

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-60377; File No. SR-FINRA-2009-031)

July 23, 2009

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Order Approving Proposed Rule Change as Amended, Relating to the Reporting of Over-the-Counter Transactions in Equity Securities Executed Outside Normal Market Hours

I. Introduction

On May 8, 2009, Financial Industry Regulatory Authority, Inc. (“FINRA”) (f/k/a National Association of Securities Dealers, Inc. (“NASD”)) 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 trade reporting rules relating to over-the-counter transactions in equity securities executed outside normal market hours to (1) require that any trades executed during the hours that a FINRA Facility (the Alternative Display Facility (“ADF”), a Trade Reporting Facility (“TRF”) or the OTC Reporting Facility (“ORF”)) is closed be reported within 15 minutes of the opening of the Facility, i.e., 8:15 a.m. Eastern Time; and (2) conform the trade reporting requirements applicable to “outside normal market hours” transactions across FINRA Facilities. On May 29, 2009, FINRA filed Amendment No. 1 to the proposed Rule Change. The proposed rule change

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

was published for comment in the Federal Register on June 9, 2009.³ The Commission received no comment letters on the proposed rule change. This order approves the proposed rule change as amended.

II. Description of the Proposed Rule Change

FINRA is proposing to amend the trade reporting rules⁴ to require that trades executed during the hours that the FINRA Facility is closed be reported within 15 minutes of the opening of the facility (i.e., 8:15 a.m. Eastern Time for all FINRA Facilities). Specifically, members would be required to report as follows: (1) trades executed between midnight and 8:00 a.m. must be reported by 8:15 a.m. on trade date, and (2) trades executed between the close of the FINRA Facility (i.e., either 6:30 p.m. or 8:00 p.m.) and midnight must be reported on an “as/of” basis the following business day by 8:15 a.m. These trades would be designated with the unique trade report modifier to denote their execution outside normal market hours. Any such trades not reported by 8:15 a.m. would be marked with the “outside normal market hours trade reported late” modifier.

FINRA also is proposing certain amendments to conform the requirements for reporting “outside normal market hours” trades across FINRA Facilities. First, under current rules and system functionality, members are not permitted to submit to the FINRA/Nasdaq TRF and ORF a trade report with the “outside normal market hours” modifier during normal market hours. For example, if a member executes a trade at 9:29:00 a.m. and reports the trade at 9:30:15 a.m. (in compliance with the 90-second reporting requirement under FINRA rules), the FINRA/Nasdaq

³ See Securities Exchange Act Release No. 60022 (June 1, 2009), 74 FR 27361 (“Notice”).

⁴ See Rules 6282(a)(2)(B); 6380A(a)(2)(C) and (D); 6380B(a)(2)(C) and (D); and 6622(a)(3)(C).

TRF and ORF will reject the trade report; the trade cannot be reported, and will not be disseminated, until after 4:00 p.m. By contrast, the ADF and FINRA/NYSE TRF permit the submission of trade reports with the “outside normal market hours” modifier throughout the day. With this change, the trade described in the example above can be reported to the ADF or FINRA/NYSE TRF and disseminated at 9:30:15 a.m.

Accordingly, FINRA is proposing to amend Rules 6380A(a)(2)(A) and (a)(2)(C) relating to the FINRA/Nasdaq TRF and Rules 6622(a)(3)(A) and (a)(3)(C)(i) relating to the ORF to delete the requirement that “outside normal market hours” transactions that are not reported by 9:30 a.m. be reported after 4:00 p.m. The proposed amendments are identical to the text of current Rules 6282(a)(2)(A) and (a)(2)(B)(i) relating to the ADF.

Additionally, FINRA is proposing conforming changes to Rules 6380B(a)(2)(A) and (C) relating to the FINRA/NYSE TRF. Today, members submit trade reports with the “outside normal market hours” modifier to the FINRA/NYSE TRF throughout the day. However, FINRA stated that when the rules for this TRF were originally adopted, these provisions inadvertently were based on the rules relating to the FINRA/Nasdaq TRF, rather than the ADF. Thus, FINRA stated that the proposed amendments for the FINRA/NYSE TRF do not represent a departure from current member reporting practices and systems functionality.⁵

In this regard, FINRA also is proposing to amend Rules 6380A(a)(2)(D), 6380B(a)(2)(D) and 6622(a)(3)(C)(ii) to require expressly that “as/of” reports submitted pursuant to these

⁵ See Notice, supra, note 4, at

provisions include the unique trade report modifier, as specified by FINRA, to denote their execution outside normal market hours. The proposed amendments conform to the text of current Rule 6282(a)(2)(C)(ii).

