

### Applicant's Representations

1. The Company is an internally managed, non-diversified, closed-end investment company that has elected to be regulated as a business development company ("BDC") under the Act. The Company is currently permitted to issue shares of Restricted Stock under the terms of its Plan in reliance on the Prior Order. Applicant seeks to amend the Prior Order in order to permit the Company, pursuant to the Plan, to: Withhold shares of the Company's common stock or purchase shares of the Company's common stock from employees or non-employee directors ("Participants") to satisfy tax withholding obligations related to the vesting of Restricted Stock or the exercise of stock options that were or will be granted pursuant to the Plan. In addition, the Company seeks to amend the Prior Order to permit Participants to pay the exercise price of options that were or will be granted to them pursuant to the Plan with shares of the Company's common stock already held by them. The Company will continue to comply with all of the terms and conditions of the Prior Order.

2. The Plan authorizes the issuance to Participants of shares of Restricted Stock and options to purchase shares of the Company's common stock, subject to certain forfeiture restrictions. On the date Restricted Stock vests, shares of the Restricted Stock are released to the Participant and are available for sale or transfer and the value of the vesting shares is deemed to be compensation for an employee of the Company.<sup>2</sup> As discussed more fully in the application, certain exercises of options result in a Participant being deemed to have received compensation in the amount by which the fair market value of the shares of the Company's common stock, determined as of the date of exercise, exceeds the exercise price. Applicant states that any compensation income recognized by an employee generally is subject to federal withholding for income and employment tax purposes. Accordingly, arrangements must be made to satisfy the necessary withholding tax obligations.

3. The Company's stockholders approved the terms and provisions of the Plan on May 7, 2008. The Plan explicitly permits the Company to withhold shares of the Company's common stock or purchase shares of the Company's common stock from the

Participants to satisfy tax withholding obligations related to the vesting of Restricted Stock or the exercise of options granted pursuant to the Plan. The Plan further provides that Participants may pay the exercise price of options to purchase shares of the Company's stock with shares of the Company's stock already held by such Participants.

### Applicant's Legal Analysis

1. Section 23(c) of the Act generally prohibits a registered closed-end investment company from purchasing any securities of which it is the issuer except in the open market, pursuant to tender offers or under other circumstances as the Commission may permit to ensure that the purchase is made on a basis that does not unfairly discriminate against any holders of the class or classes of securities to be purchased. The applicant states that the withholding or purchase of shares of Restricted Stock and common stock in payment of applicable withholding tax obligations or of common stock in payment for the exercise price of a stock option might be deemed to be purchases by the Company of its own securities within the meaning of section 23(c) and therefore prohibited by the Act.

2. Section 23(c)(3) provides that the Commission may issue an order that would permit a closed-end investment company to repurchase its shares in circumstances in which the repurchase is made in a manner or on a basis that does not unfairly discriminate against any holders of the class or classes of securities to be purchased. Applicant believes that the requested relief meets the standards of section 23(c)(3).

3. Applicant states that these purchases will be made on a basis which does not unfairly discriminate against the stockholders of the Company because all purchases of the Company's stock will be at the closing price of the common stock on the NASDAQ (or any other primary exchange on which the shares are traded) on the relevant date (i.e., the public market price on the date the Restricted Stock vests or the date of the exercise of any options). Applicant further states that no transactions will be conducted pursuant to the requested order on days where there are no reported market transactions involving the Company's shares. Applicant submits that because all transactions would take place at the public market price, the transactions would not be significantly different than could be achieved by any stockholder selling in a market transaction.

4. Applicant submits that the proposed purchases do not raise

concerns about preferential treatment of the Company's insiders because the Plan is a bona fide compensation plan of the type that is common among corporations generally. Further, the vesting schedule is determined at the time of the initial grant of the Restricted Stock while the option exercise price is determined at the time of the initial grant of the options. Applicant represents that that all purchases will be made only as permitted by the Plan, which was approved by the Company's stockholders. Applicant argues that granting the requested relief would be consistent with precedent and the Commission's recognition of the important role that equity compensation can play in attracting and retaining qualified personnel with respect to certain types of investment companies, including BDCs.

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

**Florence E. Harmon,**  
Deputy Secretary.

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### SECURITIES AND EXCHANGE COMMISSION

[Securities Act of 1933 Release No. 9025; Securities Exchange Act of 1934 Release No. 59759]

#### Order Approving Increase to Public Company Accounting Oversight Board Annual Accounting Support Fee for Calendar Year 2009

April 13, 2009.

