

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-61658; File No. SR-FINRA-2010-001)

March 5, 2010

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Order Approving Proposed Rule Change Relating to Publication of Certain Aggregate Daily Trading Volume Data

I. Introduction

On January 6, 2010, Financial Industry Regulatory Authority, Inc. (“FINRA”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder,² a proposed rule change relating to the publication of aggregate daily trading volume data for over-the-counter trades in NMS stocks that are executed within a FINRA member’s alternative trading system (“ATS”) dark pool and reported to a FINRA Trade Reporting Facility (“TRF”).³ The proposed rule change was published for comment in the Federal Register on January 22, 2010.⁴ The Commission received one comment on the proposal.⁵ This order approves the proposed rule change.

II. Description of the Proposal

FINRA has members that operate so-called “dark pools” of liquidity. FINRA proposes to define such dark pools to include an ATS that does not display quotations or subscribers’ orders

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ The FINRA TRFs are facilities used by members to report over-the-counter transactions in NMS stocks to FINRA. There are two TRFs in operation today: the FINRA/Nasdaq TRF and the FINRA/NYSE TRF. Each TRF is operated in conjunction with the respective exchange “TRF Business Member.”

⁴ See Securities Exchange Act Release No. 61361 (January 14, 2010), 75 FR 3768.

⁵ See letter from Tom Jordan, Advisory Committee Chair, Financial Information Forum, to Elizabeth M. Murphy, Secretary, Commission, dated February 24, 2010 (“FIF Letter”).

to any person or entity, either internally within an ATS dark pool or externally beyond an ATS dark pool (other than to employees of the ATS).⁶ Over-the-counter transactions executed within an ATS dark pool are reported by the ATS to a FINRA facility, e.g., a FINRA TRF. The FINRA facility reports information regarding transactions executed within an ATS dark pool to a central processor for consolidated market data in NMS stocks. The central processor then distributes the information it receives from the FINRA facility to the public in a consolidated stream pursuant to joint-SRO plans. The information relating to the trading volume reported to FINRA facilities by members operating ATS dark pools is not currently separately identified to the public.

The proposed rule change will allow for the publication of ATS dark pool trading volume to the public. FINRA, through its TRF Limited Liability Companies, will distribute transaction reporting data to the TRF Business Members so that the TRF Business Members may publish, after the close of trading, aggregate daily trading volume data for trades executed within participating ATS dark pools. The TRF Business Members will make the data widely available to the public at no cost. Specifically, members will not be charged a fee for having their ATS dark pool data included in the published aggregate daily trading volume data. Additionally, no TRF Business Member will charge a fee to view the aggregate daily trading volume data.

The TRF Business Members will post the daily trading volume data for trades executed within participating ATS dark pools on their respective Web sites. The New York Stock Exchange LLC (“NYSE”) will post daily trading volume data on its Web site based on transactions reported to the FINRA/NYSE TRF, and the NASDAQ Stock Market LLC (“Nasdaq”) will post daily trading volume data on its Web site based on transactions reported to the FINRA/Nasdaq TRF. The TRF Business Members will segregate the daily trading volume

⁶ See id. and proposed FINRA Rule 6160(c).

data for each participating ATS dark pool.⁷

FINRA members may choose to participate in the proposed program to publish dark pool transaction data. No member's ATS dark pool data will be included in the aggregate daily trading volume unless the member expressly requests that it be published. If a member decides to have its ATS dark pool volume published, it must comply with FINRA Rule 6160. Under Rule 6160, FINRA currently permits members to obtain and use multiple Market Participant Identifiers ("MPIDs") for purposes of reporting trades to a TRF on a pilot basis.⁸ The proposed rule change will add paragraph (c) to Rule 6160 and will expand the scope of the rule to allow FINRA members to request multiple MPIDs for the purpose of reporting ATS dark pool transaction data, subject to certain conditions.⁹

If a member chooses to participate in the program to publish ATS dark pool data ("participating member"), the member must obtain and use a separate MPID designated exclusively for the reporting of transactions executed within a single ATS dark pool.¹⁰ The

⁷ Initially, the data may be presented as an overall volume percentage; however, at a later date, it may be further broken down by security. FINRA members that participate in the program must acknowledge that their data may be published in one of these two ways.

⁸ Under Rule 6160, members must submit a written request to, and obtain approval from, FINRA Operations for additional MPID(s). As part of the approval process, members must provide bona fide business and/or regulatory reasons for requesting an additional MPID, such as to facilitate a member's back office operations.

⁹ FINRA considers the issuance of, and trade reporting with, multiple MPIDs to be a privilege and not a right. If FINRA determines that the use of multiple MPIDs is detrimental to the marketplace, or that a TRF participant is using one or more additional MPIDs improperly or for other than the purpose(s) identified by the participant, FINRA staff has full discretion to limit or withdraw its grant of the additional MPID(s) to the Participant for purposes of reporting trades to a TRF. See Rule 6160.

