

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-59126; File No. SR-FINRA-2008-060)

December 19, 2008

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Trade Reporting of Transfers of Securities Subject to an Asset Purchase Agreement

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 December 11, 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”) the proposed rule change as described in Items I, II and III below, which Items have been prepared by FINRA. FINRA has designated the proposed rule change as constituting a “non-controversial” rule change under Section 19(b)(3)(A) of the Act³ and Rule 19b-4(f)(6) thereunder,⁴ which renders the proposal effective upon filing with the Commission. 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 FINRA trade reporting rules to codify the circumstances under which transfers of securities made pursuant to an asset purchase agreement are not subject to the reporting requirements applicable to over-the-counter transactions in debt and equity securities.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 15 U.S.C. 78s(b)(3)(A).

⁴ 17 CFR 240.19b-4(f)(6).

Below is the text of the proposed rule change.⁵ Proposed new language is in italics; proposed deletions are in brackets.

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6200. ALTERNATIVE DISPLAY FACILITY

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6282. Transactions Reported by Members to TRACS

(a) through (h) No Change.

(i) **[Transactions Not To Be Reported To FINRA For Publication Purposes]**

Reporting Requirements For Certain Transactions and Transfers of Securities

(1) The following [types of transactions effected by FINRA members] shall not be reported to TRACS [for publication purposes]:

([1]A) transactions that are part of a primary distribution by an issuer or of a registered secondary distribution (other than “shelf distributions”) or of an unregistered secondary distribution;

([2]B) transactions made in reliance on Section 4(2) of the Securities Act;

[3) transactions where the buyer and seller have agreed to trade at a price substantially unrelated to the current market for the security, e.g., to enable the seller to make a gift;]

⁵ On September 25, 2008, the SEC approved proposed rule change SR-FINRA-2008-021, which adopts the NASD Marketplace Rules (the NASD Rule 4000 through 7000 Series) as the FINRA Rule 6000 through 7000 Series in the Consolidated FINRA Rulebook. See Securities Exchange Act Release No. 58643 (September 25, 2008), 73 FR 57174 (October 1, 2008) (Order Approving SR-FINRA-2008-021; SR-FINRA-2008-022; SR-FINRA-2008-026; SR-FINRA-2008-028; and SR-FINRA-2008-029). SR-FINRA-2008-021 was implemented on December 15, 2008. See Regulatory Notice 08-57 (October 2008). This Exhibit 5 reflects the underlying text of the FINRA Rules as adopted pursuant to SR-FINRA-2008-021.

[(4) purchases or sales of securities effected upon the exercise of an option pursuant to the terms thereof or the exercise of any other right to acquire securities at a pre-established consideration unrelated to the current market;]

[(5)C] transactions reported on or through an exchange;

[(6)D] the acquisition of securities by a member as principal in anticipation of making an immediate exchange distribution or exchange offering on an exchange; [and]

[(7)E] purchases of securities off the floor of an exchange pursuant to a tender offer[.]; and

(F) transfers of securities made pursuant to an asset purchase agreement (APA) that is subject to the jurisdiction and approval of a court of competent jurisdiction in insolvency matters, provided that the purchase price under the APA is not based on, and cannot be adjusted to reflect, the current market prices of the securities on or following the effective date of the APA.

(2) The following shall not be reported to TRACS for publication purposes, but shall be reported for regulatory transaction fee assessment purposes under Rule 7130(c):

(A) transactions where the buyer and seller have agreed to trade at a price substantially unrelated to the current market for the security, e.g., to enable the seller to make a gift; and

(B) purchases or sales of securities effected upon the exercise of an option pursuant to the terms thereof or the exercise of any other right to acquire securities at a pre-established consideration unrelated to the current market.

(j) No Change.

6300. TRADE REPORTING FACILITIES

6300A. FINRA/NASDAQ TRADE REPORTING FACILITY

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6380A. Transaction Reporting

(a) through (d) No Change.

