

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-59713; File No. SR-FINRA-2009-024)

April 6, 2009

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Trade Reporting Transfers of Proprietary Securities Positions in Connection with Certain Corporate Control Transactions

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 April 3, 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. FINRA has designated the proposed rule change as constituting a “non-controversial” rule change under Section 19(b)(3)(A) of the Act³ and paragraph (f)(6) thereunder,⁴ which renders the proposal effective upon receipt of this filing by 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 reporting requirements applicable to over-the-counter (“OTC”) transfers of proprietary positions in debt and equity securities between a member and another member or non-member broker-dealer effected in connection with certain corporate control transactions.

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).

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.

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 OTC transactions in debt and equity securities be reported to FINRA unless they qualify for an express exception under the rules.⁵ For purposes of the trade reporting rules, a "trade" or "transaction" entails a beneficial change of ownership of securities between parties (e.g., a purchase or sale of securities) in which a FINRA member participates.⁶ As a general matter, when members report trades to a FINRA trade reporting facility, FINRA facilitates the public dissemination of the trade information and/or assesses regulatory transaction fees.⁷

⁵ See Rules 6282, 6380A, 6380B, 6622 and 6730.

⁶ See Trade Reporting Frequently Asked Questions, FAQ 100.4, available at www.finra.org/Industry/Regulation/Guidance/P038942.

⁷ Certain trades are reported to FINRA, but not for publication purposes (referred to as "non-tape reports"). For example, FINRA rules require members to submit non-tape reports for transactions that are effected upon the exercise of an OTC option or for "away from the market sales" (e.g., a gift between two parties). The non-tape reports are used

Occasionally, broker-dealers may transfer proprietary securities positions, along with other assets, in connection with corporate control transactions such as mergers and acquisitions. Such transfers are “trades” or “transactions” because they result in a change of beneficial ownership, but unlike the typical securities transaction, they are not driven by a trading or investment strategy (e.g., a desire to exit a position or lock in a profit) relating to a particular security position. Rather, the transfers are in furtherance of the consolidation of the broker-dealers’ separate sales and proprietary trading businesses. Additionally, the securities that are transferred typically are assigned a value, such as the closing price of the security on a date certain, solely for purposes of effectuating the transfer.

As such, FINRA believes that public dissemination of such transfers would not provide meaningful price discovery information to the market. To the contrary, dissemination could confuse investors and other market participants, particularly where the positions being transferred are substantial. Public dissemination of significant and perhaps unusual trading activity could give the false impression of investor interest, market participant transactions and significant price discovery activities, and the volume reports could skew a variety of trading activity indicators.⁸

for audit trail and regulatory fee assessment purposes only and are not reported to the appropriate exclusive Securities Information Processor (“SIP”) for public dissemination. See Rules 6282(i)(2) and 7130(c) (relating to the Alternative Display Facility); 6380A(e)(2) and 7230A(g) (relating to the FINRA/Nasdaq Trade Reporting Facility); 6380B(e)(2) and 7230B(f) (relating to the FINRA/NYSE Trade Reporting Facility); and 6622(e)(2) and 7330(g) (relating to the OTC Reporting Facility).

⁸ Similarly, FINRA amended its trade reporting rules to clarify that in the limited circumstance 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. FINRA believes that transfers effected pursuant to an APA under these circumstances are

Accordingly, FINRA is proposing to amend its trade reporting rules to clarify that members are not required to report to FINRA for purposes of publication transfers of proprietary securities positions between a member and another member or non-member broker-dealer where the transfer (1) is effected in connection with a merger of one broker-dealer with the other broker-dealer or a direct or indirect acquisition of one broker-dealer by the other broker-dealer or the other broker-dealer's parent company and (2) is not in furtherance of a trading or investment strategy. However, while such transfers are not reportable for publication purposes, they nonetheless must be reported to FINRA for purposes of assessing applicable regulatory transaction fees pursuant to Section 3 of Schedule A to the FINRA By-Laws⁹ and/or trading activity fees under Section 1(b) of Schedule A to the FINRA By-Laws.¹⁰

Specifically, with respect to equity securities, FINRA is proposing to amend Rule 6282(i)(2) and paragraph (e)(2) of Rules 6380A, 6380B and 6622, which provisions identify the transactions that are not required to be reported for publication, but must be reported for regulatory fee assessment purposes. FINRA also is proposing corresponding amendments to Rules 7130(c), 7230A(g), 7230B(f) and 7330(g), which provisions set forth the specific reporting requirements for trades reported for regulatory transaction fee assessment purposes. With

not trade reportable events and that reporting and dissemination of these transfers would not provide meaningful price discovery information to the market. See Securities Exchange Act Release No. 59126 (December 19, 2008), 73 FR 79948 (December 30, 2008) (notice of filing and immediate effectiveness of SR-FINRA-2008-060).

⁹ Pursuant to Section 31 of the Act, FINRA and the national securities exchanges are required to pay transaction fees and assessments to the SEC that are designed to recover the costs related to the government's supervision and regulation of the securities markets and securities professionals. FINRA obtains its Section 31 fees and assessments from its membership, in accordance with Section 3 of Schedule A to the FINRA By-Laws.

¹⁰ The trading activity fee is used by FINRA solely to fund its member regulatory activities, including the supervision and regulation of members through examinations, financial monitoring, policy, rulemaking, interpretive and enforcement activities. See Section 1(a) of Schedule A to the FINRA By-Laws.

respect to debt securities, FINRA is proposing to amend Rule 6750(b), which identifies the transactions in TRACE-eligible securities that are reported, but not disseminated.

