the scheduled matters at the Closed Meeting.

Commissioner Atkins, as duty officer, voted to consider the items listed for the Closed Meeting in closed session.

The subject matter of the Closed Meeting scheduled for May 15, 2008 will be:

Formal orders of investigation; Institution and settlement of injunctive actions; Institution and settlement of administrative proceedings of an enforcement nature; Resolution of litigation claims; and an Adjudicatory matter.

At times, changes in Commission priorities require alterations in the scheduling of meeting items.

For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact: The Office of the Secretary at (202) 551-5400.

Dated: May 8, 2008.

Nancy M. Morris,  
Secretary.

[FR Doc. E8-10721 Filed 5-13-08; 8:45 am]

BILLING CODE 8010-01-P

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-57803; File No. SR-NASD-2005-114]

### Self-Regulatory Organizations; National Association of Securities Dealers, Inc. (n/k/a Financial Industry Regulatory Authority, Inc.); Order Approving Proposed Rule Change and Amendment Nos. 1, 2, 3, and 4 Thereto and Notice of Filing and Order Granting Accelerated Approval to Amendment No. 5 Relating to the Regulation of Compensation, Fees and Expenses in Public Offerings of Real Estate Investment Trusts and Direct Participation Programs

May 8, 2008.

#### I. Introduction

On September 28, 2005, the National Association of Securities Dealers, Inc. ("NASD")<sup>1</sup> filed with the Securities and Exchange Commission ("SEC" or "Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")<sup>2</sup> and Rule 19b-4 thereunder,<sup>3</sup> proposed amendments to NASD Rule 2810. On June 12, 2006, NASD filed Amendment No. 1 to the

<sup>1</sup> On July 26, 2007, the Commission approved a proposed rule change filed by NASD to amend 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 (Aug. 1, 2007).

<sup>2</sup> 15 U.S.C. 78s(b)(1).

<sup>3</sup> 17 CFR 240.19b-4.

proposed rule change.<sup>4</sup> The proposed rule change was published for comment in the **Federal Register** on July 17, 2006 ("Original Proposal"),<sup>5</sup> and the Commission received six comments.<sup>6</sup>

On April 16, 2007, NASD submitted Amendment No. 2 to the proposed rule change, and on November 9, 2007 and January 2, 2008, FINRA submitted Amendment No. 3 and No. 4, respectively, to the proposed rule change.<sup>7</sup> The Commission published the proposed rule change, as amended, for comment in the **Federal Register** on January 31, 2008 ("Revised Proposal"),<sup>8</sup> and the Commission received six comments, which are discussed below in Section III.<sup>9</sup> On April 11, 2008, FINRA submitted Amendment No. 5 to the proposed rule change.<sup>10</sup>

This notice and order solicits comment from interested persons on Amendment No. 5 and approves the proposed rule change, as amended, on an accelerated basis. The text of the proposed rule change is available at <http://www.finra.org>, the principal offices of FINRA, and the Commission's Public Reference Room.

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

As discussed in more detail in the Original Proposal and Revised Proposal, FINRA is proposing to amend NASD Rule 2810 to address the regulation of compensation, fees and expenses in

<sup>4</sup> Amendment No. 1 replaced and superseded the original rule filing.

<sup>5</sup> See Securities Exchange Act Release No. 54118 (July 10, 2006), 71 FR 40569 (July 17, 2006) (SR-NASD-2005-114).

<sup>6</sup> See letters from the Committee on Federal Regulation of Securities of the American Bar Association (Keith F. Higgins), dated Aug. 22, 2006; North American Securities Administrators Association (Patricia D. Struck), dated Aug. 11, 2006; Dominion Investor Services, Inc. (Kevin P. Takacs), dated Aug. 7, 2006; Investment Program Association (Rosemarie Thurston), dated Aug. 7, 2006; the Securities Division of Office of the Secretary of the Commonwealth of Massachusetts (Bryan Lantagne), dated Aug. 4, 2006; and Cambridge Legacy Group (Frank Akridge, Jr.), dated Aug. 4, 2006.

