

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-75782; File No. SR-FINRA-2015-025)

August 28, 2015

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Order Approving Proposed Rule Change to Require Members to Report Transactions in TRACE-Eligible Securities as Soon as Practicable

I. Introduction

On July 2, 2015, 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 amend FINRA Rule 6730, which governs the reporting of eligible transactions to its Trade Reporting and Compliance Engine (“TRACE”). The proposed rule change was published for comment in the Federal Register on July 16, 2015.³ The Commission received two comment letters on the proposed rule change.⁴ FINRA responded to the comment letters on August 20, 2015.⁵ This order approves the proposed rule change.

II. Description of the Proposed Rule Change

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 75428 (July 10, 2015), 80 FR 42149.

⁴ See letter from Darren Wasney, Program Manager, Financial Information Forum, to Robert W. Errett, Deputy Secretary, Commission, dated August 5, 2015 (“FIF Letter”) and letter from Michael Nicholas, Chief Executive Officer, Bond Dealers of America, to Secretary, Commission, dated August 6, 2015 (“BDA Letter”).

⁵ See letter from Racquel L. Russell, Associate General Counsel, FINRA, to Robert W. Errett, Deputy Secretary, Commission, dated August 20, 2015 (“FINRA Response Letter”).

FINRA Rule 6730 currently requires that each FINRA member that is a Party to a Transaction⁶ in a TRACE-Eligible Security⁷ report the transaction within 15 minutes of the Time of Execution,⁸ unless a different time period for the security is otherwise specified in the rule. Otherwise, the transaction report will be deemed “late.” The proposed rule change amends Rule 6730 to provide that, for a TRACE-Eligible Security subject to dissemination, each member that is a Party to a Transaction must report the transaction to TRACE as soon as practicable, but no later than within 15 minutes of the Time of Execution or other timeframe specified in Rule 6730. Further, the proposed rule change adds new Supplementary Material .03 that requires members to adopt policies and procedures reasonably designed to comply with this amended requirement by implementing, without delay, systems that commence the trade reporting process at the Time of Execution. The proposed rule change also provides that, where a member has in place such reasonably designed policies, procedures, and systems, the member generally will not be viewed as violating the “as soon as practicable” reporting requirement because of delays that are due to extrinsic factors that are not reasonably predictable and where the member does not purposely intend to delay the reporting of the trade. The proposed rule change states that in no event may a member purposely withhold trade reports, for example, by programming its systems to delay reporting until the end of the reporting time period.

⁶ FINRA Rule 6710(e) provides that a “Party to a Transaction” is an introducing broker-dealer, if any, an executing broker-dealer, or a customer. “Customer” includes a broker-dealer that is not a FINRA member.

⁷ See FINRA Rule 6710(a) (defining “TRACE-Eligible Security”).

⁸ FINRA Rule 6710(d) provides, among other things, that the “Time of Execution” for a transaction in a TRACE-Eligible Security is the time when the Parties to a Transaction agree to all of the terms of the transaction that are sufficient to calculate the dollar price of the trade.

The proposed rule change also recognizes that members may manually report transactions in TRACE-Eligible Securities and, as a result, the trade reporting process may not be completed as quickly as where an automated trade reporting system is used. FINRA states that, in these cases, in determining whether the member's policies and procedures are reasonably designed to report the trade "as soon as practicable," it will take into consideration the manual nature of the member's trade reporting process.

While the current rules provide time periods for members to conduct the necessary actions to report transactions, FINRA cites concerns about members delaying the reporting of executed transactions, particularly, for example, by imbedding into the trade reporting process deliberate delays until the end of the reporting time period. FINRA also represents that it observed instances that appear to indicate that firms have taken more time than is operationally necessary to report trades, which raises the possibility that certain firms may have intentionally delayed trade reporting, possibly to delay public dissemination of the trade. FINRA believes that such conduct is inconsistent with the purpose of the trade reporting rules and that it is important for public price transparency that members do not delay reporting executed transactions.

