

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-72280; File No. SR-FINRA-2014-018)

May 29, 2014

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Order Approving a Proposed Rule Change to Establish a Fee Schedule for Alternative Trading System Volume Information

On April 4, 2014, the 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 to adopt FINRA Rule 4553 (Fees for ATS Data) establishing a fee schedule for alternative trading system (“ATS”) volume information published by FINRA on its website. The proposed rule change was published for comment in the Federal Register on April 15, 2014.³ The Commission received one comment letter on the proposal during the comment period.⁴ On May 21, 2014, FINRA responded to the comment letter.⁵ This order approves the proposed rule change.

I. Background

On January 17, 2014, the Commission approved a proposed rule change to (i) adopt FINRA Rule 4552 (Alternative Trading Systems – Trading Information for Securities Executed Within the Alternative Trading System) to require ATSS to report to FINRA weekly volume information and number of trades regarding securities transactions within the ATS; and (ii)

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 71919 (April 9, 2014), 79 FR 21324 (SR-FINRA-2014-018) (“Notice”).

⁴ See Letter from Christopher Nagy, CEO and Dave Lauer, President, KOR Group LLC, to Elizabeth M. Murphy, Secretary, Commission, dated April 16, 2014 (“KOR Letter”).

⁵ See Letter from Brant K. Brown, Associate General Counsel, FINRA, to Kevin O’Neill, Deputy Secretary, Commission, dated May 21, 2014 (“FINRA Letter”).

amend FINRA Rules 6160, 6170, 6480, and 6720 to require each ATS to acquire and use a single, unique market participant identifier (“MPID”) when reporting information to FINRA (“MPID Requirement”).⁶ The implementation date of the reporting requirements under Rule 4552 was May 12, 2014, and compliance with the MPID Requirement begins on November 10, 2014.⁷ Every week, FINRA will publish on its website, on a delayed basis, the self-reported ATS data for each equity security for each ATS (“ATS Data”).⁸ According to FINRA, after the MPID Requirement is implemented in November 2014, FINRA will be able to compare the trade reporting data to the data already being reported to FINRA by ATSs pursuant to Rule 4552 to verify the consistency and accuracy of both.

II. Description of the Proposed Rule Change

The proposed rule change establishes three categories of users of the ATS Data, each of which is entitled to different levels and use of ATS Data and is subject to a different fee structure: (i) Non-Professionals;⁹ (ii) Professionals; and (iii) Vendors. Any individual seeking

⁶ See Securities Exchange Act Release No. 71341 (January 17, 2014), 79 FR 4213 (January 24, 2014). On April 3, 2014, FINRA amended Rules 4552, 6160, 6170, 6480, and 6720 to revise the reporting and MPID requirements applicable to ATSs. See Securities Exchange Act Release No. 71911 (April 9, 2014), 79 FR 21316 (April 15, 2014). The amendments to Rules 6160, 6170, 6480, and 6720 permit an ATS that trades both debt securities reported to FINRA’s Trade Reporting and Compliance Engine (“TRACE”) and equity securities (OTC Equity Securities or NMS stocks) reported to a FINRA equity reporting facility (the Alternative Display Facility, the OTC Reporting Facility, the FINRA/Nasdaq TRF, or the FINRA/NYSE TRF) to use two MPIDs, rather than a single unique MPID, if each MPID is used exclusively for either debt or equity securities.

⁷ See FINRA Regulatory Notice 14-07 (February 2014).

⁸ See Rule 4552(b).

⁹ As defined by FINRA in its proposed Rule 4553, a “Non-Professional” means a natural person who uses the ATS Data solely for his or her personal, non-commercial use and is not: (i) registered or qualified in any capacity with the Commission, the Commodity Futures Trading Commission, any state securities agency, any securities exchange or

access to the ATS Data must confirm that he or she is either (i) a Non-Professional or (ii) a Professional (or an affiliate or employee thereof) that has a current Professional or Vendor subscription. A non-Professional will be able to access, at no cost, the most recent four weeks of ATS Data in a viewable, but not downloadable, format. A Non-Professional will be required to agree to certain terms of use of the ATS Data, including that he or she receives and uses the ATS Data solely for his or her personal, non-commercial use, and a prohibition on redistribution of the data.