(e) **[Transactions Not To Be Reported For Publication Purposes] Reporting**

Requirements For Certain Transactions and Transfers of Securities

(1) The following [types of transactions] shall not be reported to the FINRA/Nasdaq Trade Reporting Facility [for publication purposes]:

 ((1)A) transactions that are part of a primary distribution by an issuer or of a registered secondary distribution (other than “shelf distributions”) or of an unregistered secondary distribution;

 ((2)B) transactions made in reliance on Section 4(2) of the Securities Act;

 ((3) transactions where the buyer and seller have agreed to trade at a price substantially unrelated to the current market for the security, e.g., to enable the seller to make a gift;]

 ((4) purchases or sales of securities effected upon the exercise of an option pursuant to the terms thereof or the exercise of any other right to acquire securities at a pre-established consideration unrelated to the current market;]

 ((5)C) transactions reported on or through an exchange;

 ((6)D) the acquisition of securities by a member as principal in anticipation of making an immediate exchange distribution or exchange offering on an exchange; [and]

([7]E) purchases of securities off the floor of an exchange pursuant to a tender offer[.]; and

(F) transfers of securities made pursuant to an asset purchase agreement (APA) that is subject to the jurisdiction and approval of a court of competent jurisdiction in insolvency matters, provided that the purchase price under the APA is not based on, and cannot be adjusted to reflect, the current market prices of the securities on or following the effective date of the APA.

(2) The following shall not be reported to the FINRA/Nasdaq Trade Reporting Facility for publication purposes, but shall be reported for regulatory transaction fee assessment purposes under Rule 7230A(g):

(A) transactions where the buyer and seller have agreed to trade at a price substantially unrelated to the current market for the security, e.g., to enable the seller to make a gift; and

(B) purchases or sales of securities effected upon the exercise of an option pursuant to the terms thereof or the exercise of any other right to acquire securities at a pre-established consideration unrelated to the current market.

(f) through (h) No Change.

6300B. FINRA/NSX TRADE REPORTING FACILITY

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6380B. Transaction Reporting

(a) through (d) No Change.

(e) **[Transactions Not To Be Reported For Publication Purposes] Reporting**

Requirements For Certain Transactions and Transfers of Securities

(1) The following [types of transactions] shall not be reported to the FINRA/NSX Trade Reporting Facility [for publication purposes]:

[(1)A] transactions that are part of a primary distribution by an issuer or of a registered secondary distribution (other than “shelf distributions”) or of an unregistered secondary distribution;

[(2)B] transactions made in reliance on Section 4(2) of the Securities Act;

[(3)] transactions where the buyer and seller have agreed to trade at a price substantially unrelated to the current market for the security, e.g., to enable the seller to make a gift;]

[(4)] purchases or sales of securities effected upon the exercise of an option pursuant to the terms thereof or the exercise of any other right to acquire securities at a pre-established consideration unrelated to the current market;]

[(5)C] transactions reported on or through an exchange;

[(6)D] the acquisition of securities by a member as principal in anticipation of making an immediate exchange distribution or exchange offering on an exchange; [and]

[(7)E] purchases of securities off the floor of an exchange pursuant to a tender offer[.]; and

(F) transfers of securities made pursuant to an asset purchase agreement (APA) that is subject to the jurisdiction and approval of a court of competent jurisdiction in insolvency matters, provided that the purchase price under the APA is not based on, and cannot be adjusted to reflect, the current market prices of the securities on or following the effective date of the APA.

(2) The following shall not be reported to the FINRA/NSX Trade Reporting Facility for publication purposes, but shall be reported for regulatory transaction fee assessment purposes under Rule 7230B(f):

(A) transactions where the buyer and seller have agreed to trade at a price substantially unrelated to the current market for the security, e.g., to enable the seller to make a gift; and

(B) purchases or sales of securities effected upon the exercise of an option pursuant to the terms thereof or the exercise of any other right to acquire securities at a pre-established consideration unrelated to the current market.

(f) through (h) No Change.

6300C. FINRA/NYSE TRADE REPORTING FACILITY

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6380C. Transaction Reporting

(a) through (d) No Change.

(e) **[Transactions Not To Be Reported For Publication Purposes] Reporting**

Requirements For Certain Transactions and Transfers of Securities

(1) The following [types of transactions] shall not be reported to the FINRA/NYSE Trade Reporting Facility [for publication purposes]:

([1]A) transactions that are part of a primary distribution by an issuer or of a registered secondary distribution (other than “shelf distributions”) or of an unregistered secondary distribution;

([2]B) transactions made in reliance on Section 4(2) of the Securities Act;

[(3) transactions where the buyer and seller have agreed to trade at a price substantially unrelated to the current market for the security, e.g., to enable the seller to make a gift;]

[(4) purchases or sales of securities effected upon the exercise of an option pursuant to the terms thereof or the exercise of any other right to acquire securities at a pre-established consideration unrelated to the current market;]

[(5)C] transactions reported on or through an exchange;

[(6)D] the acquisition of securities by a member as principal in anticipation of making an immediate exchange distribution or exchange offering on an exchange; [and]

[(7)E] purchases of securities off the floor of an exchange pursuant to a tender offer[.]; and

(F) transfers of securities made pursuant to an asset purchase agreement (APA) that is subject to the jurisdiction and approval of a court of competent jurisdiction in insolvency matters, provided that the purchase price under the APA is not based on, and cannot be adjusted to reflect, the current market prices of the securities on or following the effective date of the APA.

