



May 14, 2008

Ms. Nancy M. Morris, Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

VIA EMAIL TO: rule-comments@sec.gov

Re: Release No. 34-57681; File No. SR-FINRA-2008-011
Notice of Filing of Proposed Rule Change to Amend the Trade Reporting Structure and
Require Submission of Non-Tape Reports to Identify Other Members for Agency and
Riskless Principal Transactions

Dear Secretary Morris:

BATS Trading, Inc. ("BATS") hereby submits the following comments in response to the above-referenced rule proposal ("Proposal") filed by the Financial Industry Regulatory Authority, Inc. ("FINRA"). As discussed herein, BATS objects to the Proposal in its current form and is requesting that the Commission require FINRA to amend the Proposal with additional information and subject that amended filing to further public notice and comment.

Background

Under the current FINRA trade reporting rules, transactions between members are generally required to be reported to FINRA by the selling member. When a member executes a trade in a riskless principal capacity or as agent for another member, that member is required to report one "leg" of the transaction, again generally the side in which the executing member is the seller.

In the Proposal, FINRA is requesting that the Commission approve an amendment to require that an executing member, who executes and reports a trade in a riskless principal or agency capacity on behalf of another member, also submit a non-tape trade report identifying the other member to the transaction, if such other member is not identified on the initial trade report submitted to FINRA. Accordingly, under the Proposal, if Member A executes a trade in a riskless principal capacity (buying from Member B and selling to Member C), or if Member A executes as agent for Members B and C, Member A will be required to submit one trade report for the tape reflecting an execution between Member A and Member B or C, and also would be required to submit a non-tape report reflecting the other leg of the riskless principal transaction or the other party for whom Member A was acting as agent.



Currently, FINRA rules do not require the submission of a second trade report in such circumstances. As justification for this Proposal, FINRA stated merely the following: “FINRA believes that the proposed rule change would enhance FINRA staff’s ability to create a complete and accurate audit trail and assist in the automated surveillance of various customer protection and market integrity rules.”

Notably, the Proposal is silent on the issue of FINRA fees associated with the submission of non-tape reports or the overall cost to the industry of this aspect of the Proposal.

Although BATS does not object in principal to a requirement that member firms submit non-tape trade reports under the circumstances described in the Proposal, BATS does object to this aspect of the Proposal as filed for the following reasons:

1. The Proposal fails to contain any discussion of fees that will be borne by FINRA members in connection with requiring the reporting of the additional non-tape trade report.
2. The Proposal fails to contain sufficient justification for requiring submission of a non-tape report, and specifically fails with respect to Nasdaq-listed securities to discuss why the existing requirement for members to submit Order Audit Trail reports (“OATS”) is inadequate to meet FINRA’s regulatory needs.

BATS is not objecting to that aspect of the Proposal that would amend the trade reporting rules to in all cases place the onus for trade reporting on the executing member, nor is BATS objecting to that aspect of the Proposal that would require a shorter implementation date for ATSS as compared to other market participants.

Fees

The Exchange Act requires that SRO fees be subject to the rule filing process and that such fees are reasonable and equitably allocated among SRO members. Specifically, Section 15A(b)(5) of the Exchange Act requires that for registered securities associations such as FINRA:

The rules of the association provide for the equitable allocation of reasonable dues, fees, and other charges among members and issuers and other persons using any facility or system which the association operates or controls.

The Proposal fails to meet this requirement of the Exchange Act because it contains no discussion of fees or the relative cost to the industry in complying with the Proposal. In fact, and as discussed below, FINRA does charge fees for the submission of a non-tape report.



BATS is an ECN and FINRA member broker-dealer. For purposes of anonymity, BATS acts as an agent for both parties to an execution trading on the BATS ECN. And, BATS reports trades executed on its system to a Trade Reporting Facility ("TRF"). Consequently, for a trade executed on BATS between two FINRA members, BATS will submit to a TRF a trade report reflecting a transaction between BATS and one of the member firms.

Currently, BATS does not submit a non-tape report to a TRF reflecting the identity of the other FINRA member to the transaction. BATS understands that some FINRA members do or have in the past submitted non-tape reports to a TRF. BATS also understands that FINRA has in such cases imposed on the TRFs transaction reporting fees for these non-tape reports. As a result of these FINRA fees, the FINRA/NSX TRF, through FINRA, filed on February 8, 2008, an immediately effective rule proposal assessing a fee of \$.0075 for each non-tape report sent by a FINRA member to the FINRA/NSX TRF (see Exchange Act Release No. 34-57299, SR-FINRA-2008-004 ("FINRA/NSX TRF fee filing")). The purpose of this filing was to enable the FINRA/NSX TRF to recoup the cost it was being charged by FINRA for the submission of the non-tape report.