FINRA proposed to provide Professional access to the ATS Data by requiring an annual, enterprise-wide subscription fee of \$12,000 that is non-transferable and renewable annually. A Professional who has paid the subscription fee will have access to the ATS Data available to Non-Professionals, in addition to access to up to five years of historical ATS Data, in a downloadable format. The Professional subscription will allow an unlimited number of users within the firm to access the ATS Data. Professionals will be permitted to distribute ATS Data and Derived Data within the enterprise (including the firm, any affiliates of the firm, and employees thereof). However, Professionals are prohibited from redistributing the ATS Data or Derived Data outside of the enterprise.

association, or any commodities or futures contract market or association, nor an employee of the above; (ii) engaged as an “investment adviser” as that term is defined in Section 202(a)(11) of the Investment Advisers Act (whether or not registered or qualified under that Act), nor an employee of the above; (iii) employed by a bank, insurance company or other organization exempt from registration under federal or state securities laws to perform functions that would require registration or qualification if such functions were performed for an organization not so exempt, nor any other employee of a bank, insurance company or such other organization referenced above; or (iv) engaged in, or has the intention to engage in, any commercial redistribution of all or any portion of the ATS Data or Derived Data. Rule 4553 defines “Derived Data” as data that are derived from ATS Data and that are not able to be (A) reverse engineered by a reasonably skilled user into ATS Data or (B) used as a surrogate for ATS Data.

The proposal also includes a Vendor subscription fee of \$18,000 per year. “Vendor” is defined as a Professional that redistributes ATS Data or Derived Data to third parties. A Vendor license would permit a Vendor to redistribute the ATS Data or Derived Data in any form (or in exactly the form FINRA provides to the Vendor). A Vendor would be allowed to provide ATS Data to a third party only if a yearly, non-transferable, enterprise-wide Professional Subscriber license has been purchased for each such third party.¹⁰

III. Comments Received and FINRA’s Response

The Commission received one comment letter on the proposal during the comment period.¹¹ The commenter strongly disagreed with FINRA’s proposal to charge fees for the ATS Data and argued that ATS Data should be treated as open source data that are freely available to the public.¹² The commenter also argued that FINRA already receives fees and dues from its members and should therefore cover the cost of providing ATS Data to the public in a free, open, machine-readable format.¹³ Furthermore, the commenter believed that FINRA had proposed to charge a very high fee amount and should not compare its fees with for-profit firms.¹⁴ The commenter also believed that, under the proposal, academics would be unable to download data in a machine readable format and unable to publish any of their findings with derived data.¹⁵

¹⁰ FINRA noted that, as with TRACE data, Vendors would be responsible for reporting entity usage as a result of their redistribution of the data.

¹¹ See supra note 4. On the 44th day after publication of the Notice, the Commission received a second comment letter on the proposal that raised similar points as the KOR Letter. See Letter from Theodore R. Lazo, Managing Director and Associate General Counsel, SIFMA, to Commission, dated May 29, 2014.

¹² See KOR Letter at 1-2.

¹³ See id. at 3.

¹⁴ See id.

¹⁵ See id. at 2-3.

Finally, the commenter argued that an organization such as itself would be prohibited from access to this dataset, which would deprive the public of expertise and analysis not necessarily performed by academics that should be made freely available.

In its response, FINRA disagreed with the commenter's assertion that it is inappropriate for FINRA to impose fees to recover costs. FINRA cited its existing Rule 7330 establishing fees for the receipt of market data concerning real-time TRACE transaction information, historic TRACE data, and the FINRA Automated Data Delivery Service ("ADDS").¹⁶ FINRA believed that the proposed fee amount is significantly lower than fees for comparable data that are currently available in the marketplace.¹⁷ In addition, FINRA represented that it "intends to reassess the amount of the fee once it has more experience with the actual usage and ultimate fees paid. For example, if FINRA appears to be generating on a consistent basis significantly more revenue than the cost to build and support the program, it would lower the fee on a per subscription basis so as to better align the total revenue received from the fees with the costs of providing the data."¹⁸ FINRA reaffirmed that any such fee change would be filed with the Commission.

