

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-61361; File No. SR-FINRA-2010-001)

January 14, 2010

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

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on January 6, 2010, 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. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

FINRA has filed 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”).<sup>3</sup> The proposed rule change would amend FINRA Rule 6160 (Multiple MPIDs for Trade Reporting Facility Participants) to (1) require members that opt to have their trading data published to obtain and use a separate Market Participant Identifier (“MPID”) designated exclusively for reporting the member’s ATS dark pool transactions, and (2) adopt related Supplementary Material.

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> 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

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

Some FINRA members operate “dark pools,” a type of ATS that does not display quotations or subscribers’ orders to any person or entity either internally within the ATS dark pool or externally beyond the ATS dark pool (other than employees of the ATS).<sup>4</sup> Over-the-counter transactions executed within an ATS dark pool are reported by the ATS to a FINRA facility, e.g., a FINRA TRF. Currently, information relating to the trading volume reported to FINRA facilities by participants operating ATS dark pools is not separately identified to the public.

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TRF and the FINRA/NYSE TRF. Each TRF is operated in conjunction with the respective exchange “Business Member.”

<sup>4</sup> See, e.g., Rule 301(b)(3)(i)(A) of Regulation ATS.

The TRF Business Members have determined to publish aggregate daily trading volume data for transactions executed within ATS dark pools and reported to the TRFs.<sup>5</sup> FINRA, through its TRF Limited Liability Companies, will distribute transaction reporting data to the Business Members so that the Business Members may publish, after the close of trading, aggregate daily trading volume data for trades executed within participating ATS dark pools. FINRA is making such data available to the Business Members and the Business Members will make the data widely available to the public at no cost.<sup>6</sup>

The data for transactions reported to each TRF will be posted on the respective Business Member's web site (i.e., the NYSE will post daily trading volume data on its web site based on transactions reported to the FINRA/NYSE TRF, and Nasdaq will post daily trading volume data on its web site based on transactions reported to the FINRA/Nasdaq TRF).<sup>7</sup> The daily trading volume data will be segregated by participating ATS dark pool. Initially, the data may be presented as an overall volume percentage; however, at a later date, it may be further broken down by security. As discussed below, members that opt into the proposed program must

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<sup>5</sup> Under the TRF Limited Liability Company Agreements between FINRA and the exchanges, FINRA, the "SRO Member," has sole regulatory responsibility for the TRFs. The Business Member (see note 3) is primarily responsible for the management of the TRF's business affairs, including establishing pricing for use of the TRF, to the extent those affairs are not inconsistent with the regulatory and oversight functions of FINRA. Additionally, the Business Member is obligated to pay the cost of regulation and is entitled to the profits and losses, if any, derived from the operation of the TRF.

<sup>6</sup> The TRFs receive the data and the Business Members, because they operate the TRFs, have access to the data through their contractual arrangements with FINRA. Thus, FINRA will not be required to take any specific action to "distribute" or make the data available to the Business Members.

<sup>7</sup> FINRA notes that the TRF Business Members have previously posted data on their web site that did not require a rule filing; however, because this data product is not derived directly (or indirectly) from publicly disseminated information, SEC staff have indicated that a rule filing is necessary.

acknowledge that their data may be published in one of these two ways.

FINRA member participation in the proposed program to publish dark pool transaction data is voluntary. No member's data will be included in the aggregate daily trading volume unless the member expressly requests that it be published.

Any member that opts to have its volume included in the published data must comply with proposed new paragraph (c) of Rule 6160. Under current Rule 6160, FINRA permits members to obtain and use multiple MPIDs for purposes of reporting trades to a TRF on a pilot basis.<sup>8</sup> 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 (e.g., the member might use multiple MPIDs for trade reporting purposes if it clears trades through multiple clearing firms).<sup>9</sup>

Proposed paragraph (c) of Rule 6160 would apply only to members that voluntarily participate in the proposed program to publish ATS dark pool data. The proposed rule requires that the member obtain and use a separate MPID designated exclusively for the reporting of transactions executed within the ATS dark pool.<sup>10</sup> The member must use such separate MPID to

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<sup>8</sup> Similarly, FINRA permits members to obtain and use multiple MPIDs for purposes of displaying quotes/orders and reporting trades to the Alternative Display Facility ("ADF") under Rule 6170.

<sup>9</sup> 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 retains 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.

<sup>10</sup> Today, 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

report all transactions executed within the ATS dark pool to a TRF(s). The member shall not use such separate MPID to report any transaction that is not executed within the ATS dark pool, including, e.g., trades that are routed out by the ATS dark pool. The member cannot obtain more than one MPID under proposed paragraph (c) for purposes of reporting transactions executed within a single ATS dark pool. In addition, any member that operates multiple ATS dark pools and opts to have each ATS dark pool participate in the proposed program must obtain a separate MPID for each ATS dark pool; the member cannot use a single MPID to report transactions executed within multiple ATS dark pools. Members that opt to have their volume included in the published data must 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 the ATS dark pool.

If a member designates a separate MPID for 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.<sup>11</sup> 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 on one Business Member's web site may not reflect 100% of that member's volume. Interested parties

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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 business. An ATS dark pool using such a "multi-purpose" MPID would be ineligible to opt in to the proposed program for publication of ATS dark pool volume.

<sup>11</sup> In other words, once a member has opted in to the program, 100% 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% of the member's volume will be published. Because the ADF does not offer a program to publish dark pool transaction data, the member would be prohibited from reporting to the ADF in this instance.

would need to consult all Business Members' web sites to see the total volume for any given ATS dark pool, and the Business Members will make prominent disclosure to this effect on their web sites. The proposed Supplementary Material also would clarify that the Business Members will make such disclosure.

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 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 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 dark pool transaction reporting will ensure that the published volume is limited to the member's 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 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).

FINRA notes that 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 posted on its web site.

The proposed rule change will be effective upon Commission approval.

## 2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,<sup>12</sup> 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 by providing additional market data relating to ATS dark pools, the proposed rule change will increase market transparency of trading volumes within those ATS dark pools that choose to participate.

FINRA also believes that distribution of this data is consistent with Rule 603(a) of Regulation NMS, which requires, among other things, that distributions of certain data by FINRA not be unreasonably discriminatory.<sup>13</sup> FINRA, through its TRF Limited Liability Companies, will distribute certain data to the Business Members so that the Business Members may publish, after the close of trading, aggregate daily trading volume data for trades executed within participating ATS dark pools. FINRA is making such data available to the Business

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<sup>12</sup> 15 U.S.C. 78o-3(b)(6).

<sup>13</sup> See Rule 603(a)(2) of Regulation NMS.

Members and the Business Members will make the data widely available to the public at no cost. Because the data that FINRA is proposing to distribute to the Business Members will be published by each Business Member on its web site in a widely disseminated and easily accessible manner, the proposal is not unreasonably discriminatory. In addition, the benefit to the marketplace of increased transparency regarding dark pool transaction volume, together with the readily accessible manner in which this reference data will be made available by the Business Members, offers compelling justification for the proposed program to publish ATS dark pool data.

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

(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 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](mailto:rule-comments@sec.gov). Please include File Number SR-FINRA-2010-001 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-2010-001. 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 10:00 a.m. and 3:00 p.m. Copies of the 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-2010-001 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.<sup>14</sup>

Florence E. Harmon  
Deputy Secretary

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<sup>14</sup> 17 CFR 200.30-3(a)(12).