In as much as FINRA already demonstrated its intent to charge a fee for non-tape prints when they were submitted voluntarily, and that the TRFs have demonstrated an intent to pass this fee along to the FINRA membership, BATS believes it is patently unreasonable and inconsistent with the Exchange Act for FINRA not to subject the basis for that fee to scrutiny in this Proposal.

In fact, to not address the reasonableness of fees in the context of this Proposal leads to the following result: If the Proposal is approved, FINRA will impose the requirement on its members and then charge the TRFs for the associated non-tape submission. The TRFs in turn will submit rule filings seeking to pass the fee on to FINRA members. To justify the cost associated with the proposed fee, the TRFs will be able to do no more than reference the need to pass along the cost allocated to them by FINRA – the TRFs themselves have no ability to determine the reasonableness of the fee.

This result has already played out once. In the FINRA/NSX TRF fee filing, FINRA stated that the basis for setting the fee at \$.0075 per report was that "NSX, as the Business Member [of the TRF], has determined that the proposed fee of \$.0075 per report best approximates its regulatory costs associated with non-media reports submitted to the FINRA/NSX TRF and is necessary for competitive reasons." What's missing from this statement, however, is the fact that the reason why NSX, as the Business Member, can only approximate its regulatory costs is because the costs are being determined by FINRA and then billed to NSX through the FINRA/NSX TRF contractual arrangement. As such, the FINRA/NSX TRF has limited ability to determine the fee or its reasonableness.



BATS understands that to date, FINRA has charged the FINRA/NSX TRF a fee for the non-tape report that equals the fee for the trade report that goes to the tape. If the basis for that fee is regulatory costs, it is difficult to understand why a non-tape report would be assessed a charge equal to a tape report (there is only one trade or “event” to regulate – the non-tape report simply provides one additional piece of information).

The result described above was not problematic when the reporting of a non-tape report was voluntary; however, it becomes highly problematic for members when they are required by rule to submit a non-tape report. Consequently, if the Commission fails to require FINRA as part of this Proposal to demonstrate the reasonableness of any fees imposed, then members will ultimately be required to pay a fee that has never been subject to appropriate regulatory scrutiny. The Commission has the opportunity in this filing to consider the reasonableness of this regulatory burden in the context of existing regulatory fees charged by FINRA, such as the Gross Income Assessment and the Trading Activity Fee.

Necessity of Non-Tape Reports

Pursuant to Section 15A(c) of the Exchange Act, the rules of a registered securities association such as FINRA must be “necessary or appropriate in the public interest or for the protection of investors and to carry out the purposes of this section.” As justification for requiring non-tape reports, FINRA states in the Proposal merely that it “believes that the proposed rule change would enhance FINRA staff’s ability to create a complete and accurate audit trail and assist in the automated surveillance of various customer protection and market integrity rules.”

Before approving a requirement on member firms to submit non-tape reports, BATS believes the Commission should require more clarity from FINRA as to why it believes this requirement is “necessary or appropriate”. In particular, BATS notes that historically FINRA has regulated its members successfully without receiving such non-tape reports. BATS believes FINRA should be required to explain as part of this Proposal what has changed, either in the quality of the information it is receiving about transactions or in the regulatory requirements under which it is operating that now makes access to non-tape reports necessary or appropriate.*

In addition, as it relates to Nasdaq-listed securities, BATS believes FINRA already has sufficient information reported through OATS to match up the ultimate buyers and sellers in the

* BATS notes that to the extent FINRA has in the past needed to determine the identity of the ultimate contra-party FINRA member with respect to a riskless principal transaction or a transaction reported by a member acting as agent for two other members, FINRA has the ability to request this information directly from the executing member firms as needed. FINRA has rarely requested this information from BATS.



transactions at issue. For example, when two member firms execute a trade on BATS in a Nasdaq-listed security, the following information is communicated to FINRA through OATS:

1. Both member firms that participated in the BATS transaction submit OATS reports reflecting that they routed their respective orders to BATS.
2. BATS submits two OATS execution reports, each reflecting a transaction between BATS (one as buyer and one as seller) and the respective member firm at the execution price. Both OATS execution reports reflect the same order execution time and, importantly, BATS populates the Branch/Sequence Number field on both OATS execution reports with a common execution number identifier, making it a fairly easy exercise to match up the ultimate buyer and seller. BATS believes this practice is consistent with how other ATSS and ECNs submit execution reports through OATS.

Accordingly, BATS objects to the proposal on the grounds that it fails to adequately specify a basis for requiring the submission of a non-tape report.

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Thank you for the opportunity to comment on this Proposal. Although BATS does not object in principal to a FINRA requirement that member firms submit non-tape reports, BATS objects to this Proposal as filed because it fails to provide an adequate basis for determining the necessity or appropriateness for the requirement or for any associated fees. Accordingly, BATS respectfully requests that the Commission require FINRA to amend this Proposal to address these issues. Should you have any questions about our comments or need additional information, please do not hesitate to contact me at (212) 378-8523.

Sincerely,

Eric Swanson
General Counsel