Second, FINRA is proposing to amend Rules 6282(a), 6380A(a), 6380B(a) and 6622(a) to consolidate the provisions relating to late trade reporting and make clear that trades that are required to be reported on trade date, but are not reported on trade date, must be reported on an “as/of” basis on a subsequent date (T+N) and shall be designated as late. This requirement applies to trades executed during normal market hours, as well as those “outside normal market hours” trades that are required by rule to be reported on trade date (i.e., trades executed between midnight and 9:30 a.m. and between 4:00 p.m. and the close of the FINRA Facility at either 6:30 or 8:00 p.m.). The proposed amendments also would make clear the requirement that “outside normal market hours” trades that are required to be reported on an “as/of” basis the following business day (T+1), but are not reported T+1, must be reported on a subsequent date (T+N) and shall be designated as late.⁶ Accordingly, FINRA is proposing to amend Rules 6380A(a)(2)(B), 6380B(a)(2)(B) and 6622(a)(3)(B) to delete the duplicative requirement that transactions not reported by 8:00 p.m. on trade date must be reported on an “as/of” basis the following business day (T+1).

Third, FINRA is proposing certain technical, non-material changes to conform the text of the rules relating to the reporting of trades executed outside normal market hours across FINRA Facilities. For example, FINRA is proposing to amend Rule 6282(a)(2) relating to the ADF and Rule 6622(a)(3) relating to the ORF to delete the specific references to the “.T” trade report

⁶ FINRA is proposing to amend paragraph (a)(1) and adopt new paragraph (a)(6) of Rule 6282 to conform to Rules 6380A(a)(4), 6380B(a)(4) and 6622(a)(5).

modifier. This conforms to the trade reporting rules relating to the TRFs, as well as the other provisions of the ADF trade reporting rules, which do not refer to specific trade report modifier labels.⁷ Additionally, FINRA is proposing to renumber the subparagraphs in Rule 6282(a)(2) relating to the ADF and Rule 6622(a)(3) relating to the ORF to conform to the numbering of the subparagraphs in Rules 6380A(a)(2) and 6380B(a)(2) relating to the TRFs.

III. Discussion and 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.⁸ In particular, the Commission finds that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,⁹ which requires, among other things, that FINRA rules 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 will enhance market transparency by ensuring that these “outside normal market hours” trades are reported and disseminated closer to the actual execution time rather than reported at some later time during the trading day. As a result, market participants will have better information about the time of execution for such trades. For example, under current rules, a trade with the “outside normal market hours” modifier that is reported and disseminated at 9:20 a.m. could have been executed

⁷ See, e.g., Rules 6282(a)(4), 6380A(a)(2) and (5) and 6380B(a)(2) and (5).

⁸ 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).

⁹ 15 U.S.C. 78o-3(b)(6).

and reported real-time at 9:20 a.m., or it could have been executed at some point between midnight and the opening of the FINRA Facility at 8:00 a.m. There is currently nothing to distinguish a trade executed and reported at 9:20 a.m. from a trade executed between midnight and 8:00 a.m. and reported at 9:20 a.m. Under the proposed rule change, a trade executed between midnight and 8:00 a.m. that is reported at 9:20 a.m. would be marked late, thus distinguishing it from a trade executed and reported real-time at 9:20 a.m. The Commission believes that this change will enhance market transparency by eliminating systematically imposed delays in the reporting of “outside normal market hours” trades to the FINRA/Nasdaq TRF and ORF.

The Commission believes that by conforming the reporting requirements and systems functionality with respect to “outside normal market hours” trades across FINRA Facilities, the proposed rule change will promote more consistent trade reporting by members and a more complete and accurate audit trail.¹⁰

¹⁰ The Commission notes that in connection with these changes to the trade reporting rules FINRA is also moving language from Rule 6282(a)(1) to Rule 6282(a)(6) concerning patterns or practices of late trade reporting. Rule 6282(a)(1) currently states that “[a] pattern or practice of late trade reporting without exceptional circumstances shall be considered conduct inconsistent with high standards of commercial honor and just equitable principles of trade violation of Rule 2010.” The change FINRA is proposing would replace the word “shall” with “may,” and applies the lower standard not only to a pattern or practice of late trade reporting outside of normal market hours, but to a pattern or practice of late trade reporting during normal market hours. Rule 6282 concerns transactions reported only to TRACS, and FINRA has informed the Commission staff that the change is designed to make the rule consistent with the FINRA/NASDAQ, FINRA/NYSE, and OTC Trade Reporting Facilities, all of which currently have the identical language to proposed Rule 6282(a)(6). Telephone call between Stephanie Dumont, Senior Vice President and Director of Capital Markets Policy, FINRA, and Kathy England, Assistant Director, Commission, May 29, 2009. The Commission expects FINRA to continue pursuing violations of its trade reporting rules and to continue, as appropriate, charging violations of Rule 2010 (Standards of Commercial Honor and Principles of Trade). The Commission notes that it has routinely upheld appeals from FINRA disciplinary actions when FINRA has charged respondents with

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,¹¹ that the proposed rule change (SR-FINRA-2009-031), as amended, be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹²

Florence E. Harmon
Deputy Secretary

violations of Rule 2010 based solely on an underlying violation of another SRO rule. See e.g., Stephen J. Gluckman, 54 S.E.C. 175, 185 (1999), Exchange Act Release No. 41628 (July 20, 1999).

¹¹ 15 U.S.C. 78s(b)(2).

¹² 17 CFR 200.30-3(a)(12).