<sup>7</sup> Each amendment replaced and superseded the earlier amendment. Amendment No. 4 also responded to comments on the Original Proposal.

<sup>8</sup> See Securities Exchange Act Release No. 57199 (Jan. 25, 2008), 73 FR 5885 (Jan. 31, 2008) (SR-NASD-2005-114).

<sup>9</sup> See letters from R.J. O'Brien Fund Management, LLC (Annette A. Cazenave), dated Apr. 28, 2008 ("R.J. O'Brien"); Michael V. Scillia, ASG Securities, Inc., dated Feb. 24, 2008 ("Scillia"); Committee on Federal Regulation of Securities of the American Bar Association (Keith F. Higgins), dated Feb. 22, 2006 ("ABA Committee"); Snyder Kearney LLC, dated Feb. 21, 2008 ("Snyder"); David Lerner, David Lerner Associates, Inc., dated Feb. 21, 2008 ("Lerner"); and Investment Program Association (Jack L. Hollander), dated Feb. 21, 2006 ("IPA").

<sup>10</sup> Amendment No. 5 responded to comments on the Revised Proposal and proposed several amendments to the proposed rule change.

public offerings of direct participation programs (as defined in NASD Rule 2810(a)(4)) ("DPPs") and unlisted real estate investment trusts (as defined in NASD Rule 2340(d)(4)) ("REITs") (collectively "Investment Programs").<sup>11</sup> Specifically, the proposed rule change addresses: (1) Compensation limitations and the use and allocation of offering proceeds; (2) disclosure regarding the liquidity of prior programs offered by the same sponsor; (3) sales loads on reinvested dividends; and (4) non-cash compensation provisions regarding the appropriate location for training and education meetings. The proposed rule change also adds REITs to provisions that already apply to DPPs, but does not make any substantive changes to these sections.<sup>12</sup>

#### III. Summary of Comments Received and FINRA Response

In Amendment No. 5, FINRA responded to comments on the Revised Proposal and proposed additional amendments to the proposed rule change.

##### *A. Registered Representatives Engaged in de minimis and Incidental Sales Activities*

The proposed amendment to Rule 2810(b)(4)(C)(ii)(c) would exclude from the underwriting compensation limit<sup>13</sup> payments to registered representatives, including dual employees, engaged in the solicitation, marketing, distribution or sales of the offering whose functions in connection with that offering are solely and exclusively clerical and ministerial. The IPA suggested that this should be revised to permit a *de minimis* exception for payments to registered representatives whose functions are predominantly—i.e., at least 95 percent of the employee's time—clerical or ministerial, but who

<sup>11</sup> The DPPs and REITs that comprise Investment Programs typically are structured so that several affiliated entities make up the program. The affiliated entities include the sponsor, the trust or limited partnership, and a broker-dealer.

<sup>12</sup> See proposed amendments to Rule 2810(b)(3)(A), Rule 2810(b)(4)(A), Rule 2810(b)(4)(B)(v), Rules 2810(b)(4)(D)–(G) and Rule 2810(b)(5). The proposed amendment to Rule 2810(b)(4)(G) also corrects a typographical error by citing "subparagraph (C)," instead of "subparagraph (E)" under the existing rule.

<sup>13</sup> The underwriting compensation payable to underwriters, broker-dealers, or affiliates may not exceed ten percent of the gross proceeds of the offering, regardless of the source from which the compensation is derived. See current Rule 2810(b)(4)(B)(i) and Notice to Members 82-51. As explained in the Revised Proposal, the ten percent figure currently is FINRA policy. The proposed amendment to Rule 2810(b)(4)(B)(ii) would expressly state that all items of compensation shall not exceed ten percent of the gross proceeds of the offering.