¹⁶ See FINRA Letter at 3. FINRA also noted that the ADDS fees were intended to offset costs associated with providing the information. See Securities Exchange Act Release No. 68387 (December 7, 2012), 77 FR 74249, 74251 (December 13, 2012) (notice of filing of SR-FINRA-2012-053). See also Securities Exchange Act Release No. 68675 (January 16, 2013), 78 FR 4917 (January 23, 2013) (order approving SR-FINRA-2012-053).

¹⁷ For example, FINRA noted Nasdaq OMX's Daily Share Volume ("DSV") product, which provides some market transparency by MPID, rather than by ATS, with respect to aggregate volume executed through the NASDAQ OMX equity exchange facilities. See Securities Exchange Act Release No. 59580 (March 13, 2009), 74 FR 12169 (March 23, 2009).

¹⁸ FINRA Letter at 4.

With respect to the access to ATS Data, FINRA replied that the commenter’s assertion that the proposal would prohibit the use of ATS Data and obstruct the distribution of derived data was incorrect.¹⁹ FINRA stated that the proposal “does not prohibit anyone from accessing ATS Data and merely requires professional users to pay a reasonable fee to receive the data.”²⁰ FINRA added that individual investors (Non-Professionals) accessing ATS Data are provided ATS Data for free and that professional consumers (Professionals and Vendors) should be expected to pay a reasonable fee so that the costs associated with providing the data are borne by those using it. Furthermore, FINRA stated that non-commercial requests from regulators, academics, and media reporters would generally be considered non-professional usage and accommodated on an individual basis, and that FINRA would address these types of ad hoc requests as it does requests for TRACE data.²¹ FINRA also stated that it would consider making the data available in other formats as it gains experience with the information reported.

IV. Discussion and Commission Findings

The Commission has carefully reviewed the proposed rule change, the comment letters, and FINRA’s response, and finds that the proposed rule change is consistent with the Act and the rules and regulations thereunder applicable to a national securities association.²² In particular, the Commission finds that the proposed rule change is consistent with Section 15A(b)(5) of the

¹⁹ See id. at 3.

²⁰ Id.

²¹ See id. at 4. FINRA further stated that it will work with the requesting party to determine the scope of data requested, the form in which the data can be provided, and the extent to which the requesting party is permitted certain redistribution rights under a separate agreement. Furthermore, according to FINRA, as a general matter, academic-related research agreements provide that redistribution of data pursuant to the agreement is not considered commercial use or prohibited redistribution.

²² In approving this proposed rule change, the Commission has considered the proposed rule’s impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

Act,²³ which requires, among other things, that the rules of an association provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using any facility or system that FINRA operates or controls.

The fees for ATS Data that FINRA is proposing to charge are structured similarly to fees for TRACE data, which the Commission previously has approved.²⁴ The ATS Data fees approved today, similar to TRACE fees, vary according to use, and the Commission believes that this use-based approach is consistent with equitable distribution of fees. Furthermore, the Commission previously has approved TRACE fees on the basis, in part, that they were reasonably related to the costs of developing the TRACE facility and to the estimated operating expenses of the TRACE system.²⁵ The proposed fees in this filing appear reasonably designed by FINRA to recover the costs of collecting and disseminating the ATS Data.

²³ 15 U.S.C. 78o-3(b)(5).

²⁴ See, e.g., Securities Exchange Act Release No. 46145 (June 28, 2002), 67 FR 44911 (July 5, 2002) (order approving fees for TRACE).

²⁵ See id., 67 FR at 44913.

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,²⁶ that the proposed rule change (SR-FINRA-2014-018) be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁷

Kevin M. O'Neill
Deputy Secretary

²⁶ 15 U.S.C. 78s(b)(2).

²⁷ 17 CFR 200.30-3(a)(12).