¹⁰ Today, under FINRA rules, a broker-dealer that operates an ATS dark pool may report trades executed within the ATS using the same MPID that it uses for transactions it executes in other areas of its business (including, e.g., other ATSs it operates). As a result, it would not be possible to determine from the trade reporting data which trades were executed within the ATS dark pool as opposed to other areas of the broker-dealer's

member will be required to use this separate MPID to report all transactions executed within that ATS dark pool to a TRF (or TRFs).¹¹ In addition, the member will be prohibited from using such separate MPID to report any transaction that is not executed within the ATS dark pool, including, e.g., trades that are routed away by the ATS dark pool. Any member that operates multiple ATS dark pools and decides to have each ATS dark pool participate in the proposed program must obtain a separate MPID for each ATS dark pool.¹² FINRA members that choose to have their ATS dark pool volume included in the published data also will be required to have policies and procedures in place to ensure that trades reported with a separate MPID obtained under proposed Rule 6160(c) are restricted to trades executed within that ATS dark pool.

If a FINRA member obtains a separate MPID for ATS dark pool transaction reporting for purposes of the proposed program, then all transactions reported under such MPID will be included in the published ATS dark pool volume, irrespective of whether the member reports to a single TRF or multiple TRFs.¹³ Because a member that opts in to the proposed program may report transactions executed within its ATS dark pool to more than one TRF, the data published

business. An ATS dark pool using such a “multi-purpose” MPID will be ineligible to participate in the proposed program for publication of ATS dark pool volume.

¹¹ For example, if “Member A” chooses to participate in the program to publish data for its ATS dark pool, “Dark Pool X,” Member A will be assigned a single MPID to use exclusively to report the trading information for Dark Pool X. Member A cannot be assigned a second MPID to report the trading information for Dark Pool X.

¹² A member cannot use a single MPID to report transactions executed within multiple ATS dark pools. For example, if “Member B” participates in the program to publish data for its ATS dark pools, “Dark Pool Y” and “Dark Pool Z,” Member B must obtain a separate MPID for each dark pool. Member B cannot use the MPID that is assigned to Dark Pool Y to report any transactions executed within Dark Pool Z.

¹³ In other words, once a member has chosen to participate in the program, 100 percent of its ATS dark pool transactions must be reported under a single MPID to one or more TRFs (the member can choose to report to a single TRF or multiple TRFs) and 100 percent of this volume will be published. Because FINRA’s Alternative Display Facility

on one TRF Business Member's Web site may not reflect 100 percent of that member's volume for that ATS dark pool. Persons who wish to view the ATS dark pool data therefore may need to consult all TRF Business Members' Web sites to see the total volume for any given ATS dark pool, and the TRF Business Members will make prominent disclosure to this effect on their Web sites.¹⁴

Pursuant to the proposed Supplementary Material, a member operating an ATS dark pool must certify in writing to FINRA that: (1) the member is affirmatively opting in for purposes of having its ATS dark pool transaction data included in the published data and acknowledges that its data may be presented as an overall percentage volume only or may be broken down by security; (2) the member meets the definition of ATS dark pool in proposed Rule 6160(c); and (3) the member has obtained a separate MPID that will be used exclusively for reporting its ATS dark pool transactions as required by proposed Rule 6160(c). The member will be required to identify to FINRA the MPID (or MPIDs, if the member operates more than one ATS dark pool and opts to have each ATS dark pool participate in the proposed program) that should be aggregated in the published volume.

The proposed requirements relating to the establishment and use of separate MPIDs for purposes of ATS dark pool transaction reporting are designed to ensure that the published volume is limited to the member's ATS dark pool activity. In addition to these requirements, FINRA has established certain other parameters to minimize the risk of double counting and ensure the accuracy and reliability of the published data. The data posted on each TRF Business

("ADF") does not offer a program to publish dark pool transaction data, the member will be prohibited from reporting to the ADF in this instance.

¹⁴ The proposed Supplementary Material to Rule 6160 also will clarify that the TRF Business Members will make such disclosure.

Member's Web site will show the trading volume reported to the respective TRF only and will not include transactions reported to or counted by another venue, e.g., another TRF. Only transactions that are reported for purposes of publication will be included in the published data (i.e., "non-tape" regulatory or clearing-only reports will not be included in the aggregate volume). In addition, there will be no double counting of trade volume (i.e., a 1,000 share trade reported for publication purposes will not be counted as 2,000 shares to reflect 1,000 shares on the buy side and 1,000 shares on the sell side).