The Sarbanes-Oxley Act of 2002 (the "Act") established the Public Company Accounting Oversight Board ("PCAOB") to oversee the audits of public companies and related matters, to protect investors, and to further the public interest in the preparation of informative, accurate and independent audit reports. The PCAOB is to accomplish these goals through registration of public accounting firms and standard setting, inspection, and disciplinary programs. Section 109 of the Act provides that the PCAOB shall establish a reasonable annual accounting support fee, as may be necessary or appropriate to establish and maintain the PCAOB. Section 109(h) amends Section 13(b)(2) of the Securities Exchange Act of 1934 to require issuers to pay the allocable share of a reasonable annual accounting support fee or fees, determined in accordance with Section 109 of the Act. Under Section 109(f), the aggregate

<sup>2</sup>During the restriction period (i.e., prior to the lapse of the forfeiture restrictions), the Restricted Stock may not be sold, transferred, hypothecated, margined, or otherwise encumbered by the Participant.

annual accounting support fee shall not exceed the PCAOB's aggregate "recoverable budget expenses," which may include operating, capital and accrued items. Section 109(b) of the Act directs the PCAOB to establish a budget for each fiscal year in accordance with the PCAOB's internal procedures, subject to approval by the Securities and Exchange Commission (the "Commission").

On July 18, 2006, the Commission amended its Rules of Practice related to its Informal and Other Procedures to add a rule to facilitate the Commission's review and approval of PCAOB budgets and accounting support fees.<sup>1</sup> This budget rule provides, among other things, a timetable for the preparation and submission of the PCAOB budget and for Commission actions related to each budget, a description of the information that should be included in each budget submission, limits on the PCAOB's ability to incur expenses and obligations except as provided in the approved budget, procedures relating to supplemental budget requests, requirements for the PCAOB to furnish on a quarterly basis certain budget-related information, a list of definitions that apply to the rule and to general discussions of PCAOB budget matters, and the ability of the Commission to waive compliance with any provisions of the rule.

On December 17, 2008, the Commission approved the PCAOB's 2009 budget of \$157.6 million and 2009 annual accounting support fee of \$151.8 million.<sup>2</sup> Due to the development of certain unforeseen contingencies, on March 16, 2009 the PCAOB requested Commission approval to increase its 2009 annual accounting support fee by \$5.6 million, to \$157.4 million. The primary reason for the requested increase relates to proposed legislation in Congress that would increase the PCAOB's responsibilities over auditors of broker-dealers.

Specifically, the PCAOB's request would create an additional reserve for contingencies in addition to the five month working capital reserve provided for in the Commission's budget rule.<sup>3</sup>

Therefore, the requested amount of the increase to the annual accounting support fee would result in the PCAOB being noncompliant with certain provisions of the Commission's budget rule. The Commission's budget rule provides that the Commission, in its discretion, may waive compliance with any provision of the rule,<sup>4</sup> and the PCAOB has requested a waiver. In approving the PCAOB's request to increase its 2009 annual accounting support fee, the Commission is hereby waiving paragraph (d)(3) of the budget rule with respect to the PCAOB's 2009 budget and annual accounting support fee.

Pursuant to the budget rule, and as the PCAOB indicates in its request, the incremental monies collected by the PCAOB are to be held by the PCAOB until the Commission, through the approval of a supplemental budget, later approves disbursement of such monies. The procedures for submitting a supplemental budget request are provided in the budget rule. Prior to submission of any such supplemental budget request or to the implementation of any legislation that expands the PCAOB's authority over the auditors of broker-dealers, the PCAOB shall consult with the Commission on a timely basis about the PCAOB's plans for additional resources, program changes, or information technology developments and enhancements contemplated.

The Commission has determined that the PCAOB's increased annual accounting support fee is consistent with Section 109 of the Act. Accordingly,

*It is ordered*, pursuant to Section 109 of the Act, that the PCAOB's increase to its annual accounting support fee for calendar year 2009 is approved.

By the Commission.

**Elizabeth M. Murphy,**

*Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-59754; File No. SR-FINRA-2009-018]

### Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of Proposed Rule Change To Adopt IM-2830-1 ("Breakpoint" Sales) in the Consolidated FINRA Rulebook

April 13, 2009.

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> notice is hereby given that on March 26, 2009, 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 been prepared by FINRA. 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 adopt NASD Interpretive Material 2830-1 ("IM-2830-1") ("Breakpoint" Sales) as a FINRA rule in the consolidated FINRA rulebook with minor changes. The proposed rule change would renumber NASD IM-2830-1 as FINRA Rule 2342 in the consolidated FINRA rulebook.

The text of the proposed rule change is available on FINRA's Web site at <http://www.finra.org>, at the principal office of FINRA and at the Commission's Public Reference Room.

#### II. 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.

<sup>1</sup> 17 CFR 202.11. See Release No. 33-8724 (July 18, 2006) [71 FR 41998 (July 24, 2006)].

<sup>2</sup> See Release No. 33-8989 (December 17, 2008) [73 FR 78861 (December 23, 2008)].

<sup>3</sup> See 17 CFR 202.11(d)(3), which provides that, "In addition to amounts needed to fund disbursements during the budget year, a budget may reflect receipts in amounts needed to fund expected disbursements during a period not to exceed the first five months of the fiscal year immediately following the budget year (the working capital reserve), provided such amounts shall be disbursed only as specified in the following year's

budget or in a supplemental budget approved by the Commission."

<sup>4</sup> See 17 CFR 202.11(i).

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

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