(2) The following shall not be reported to the FINRA/NYSE Trade Reporting Facility for publication purposes, but shall be reported for regulatory transaction fee assessment purposes under Rule 7230C(f):

(A) transactions where the buyer and seller have agreed to trade at a price substantially unrelated to the current market for the security, e.g., to enable the seller to make a gift; and

(B) purchases or sales of securities effected upon the exercise of an option pursuant to the terms thereof or the exercise of any other right to acquire securities at a pre-established consideration unrelated to the current market.

(f) through (h) No Change.

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6600. OTC REPORTING FACILITY

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6620. Reporting Transactions in OTC Equity Securities

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6622. Transaction Reporting

(a) through (d) No Change.

(e) **[Transactions Not To Be Reported For Publication Purposes] Reporting**

Requirements For Certain Transactions and Transfers of Securities

(1) The following [types of transactions] shall not be reported [for publication purposes] to the OTC Reporting Facility:

([1]A) Transactions that are part of a primary distribution by an issuer or a registered secondary distribution (other than “shelf distributions”) or of an unregistered secondary distribution;

([2]B) Transactions made in reliance on Section 4(2) of the Securities Act; and

[(3) Transactions where the buyer and seller have agreed to trade at a price substantially unrelated to the current market for the security;]

[(4) Purchases or sales of securities effected upon the exercise of an option pursuant to the terms thereof or the exercise of any other right to acquire securities at a pre-established consideration unrelated to the current market.]

(C) transfers of securities made pursuant to an asset purchase agreement (APA) that is subject to the jurisdiction and approval of a court of competent jurisdiction in insolvency matters, provided that the purchase price under the APA is not based on, and cannot be adjusted to reflect, the current market prices of the securities on or following the effective date of the APA.

(2) The following shall not be reported to the OTC Reporting Facility for publication purposes, but shall be reported for regulatory transaction fee assessment purposes under Rule 7330(g):

(A) Transactions where the buyer and seller have agreed to trade at a price substantially unrelated to the current market for the security; and

(B) Purchases or sales of securities effected upon the exercise of an option pursuant to the terms thereof or the exercise of any other right to acquire securities at a pre-established consideration unrelated to the current market.

(f) through (g) No Change.

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6630. Reporting Transactions in PORTAL® Securities

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6633. Reporting Debt and Equity Transactions in PORTAL Securities

(a) Subject to Rule 6622(e)(1), [T]transactions in a PORTAL equity security shall be reported to the OTC Reporting Facility in accordance with this Rule. Each PORTAL transaction

report on a PORTAL equity security shall:

(1) through (3) No Change.

(b) through (d) No Change.

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6640. Reporting Transactions in Direct Participation Program Securities

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6643. Transaction Reporting

(a) through (d) No Change.

(e) Transactions Not Required To Be Reported

The following [transactions] are not required to be reported under the foregoing procedures:

(1) through (3) No Change.

(4) Transfers of securities made pursuant to an asset purchase agreement (APA) that is subject to the jurisdiction and approval of a court of competent jurisdiction in insolvency matters, provided that the purchase price under the APA is not based on, and cannot be adjusted to reflect, the current market prices of the securities on or following the effective date of the APA.

6700. TRADE REPORTING AND COMPLIANCE ENGINE (TRACE)

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6730. Transaction Reporting

(a) through (d) No Change.

(e) [Transactions Exempt From Reporting] Reporting Requirements For Certain Transactions and Transfers of Securities

The following [types of transactions] shall not be reported:

(1) through (5) No Change.

(6) Transfers of securities made pursuant to an asset purchase agreement (APA) that is subject to the jurisdiction and approval of a court of competent jurisdiction in insolvency matters, provided that the purchase price under the APA is not based on, and cannot be adjusted to reflect, the current market prices of the securities on or following the effective date of the APA.

(f) No Change.