III. Discussion and Commission's Findings

After careful review of the proposed rule change, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities association.¹⁵ In particular, the Commission finds that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,¹⁶ 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; and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Commission believes that the proposed rule change will help increase the information available about transactions executed in dark pools, and therefore further the ability of investors to identify the sources of liquidity in NMS stocks. The Commission notes that the provisions of Rule 6160(c) are designed to ensure that once a member determines to participate in the program with respect to one (or more) of its ATS dark pools, all of that dark pool's

¹⁵ In approving this proposal, the Commission has considered the proposed rule's impact on efficiency, competition and capital formation. See 15 U.S.C. 78c(f).

¹⁶ 15 U.S.C. 78q-3(b)(6).

transactions, and only that dark pool's transactions, will be aggregated for publication.¹⁷ The published ATS dark pool information will separately identify each dark pool and the TRF Business Members will make prominent disclosure on their Web sites that a person may need to look at both Web sites to obtain the total volume for a particular ATS dark pool.¹⁸ Further, FINRA members will be required to have policies and procedures in place to ensure that trades reported with a separate MPID obtained under proposed Rule 6160(c) are restricted to trades executed within that ATS dark pool. The Commission believes that these conditions are important to assure that the public has accurate, reliable and complete information regarding the activity of ATS dark pools that choose to participate in this program.

The Commission received one comment letter in connection with the proposed rule change.¹⁹ This commenter expressed concern that, while the publishing of ATS dark pool transactions is voluntary under the proposed rule change, the requirement of a separate MPID designed exclusively for reporting a member's ATS dark pool transactions could limit ATS participation and delay implementation because of both administrative processes and technology

¹⁷ Rule 6160(c) requires FINRA members that choose to participate in the program with respect to an ATS dark pool to provide all of the transaction data for that ATS dark pool to one or more of the FINRA TRFs for purposes of publication by the TRF Business Members. Thus, members may not selectively report some transactions executed within a participating ATS dark pool and keep other transactions executed in the ATS "dark." Further, Rule 6160(c) requires FINRA members that choose to participate in the program to use a single MPID to report transaction information for each participating ATS dark pool. A member cannot be assigned a second MPID to report the trading information for the same dark pool and cannot use a single MPID to report transactions executed within multiple dark pools.

¹⁸ The TRF Business Members will segregate the information they receive for each ATS dark pool on their Web site and must prominently disclose that the Web site may not reflect 100 percent of that dark pool's volume, and that interested parties will need to consult all TRF Business Members' Web sites to see the total volume for any given ATS dark pool.

¹⁹ See FIF Letter, supra note 5.

modifications required to implement this reporting in the manner defined in the rule filing.²⁰

While the commenter believes that publishing ATS dark pool volume would be beneficial to the market and the public, it believes that FINRA should consider other methods to achieve this goal.²¹ The commenter suggested some alternatives to identifying ATS dark pool volume other than obtaining a separate MPID.²² The Commission appreciates this commenter's view on the proposed rule change. However, the Commission believes that FINRA's proposal to allow members to request multiple MPIDs for the purpose of reporting ATS dark pool transaction data is a reasonable method by FINRA to assure the accuracy of the information being made public. In addition, the Commission notes that a FINRA member's participation in the program to publish ATS dark pool information is voluntary and that if a member does not wish to obtain a separate MPID to display its ATS dark pool data, it does not have to participate.

In addition, the Commission finds that the proposed rule change is consistent with Section 15A(b)(6) of the Act,²³ which requires, among other things, that FINRA rules are not designed to permit unfair discrimination between customers, issuers, brokers or dealers, and Rule 603(a) of Regulation NMS under the Act,²⁴ which requires, among other things, that any national securities exchange, national securities association, broker or dealer that distributes information with respect to quotations for or transactions in an NMS stock to a securities information processor, broker, dealer, or other persons shall do so on terms that are not unreasonably discriminatory. In approving the proposed rule change, the Commission notes that FINRA,

²⁰ See FIF Letter, supra note 5, at 1.

²¹ Id.

²² See FIF Letter, supra note 5, at 2.

²³ 15 U.S.C. 78o-3(b)(6).

²⁴ 17 CFR 242.603(a).

through its TRF Limited Liability Companies, will distribute the transaction reporting data for ATS dark pools that choose to participate in this program to the TRF Business Members so that the TRF Business Members may publish, after the close of trading, aggregate daily trading volume data for trades executed within the participating ATS dark pools, separated by dark pool, on their respective Web sites. The Commission also notes that FINRA members will not be charged a fee for having their ATS dark pool data included in the published aggregate daily trading volume data and that no TRF Business Member will charge a fee to anyone to view the aggregate daily trading volume data posted on its Web site. The Commission believes that these conditions are necessary and appropriate to ensure that investors, market participants and other persons will have access to the ATS dark pool data on terms that are not unreasonably or unfairly discriminatory.

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,²⁵ that the proposed rule change (SR-FINRA-2010-001) be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁶

Florence E. Harmon
Deputy Secretary

²⁵ 15 U.S.C. 78s(b)(2).

²⁶ 17 CFR 200.30-3(a)(12).