FINRA already has taken certain steps to deter such conduct. Paragraph (a)(4) of Rule 6730 currently provides that members have an ongoing obligation to report transaction information promptly, accurately, and completely. In addition, FINRA previously has conveyed its expectation, through regulatory notices, that members not delay the reporting of transactions through certain communications with its members.⁹ FINRA now believes that Rule 6730 should

⁹ See, e.g., Trade Reporting Notice, May 10, 2011 (Reporting Asset-Backed Securities to the Trade Reporting and Compliance Engine) (although firms have up to two business days to report transactions in ABSs, firms should submit reports as soon as practicable after the execution of a transaction and throughout the trading day, rather than queuing such reports until the end of the reporting time period); Regulatory Notice 12-52

be explicitly amended to prohibit delays, thereby promoting consistent and timely reporting by all members and improving the usefulness of disseminated TRACE information for regulators, investors, and other market participants. FINRA also states that the proposed rule change will clarify that intentionally delaying trade reporting is violative of a member's ongoing obligation to report transaction information to TRACE promptly.

FINRA anticipates that the proposal will not impose any significant new compliance costs on members. FINRA also represents that it understands that the vast majority of firms that report transactions to TRACE have automated their trade reporting systems, which may facilitate their ability to comply with the proposed rule change.¹⁰ FINRA acknowledges the additional timing needs for firms that manually report their TRACE trades and represents that it will consider those needs when evaluating the policies and procedures of those members.

III. Summary of Comments and FINRA's Response

As noted above, the Commission received two comment letters on the proposed rule change¹¹ and a response letter from FINRA.¹² The comment letters and FINRA's response are summarized below.

The FIF Letter requests clarification regarding how the proposed rule change would apply to member firms and suggests that FINRA only include language explicitly stating that

(December 2012) (transactions in securities subject to TRACE reporting requirements should be reported without delay, even though the TRACE rule generally allows for up to 15 minutes to report transactions in corporate and agency debt securities).

¹⁰ FINRA provided statistics, based on a review of TRACE trade reporting data from January 2014 through December 2014, that over 90% of trade reports in corporate and agency debt were submitted within five minutes of the time of execution and 79% were reported within one minute. Furthermore, approximately 71% of trade reports in securitized products were submitted within five minutes of execution, and over 55% were reported within one minute.

¹¹ See supra note 4.

¹² See supra note 5.

intentionally delaying reporting would constitute a violation of Rule 6730. The FIF Letter also suggests that FINRA eliminate the “as soon as practicable” language included in the proposed rule change.¹³

FINRA rejects this suggested change. While intentionally delaying reporting would constitute a violation of the proposed rule, FINRA states that the proposal puts an affirmative obligation on firms to implement efficient reporting systems, a goal that goes beyond the policing of intentional delays. FINRA notes the importance of price transparency to the investing public and the marketplace overall and states that each member should take steps to ensure that transaction information is reported promptly without taking more time than is operationally necessary.¹⁴

The FIF Letter also asks whether firms may be deemed in violation of the proposed rule under certain scenarios. The Letter inquires, for example, whether brokers, due to using different data providers and having different internal workflows, have different reporting time requirements.¹⁵ Further, the FIF Letter also asks whether firms would be expected to modify existing systems to comply with the proposed rule change.¹⁶

In its response letter, FINRA recognizes that members’ processes around TRACE reporting are diverse and may differ depending on the degree of automation, the method of order receipt and execution, and other factors. FINRA also states that it understands a certain amount of time is operationally needed for reporting and that its rule text acknowledged this. FINRA states that compliance with the rule would hinge on whether the member firm’s policies and

¹³ See FIF Letter at 1-2.

¹⁴ See FINRA Response Letter at 1-2.

¹⁵ See FIF Letter at 2.

¹⁶ See FIF Letter at 2.

procedures are reasonably designed to report trades as soon as practicable by having systems that commence reporting at the time of execution without delay.¹⁷ It also states that, if a member currently has such policies and procedures, then no further changes would be required to comply with the proposed rule change.¹⁸

The BDA Letter generally supports the proposal but suggests that FINRA alter the wording of the proposed rule text to read that members “generally will not be viewed as violating the ‘as soon as practicable’ requirement because of delays in trade reporting that are due to the facts and circumstances of the transaction.”¹⁹ The BDA Letter cites some examples of intrinsic factors that it states can cause reporting delays, including changes in staff, routine day-to-day business and personnel issues, and transactions in complex securitized products or by telephone, which may require additional time for reporting. The BDA Letter states that firms experiencing reporting delays due to such factors should not be considered out of compliance.²⁰

FINRA, in response, states that it agrees that the facts and circumstances of a transaction are one of the factors that may be considered in determining whether a transaction was reported as soon as practicable, but rejects the suggested modification. FINRA states that the intent of the proposed rule language is to provide comfort to members experiencing delays resulting from unpredictable extrinsic factors, which are by their nature outside of a member’s control. FINRA further provides that the predictable and routine factors noted by the BDA Letter (such as staff turnover, voice transactions, and trading in new or complex security types) are factors that

¹⁷ See FINRA Response Letter at 2.

