

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-60022; File No. SR-FINRA-2009-031)

June 1, 2009

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of Proposed Rule Change Relating to the Reporting of Over-the-Counter Transactions in Equity Securities Executed Outside Normal Market Hours

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 May 8, 2009, Financial Industry Regulatory Authority, Inc. (“FINRA”) 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. On May 29, 2009, FINRA filed Amendment No. 1 to the proposed rule change. The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, 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 relating to over-the-counter transactions in equity securities executed outside normal market hours to (1) require that any trades executed during the hours that a FINRA Facility (the Alternative Display Facility (“ADF”), a Trade Reporting Facility (“TRF”) or the OTC Reporting Facility (“ORF”)) is closed be reported within 15 minutes of the opening of the Facility, i.e., 8:15 a.m. Eastern Time; and (2) conform the trade reporting requirements applicable to “outside normal market hours” transactions across FINRA Facilities.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

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 rules prescribe special requirements applicable to the reporting of trades executed outside normal market hours (i.e., trades executed outside the hours of 9:30 a.m. to 4:00 p.m. Eastern Time), and the rules distinguish between such trades that are executed during the hours a FINRA Facility is open and trades that are executed during the hours the facility is closed.³ Specifically, trades that are executed outside normal market hours and during the hours that the FINRA Facility to which the member is reporting is open must be reported within 90 seconds of execution.⁴ Thus, for example, a trade executed at 9:00 a.m. or a trade executed at 5:00 p.m. must be reported within 90 seconds. Trades that are executed outside normal market hours and during the hours that

³ The TRFs and ORF are open between 8:00 a.m. and 8:00 p.m. Eastern Time and the ADF is open between 8:00 a.m. and 6:30 p.m. Eastern Time.

⁴ See Rules 6282(a)(2)(A); 6380A(a)(2)(A) and (B); 6380B(a)(2)(A) and (B); and 6622(a)(3)(A) and (B).

the FINRA Facility is closed are not subject to 90-second reporting, since the facility is not open to facilitate the reporting of the trade. Rather, such trades are reported as follows: (1) trades executed between midnight and 8:00 a.m. must be reported on trade date; and (2) trades executed between the close of the facility (i.e., either 6:30 p.m. or 8:00 p.m.) and midnight must be reported on an “as/of” basis the following business day.⁵ “Outside normal market hours” trades are designated with a unique trade report modifier, as specified by FINRA.

Proposed Amendments to Require Reporting Within 15 Minutes of Opening of Facility

FINRA is proposing to amend the trade reporting rules⁶ to require that trades executed during the hours that the FINRA Facility is closed be reported within 15 minutes of the opening of the facility (i.e., 8:15 a.m. Eastern Time for all FINRA Facilities). Specifically, members would be required to report as follows: (1) trades executed between midnight and 8:00 a.m. must be reported by 8:15 a.m. on trade date, and (2) trades executed between the close of the FINRA Facility (i.e., either 6:30 p.m. or 8:00 p.m.) and midnight must be reported on an “as/of” basis the following business day by 8:15 a.m. These trades would be designated with the unique trade report modifier to denote their execution outside normal market hours. Any such trades not reported by 8:15 a.m. would be marked with the “outside normal market hours trade reported late” modifier.

⁵ See Rules 6282(a)(2)(B); 6380A(a)(2)(C) and (D); 6380B(a)(2)(C) and (D); and 6622(a)(3)(C).

⁶ See Rules 6282(a)(2)(B); 6380A(a)(2)(C) and (D); 6380B(a)(2)(C) and (D); and 6622(a)(3)(C).

FINRA believes that the proposed rule change will enhance market transparency by ensuring that these “outside normal market hours” trades are reported and disseminated closer to the actual execution time rather than reported at some later time during the trading day. As a result, market participants will have better information about the time of execution for such trades. For example, under current rules, a trade with the “outside normal market hours” modifier that is reported and disseminated at 9:20 a.m. could have been executed and reported real-time at 9:20 a.m., or it could have been executed at some point between midnight and the opening of the FINRA Facility at 8:00 a.m. There is currently nothing to distinguish a trade executed and reported at 9:20 a.m. from a trade executed between midnight and 8:00 a.m. and reported at 9:20 a.m. Under the proposed rule change, a trade executed between midnight and 8:00 a.m. that is reported at 9:20 a.m. would be marked late, thus distinguishing it from a trade executed and reported real-time at 9:20 a.m.

Proposed Conforming Amendments

FINRA also is proposing certain amendments to conform the requirements for reporting “outside normal market hours” trades across FINRA Facilities. First, under current rules and system functionality, members are not permitted to submit to the FINRA/Nasdaq TRF and ORF a trade report with the “outside normal market hours” modifier during normal market hours. For example, if a member executes a trade at 9:29:00 a.m. and reports the trade at 9:30:15 a.m. (in compliance with the 90-second reporting requirement under FINRA rules), the FINRA/Nasdaq TRF and ORF will reject the trade report; the trade cannot be reported, and will not be disseminated, until after 4:00 p.m. By contrast, the ADF and FINRA/NYSE TRF permit the submission of trade

reports with the “outside normal market hours” modifier throughout the day. Thus, the trade described in the example above can be reported to the ADF or FINRA/NYSE TRF and disseminated at 9:30:15 a.m.

Accordingly, FINRA is proposing to amend Rules 6380A(a)(2)(A) and (a)(2)(C) relating to the FINRA/Nasdaq TRF and Rules 6622(a)(3)(A) and (a)(3)(C)(i) relating to the ORF to delete the requirement that “outside normal market hours” transactions that are not reported by 9:30 a.m. be reported after 4:00 p.m. This will enhance market transparency by eliminating systematically imposed delays in the reporting of “outside normal market hours” trades to the FINRA/Nasdaq TRF and ORF. The proposed amendments are identical to the text of current Rules 6282(a)(2)(A) and (a)(2)(B)(i) relating to the ADF.