The distinguishing factor is whether the position transfer is being effected as part of an overall sale and the consolidation of the broker-dealers' separate proprietary trading businesses (in which case it would fall within the proposed exception) rather than being driven by a trading or investment strategy (in which case it would not fall within the exception). For example, as a result of a corporate control transaction, a member, Firm 1, acquires all of the assets of another member (or non-member broker-dealer), Firm 2, or Firm 1's parent company acquires Firm 2, such that Firm 1 and Firm 2 become wholly owned by the same parent company. In connection with the corporate control transaction, Firm 1 and Firm 2 consolidate their separate sales and trading businesses onto a single platform and, along with the migration of sales and trading personnel, clients and systems and technology, Firm 2's proprietary positions are transferred to Firm 1. In this instance, the transfer from Firm 2 to Firm 1 would fall within the proposed exception and would not be reportable for publication purposes, but must be reported for regulatory purposes.

By way of further example, a member, Firm 1 and another member (or non-member broker-dealer), Firm 2, currently are wholly owned by the same parent company and operate separately. Firm 1 owns 100,000 shares of ABCD security and the value of ABCD has increased substantially since Firm 1 purchased the shares. As part of an investment strategy, Firm 1 sells the shares to Firm 2. In this instance, the sale from Firm 1 to Firm 2 would not fall within the proposed exception and must be reported for publication purposes.

The proposed rule change would expressly limit the exception to transfers between two members or between a member and a non-member broker-dealer that are effected in connection

with a merger of one broker-dealer with the other broker-dealer or a direct or indirect acquisition of one broker-dealer by the other broker-dealer or the other broker-dealer's parent company. FINRA notes that these corporate control transactions are among the changes in a member's ownership or control that would trigger the notice requirements and membership application process under FINRA rules.¹¹ Thus, the proposed exception generally would apply where the merger or acquisition would require the member to submit notice and/or an application under FINRA rules. However, because FINRA membership application rules are broader than the scope of the proposed trade reporting exception, FINRA is clarifying that the proposed exception will not be considered satisfied merely because a member has submitted an application or notice under FINRA membership rules.

Pursuant to the proposed rule change, members will be required to report in the manner prescribed by FINRA to designate that the reports are submitted for regulatory and not publication purposes.¹² Members generally should report to FINRA on the same day as the ultimate transfer of the positions on their books and records, unless later reporting is warranted under specific circumstances.¹³

In addition, members will be required to provide FINRA at least three business days advance written notice of their intent to use this exception, including the basis for their determination that the transfer meets the terms of the exception. FINRA notes that while the

¹¹ See NASD Rule 1017(a)(1) and (2). See also, Incorporated NYSE Rule 312.

¹² FINRA will publish a Notice setting forth the specific reporting requirements applicable to the proposed exception. Members also should refer to the applicable technical specifications for the FINRA facility to which they are reporting trades.

¹³ FINRA expects that in most instances, if members cannot report on the same day that the transfers are reflected on their books and records (for example, if the transfers take place after the close of the FINRA trade reporting facilities), members will report no later than the following business day (T+1). However, FINRA recognizes that for some transfers, manual processing may be required or other operational issues may arise.

advance notice requirement is not intended to establish a protocol for prior approval by FINRA, it may help reduce the potential for improper use of the proposed exception. Advance written notice to FINRA shall not constitute an estoppel as to FINRA or bind FINRA in any subsequent administrative, civil or disciplinary proceeding with respect to a member's use of the proposed exception. In other words, advance notice to FINRA should not be taken to mean that FINRA approved the transaction as properly qualifying under the terms of the exception. A member relying on the proposed exception must ensure that the transfer satisfies the terms of the exception.

Finally, FINRA is proposing certain technical, non-substantive changes to these rules. First, FINRA is proposing to reorganize Rules 7130(c), 7230A(g), 7230B(f) and 7330(g), and to delete the references to the “.RA” and “.RX” modifiers in the rules.¹⁴ Second, FINRA is proposing to change the heading of paragraph (b) of Rule 6750 to “Transaction Information Not Disseminated,” and to create new numbered subparagraphs for the transactions that are reported to the Trade Reporting and Compliance Engine (“TRACE”), but not disseminated.

FINRA has filed the proposed rule change for immediate effectiveness. The operative date of the proposed rule change will be 30 days after the date of filing.

2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,¹⁵ which requires, among other things, that FINRA rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable

¹⁴ This is consistent with Rules 6282, 6380A and 6380B, which no longer refer to specific labels (e.g., “.PRP” or “.W”) for the trade report modifiers that members are required to use when reporting trades to FINRA. Rather, the rules identify the types of transactions that must have a unique modifier associated with them and such modifiers are labeled in the facility's technical specifications rather than in the rules.

¹⁵ 15 U.S.C. 78o-3(b)(6).

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, enhance market transparency and protect investors and other market participants by ensuring that transfers that do not contribute to market price discovery and could confuse market participants are not disseminated.

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.

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

Because the foregoing proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act¹⁶ and Rule 19b-4(f)(6) thereunder.¹⁷

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.

¹⁶ 15 U.S.C. 78s(b)(3)(A).

¹⁷ 17 CFR 240.19b-4(f)(6).

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-2009-024 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-2009-024. 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 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 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-2009-024 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.¹⁸

Florence E. Harmon
Deputy Secretary

¹⁸ 17 CFR 200.30-3(a)(12).