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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 those 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 parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

FINRA trade reporting rules require that over-the-counter transactions in debt and equity securities be reported to FINRA unless they qualify for an express exception under the rules.⁶

FINRA is proposing to amend the trade reporting rules to clarify that in the limited circumstance

⁶ See FINRA Rules 6282 (formerly NASD Rule 4632A); 6380A (formerly NASD Rule 4632); 6380B (formerly NASD Rule 4632C); 6380C (formerly NASD Rule 4632E); 6622 (formerly NASD Rule 6620); 6633 (formerly NASD Rule 6732); 6643 (formerly NASD Rule 6920); and 6730 (formerly NASD Rule 6230).

where securities are transferred pursuant to an asset purchase agreement (“APA”), such transfer does not have to be reported if (1) the APA is subject to the jurisdiction and approval of a court of competent jurisdiction in insolvency matters; and (2) the purchase price under the APA is not based on, and cannot be adjusted to reflect, the current market prices of the securities on or following the effective date of the APA.⁷

FINRA believes that transfers effected pursuant to an APA under these circumstances are not trade reportable events and that reporting and dissemination of these transfers would not provide meaningful price discovery information to the market. By contrast, a transfer of securities pursuant to an APA where the terms of the APA dictate that the securities be transferred based on market prices that are current either on or following the effective date of the APA would be subject to the trade reporting rules. Thus, for example, if under the terms of the APA, the purchase price can be adjusted based on a change in the market price of the securities between the agreement date and the transfer date, the transfer of securities would be required to be reported.

Additionally, FINRA is proposing technical, non-substantive amendments to reorganize certain of the trade reporting rules to clarify that, as is the case today, the transactions and transfers enumerated in new subparagraph (1) of the Rules are not to be reported to FINRA, while the transactions enumerated in new subparagraph (2) of the Rules are not to be reported to

⁷ Generally, an APA addresses both the assets and liabilities to be transferred, which include both securities and non-securities assets and liabilities. In such instance, the purchase price under the APA would not be based solely on the securities positions, but on the basket of assets and liabilities as a whole. FINRA notes that where securities are the only asset being transferred pursuant to an APA, such transfer may nonetheless qualify under the proposed rule change where the APA is approved by the court and the purchase price is not based on current or future market prices.

FINRA for publication purposes, but must be reported for regulatory transaction fee assessment purposes.⁸

FINRA rules have never required members to report the transactions enumerated in new subparagraph (1) (e.g., transactions reported on or through an exchange) to FINRA for either publication or regulatory purposes. By contrast, members historically have been required to report the transactions enumerated in new subparagraph (2) (i.e., away from the market sales and transactions effected upon the exercise of an over-the-counter option) to FINRA for purposes of regulatory transaction fees under Section 3 of Schedule A to the By-Laws (“Section 3”). Prior to 2006, these transactions were reported manually and not through one of FINRA’s automated reporting facilities. In 2006, FINRA amended its rules and bylaws to require members to report on an automated basis all transactions that are subject to a regulatory transaction fee, but did not explicitly distinguish the two categories of transactions (i.e., transactions that do not get reported to FINRA at all and transactions that do not get reported for publication purposes, but do get reported for regulatory transaction fee assessment purposes) within the exceptions to the trade reporting rules.⁹ The technical amendments that FINRA is proposing herein merely seek to clarify that distinction. They will not change members’ reporting obligations or limit the transaction-related information that FINRA receives.

⁸ See FINRA Rules 6282(i) (formerly NASD Rule 4632A); 6380A(e) (formerly NASD Rule 4632); 6380B(e) (formerly NASD Rule 4632C); 6380C(e) (formerly NASD Rule 4632E); and 6622(e) (formerly NASD Rule 6620).

⁹ See Securities Exchange Act Release No. 53977 (June 12, 2006), 71 FR 34976 (June 16, 2006) (order approving SR-NASD-2006-055).

2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of 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. FINRA believes that the proposed rule change will clarify members' trade reporting obligations and enhance market transparency.

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

FINRA does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the 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.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange represented that the proposed rule change qualifies for immediate effectiveness pursuant to Section 19(b)(3)(A) of the Exchange Act¹¹ and Rule 19b-4(f)(6) thereunder¹² because it: (i) does not significantly affect the protection of investors or the public interest; (ii) does not impose any significant burden on competition; and (iii) by its terms, does not become operative for 30 days from the date on which it was filed, or such shorter time as the

¹⁰ 15 U.S.C. 78o-3(b)(6).

¹¹ 15 U.S.C. 78s(b)(3)(A).

¹² 17 CFR 240.19b-4(f)(6).

Commission may designate if consistent with the protection of investors and the public interest.¹³

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

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-2008-060 on the subject line.

Paper Comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-FINRA-2008-060. 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 Web site (<http://www.sec.gov/rules/sro.shtml>). Copies

¹³ In addition, Rule 19b-4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. FINRA has satisfied this requirement.

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 inspection and copying in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 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-FINRA-2008-060 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

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

Florence E. Harmon
Acting Secretary

¹⁴ 17 CFR 200.30-3(a)(12).