¹⁸ See FINRA Response Letter at 3.

¹⁹ See BDA Letter at 1-2. The proposed rule provides that delays due to “extrinsic factors that are not reasonably predictable” will generally not be viewed as violative of Rule 6730.

²⁰ See BDA Letter at 2-3.

should be considered when designing reporting systems to facilitate prompt transaction reporting. FINRA acknowledges, however, that the particulars of what operationally is necessary to report a specific trade or type of trade legitimately may vary depending on the circumstances.²¹

IV. Discussion and Commission Findings

After careful review, 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.²² In particular, the Commission finds that the proposed rule change is consistent with Section 15A(b)(2) of the Act,²³ which requires, among other things, that FINRA be so organized and have the capacity to be able to carry out the purposes of the Act, to comply with the Act, and to enforce compliance by FINRA members and persons associated with members with the Act, the rules and regulations thereunder, and FINRA rules. The Commission also finds the proposed rule change consistent with Section 15A(b)(6) of the Act,²⁴ 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.

The Commission believes that the proposed rule change is reasonably designed to clarify the manner in which firms must comply with existing FINRA Rule 6730(a)(4). The Commission believes that it is consistent with the Act for FINRA to explicitly prohibit the delay of transaction reporting and to require members to establish and implement policies and procedures that are

²¹ See FINRA Letter 3-4.

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).

²³ 15 U.S.C. 78o-3(b)(2).

²⁴ 15 U.S.C. 78o-3(b)(6).

reasonably designed to comply with the TRACE reporting requirement as amended. The Commission believes that the proposed rule change will promote timely trade reporting and thereby enhance public price transparency, consistent with the protection of investors and public interest.

The Commission notes that FINRA recognizes that members may manually report transactions in TRACE-Eligible Securities and, as a result, the trade reporting process may not be completed as quickly as where an automated trade reporting system is used. The Commission believes it is appropriate that, in these cases, FINRA would take into consideration the manual nature of the member's trade reporting process in determining whether its policies and procedures are reasonably designed to report the trade "as soon as practicable."

The Commission also notes that one commenter suggested removing the "as soon as practicable" requirement, while another commenter, who supported the requirement, suggested modifications to the proposed rule text to account for intrinsic factors that may delay reporting. Further, both commenters raised concerns about certain circumstances that may affect the timeliness of trade reporting, including the variations in member reporting mechanisms, routine business matters, or the complexity of the securities traded.

The Commission believes FINRA's decision not to modify the rule text as suggested by the commenters is appropriate. The Commission notes that FINRA acknowledges that reporting processes differ by member firm and by security and that its rule text already accounted for this. As FINRA notes, compliance with the rule would hinge on whether the member firm's policies and procedures are reasonably designed to report trades as soon as practicable by having systems that commence reporting at the time of execution without delay. The Commission also notes that FINRA acknowledges that the facts and circumstances of a particular transaction are among the

factors that may be considered in determining whether a transaction was reported as soon as practicable. Moreover, FINRA states that routine and predictable factors that affect the timing of reporting should be accounted for when a member designs policies, procedures, and systems for trade reporting, in contrast to unpredictable, extrinsic factors, which are by their nature outside of a member's control.

While the proposed rule would require firms to undertake an assessment of existing policies and procedures for compliance with the rule and may entail some additional costs for member firms that do not already have policies and procedures in place to report trades as soon as practicable, the Commission believes the proposed rule is be reasonably designed to achieve compliance with FINRA rules and the applicable federal securities law and regulations.

Therefore, for the foregoing reasons, the Commission finds that the proposed rule change is consistent with the Act.

V. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,²⁵ that the proposed rule change (SR-FINRA-2015-025), be, and hereby is, approved.

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

Robert W. Errett
Deputy Secretary

²⁵ 15 U.S.C. 78s(b)(2).

²⁶ 17 CFR 200.30-3(a)(12).