Additionally, FINRA is proposing conforming changes to Rules 6380B(a)(2)(A) and (C) relating to the FINRA/NYSE TRF. Today, members submit trade reports with the “outside normal market hours” modifier to the FINRA/NYSE TRF throughout the day. However, when the rules for this TRF were originally adopted, these provisions inadvertently were based on the rules relating to the FINRA/Nasdaq TRF, rather than the ADF. Thus, the proposed amendments for the FINRA/NYSE TRF do not represent a departure from current member reporting practices and systems functionality.

In this regard, FINRA also is proposing to amend Rules 6380A(a)(2)(D), 6380B(a)(2)(D) and 6622(a)(3)(C)(ii) to require expressly that “as/of” reports submitted pursuant to these provisions include the unique trade report modifier, as specified by FINRA, to denote their execution outside normal market hours. The proposed amendments conform to the text of current Rule 6282(a)(2)(C)(ii).

Second, FINRA is proposing to amend Rules 6282(a), 6380A(a), 6380B(a) and 6622(a) to consolidate the provisions relating to late trade reporting and make clear the requirement that trades that are required to be reported on trade date, but are not reported on trade date, must be reported on an “as/of” basis on a subsequent date (T+N) and shall be designated as late. This requirement applies to trades executed during normal market hours, as well as those “outside normal market hours” trades that are required by rule to be reported on trade date (i.e., trades executed between midnight and 9:30 a.m. and between 4:00 p.m. and the close of the Facility at either 6:30 or 8:00 p.m.). The proposed amendments also would make clear the requirement that “outside normal market hours” trades that are required to be reported on an “as/of” basis the following business day (T+1), but are not reported T+1, must be reported on a subsequent date (T+N) and shall be designated as late.⁷ Accordingly, FINRA is proposing to amend Rules 6380A(a)(2)(B), 6380B(a)(2)(B) and 6622(a)(3)(B) to delete the duplicative requirement that transactions not reported by 8:00 p.m. on trade date must be reported on an “as/of” basis the following business day (T+1).

Third, FINRA is proposing certain technical, non-material changes to conform the text of the rules relating to the reporting of trades executed outside normal market hours across FINRA Facilities. For example, FINRA is proposing to amend Rule 6282(a)(2) relating to the ADF and Rule 6622(a)(3) relating to the ORF to delete the specific references to the “.T” trade report modifier. This conforms to the trade reporting rules relating to the TRFs, as well as the other provisions of the ADF trade reporting rules,

⁷ FINRA is proposing to amend paragraph (a)(1) and adopt new paragraph (a)(6) of Rule 6282 to conform to Rules 6380A(a)(4), 6380B(a)(4) and 6622(a)(5).

which do not refer to specific trade report modifier labels.⁸ Additionally, FINRA is proposing to renumber the subparagraphs in Rule 6282(a)(2) relating to the ADF and Rule 6622(a)(3) relating to the ORF to conform to the numbering of the subparagraphs in Rules 6380A(a)(2) and 6380B(a)(2) relating to the TRFs.

FINRA believes that by conforming the reporting requirements and systems functionality with respect to “outside normal market hours” trades across FINRA Facilities, the proposed rule change will promote more consistent trade reporting by members and a more complete and accurate audit trail.⁹

FINRA will announce the effective date of the proposed rule change in a Regulatory Notice. The effective date will be no earlier than 120 days and no later than 180 days from the date of Commission approval.

⁸ See, e.g., Rules 6282(a)(4), 6380A(a)(2) and (5) and 6380B(a)(2) and (5).

⁹ The Commission notes that in connection with these changes to the trade reporting rules FINRA is also moving language from Rule 6282(a)(1) to Rule 6282(a)(6) concerning patterns or practices of late trade reporting. Rule 6282(a)(1) currently states that “[a] pattern or practice of late trade reporting without exceptional circumstances shall be considered conduct inconsistent with high standards of commercial honor and just equitable principles of trade violation of Rule 2010.” The change FINRA is proposing would replace the word “shall” with “may,” and applies the lower standard not only to a pattern or practice of late trade reporting outside of normal market hours, but to a pattern or practice of late trade reporting during normal market hours. Rule 6282 concerns transactions reported only to TRACS, and FINRA has told Commission staff that the change is to make the rule consistent with the FINRA/NASDAQ, FINRA/NYSE, and OTC Trade Reporting Facilities, all of which currently have the identical language to proposed Rule 6282(a)(6). See telephone call between Stephanie Dumont, Senior Vice President and Director of Capital Markets Policy, FINRA, and Kathy England, Assistant Director, Commission, May 29, 2009. The Commission notes that it has routinely upheld appeals from FINRA disciplinary actions when FINRA has charged respondents with violations of Rule 2010 (Standards of Commercial Honor and Principles of Trade) based solely on an underlying violation of another SRO rule. See e.g., Stephen J. Gluckman, 54 S.E.C. 175, 185 (1999), Exchange Act Release No. 41628 (July 20, 1999).

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 enhance market transparency and promote more consistent trade reporting by members and a more complete and accurate audit trail.

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

Within 35 days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) by order approve such proposed rule change, or

¹⁰

15 U.S.C. 78q-3(b)(6).

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change, as amended, 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-2009-031 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-2009-031. 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 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-2009-031 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.¹¹

Florence E. Harmon
Deputy Secretary

¹¹ 17 CFR 200.30-3(a)(12).