

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-60960; File No. SR-FINRA-2009-061)

November 6, 2009

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of Proposed Rule Change, and Amendment No. 1 Thereto, to Require Members to Report OTC Transactions in Equity Securities Within 30 Seconds of Execution

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 September 16, 2009, Financial Industry Regulatory Authority, Inc. (“FINRA”) filed with the Securities and Exchange Commission (“SEC” or “Commission”) a proposed rule change SR-FINRA-2009-061 as described in Items I, II, and III below, which Items have been prepared by FINRA. On October 30, 2009, FINRA filed Amendment No. 1 to the proposed rule change. The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

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

FINRA is proposing to amend FINRA trade reporting rules to (1) require that members report over-the-counter (“OTC”) equity transactions<sup>3</sup> to FINRA within 30 seconds of execution; (2) require that members report secondary market transactions in non-exchange-listed direct participation program (“DPP”) securities to FINRA within 30 seconds of execution; and (3) make certain conforming changes to the rules relating to the OTC Reporting Facility (“ORF”).

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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> Specifically, OTC equity transactions are: (1) transactions in NMS stocks, as defined in SEC Rule 600(b) of Regulation NMS, effected otherwise than on an exchange, which are reported through the Alternative Display Facility (“ADF”) or a Trade Reporting Facility (“TRF”); and (2) transactions in “OTC Equity Securities,” as defined in FINRA Rule 6420 (e.g., OTC Bulletin Board and Pink Sheets securities), which are reported through the OTC Reporting Facility (“ORF”). The ADF, TRFs and ORF are collectively referred to herein as the “FINRA Facilities.”

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

30-Second Reporting Requirement

Under FINRA trade reporting rules, members generally must report OTC equity transactions that are executed during the hours that the FINRA Facilities are open within 90 seconds of execution.<sup>4</sup> Last sale information for such trades is publicly disseminated on a real-time basis. There are certain limited exceptions to this general requirement, including for trades in non-exchange-listed DPP securities, as discussed below.<sup>5</sup> The 90-second reporting requirement has been in effect since 1982, when OTC trading was more manual in nature. As trading has become increasingly automated, however, the vast majority of trades are now reported in a much shorter period of time. For example, during the period of February 23

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<sup>4</sup> See, e.g., FINRA Rules 6282(a), 6380A(a), 6380B(a) and 6622(a).

<sup>5</sup> Additionally, FINRA notes that transactions in PORTAL securities, as defined in FINRA Rule 6631, are not subject to the 90-second reporting requirement, but must be reported to the ORF by the end of the day. See FINRA Rule 6633.

through February 27, 2009, overall member compliance with the current 90-second reporting requirement was 99.95% (for all trades submitted to a FINRA Facility for public dissemination), and 99.90% of trades were reported in 30 seconds or less.

FINRA is proposing to amend the trade reporting rules to require that members report OTC equity transactions to FINRA within 30 seconds of execution. Specifically, the trade reporting rules would be amended to replace the references to 90 seconds with 30 seconds.<sup>6</sup> Trades not reported within 30 seconds, unless expressly subject to a different reporting requirement or excluded from the trade reporting rules altogether, would be late. Although members would have 30 seconds to report, FINRA reiterates that – as is the case today – members must report trades as soon as practicable and cannot withhold trade reports, e.g., by programming their systems to delay reporting until the last permissible second.

Because of the automated nature of trade reporting today, FINRA believes that in the vast majority of circumstances members should have no difficulty complying with the proposed 30-second reporting requirement. However, to better understand the potential limitations some members may face, FINRA is requesting that the SEC solicit comments specifically on whether there are any categories of trades (e.g., trades that are manual in nature) or any firm structures (e.g., smaller firms that may not have automated systems for trade reporting) that may justify a longer reporting time frame under FINRA rules.<sup>7</sup>

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<sup>6</sup> See FINRA Rules 6282(a); 6380A(a) and (g); 6380B(a) and (f); 6622(a) and (f); 7130(b); 7230A(b); 7230B(b); and 7330(b).

FINRA also is proposing to amend FINRA Rules 6181 and 6623 to replace the reference to 90 seconds with a more general reference to “the required time period” to clarify that these provisions also apply to trades that are subject to a different reporting requirement (e.g., certain trades executed outside normal market hours).

<sup>7</sup> FINRA notes that smaller firms that route their orders to another member firm for handling or execution do not have the trade reporting obligation under the “executing party” trade reporting structure that became effective on August 3, 2009. For

FINRA believes that the proposed rule change will promote consistent and timely reporting by all members and enhance market transparency and price discovery by ensuring that trades are disseminated closer in time to execution. Timely reporting has become even more critical with the implementation of Regulation NMS. A delay in the reporting and dissemination of a transaction could potentially appear to other market participants as a violation of the Regulation NMS Order Protection Rule; if a trade is not reported and disseminated until a full 90 seconds after execution, the best displayed market could have changed between the time of execution and ultimate dissemination of the trade. Additionally, the proposed rule change will ensure that members do not withhold important market information from investors and other market participants for competitive or other improper reasons.<sup>8</sup>

#### Reporting Requirements Applicable to Trades in Non-Exchange-Listed DPP Securities

Pursuant to FINRA Rule 6643(a)(1), members are required to report trades in non-exchange-listed DPP securities to the ORF by 1:30 p.m. Eastern Time on the next business day (T+1) after the date of execution; members that have the operational capability to report transactions within 90 seconds of execution may do so at their option. Transaction information for such trades is not disseminated on a real-time trade-by-trade basis, but is included in end-of-day summary information disseminated twice daily. By contrast, under FINRA rules, OTC trades in exchange-listed DPP securities are reported to a TRF or the ADF and are subject to the

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transactions between members, the “executing party” (which is defined as the member that receives an order for handling or execution or is presented an order against its quote, does not subsequently re-route the order, and executes the transaction) has the obligation to report the trade to FINRA. See Regulatory Notice 09-08 (January 2009).

<sup>8</sup> FINRA reiterates the importance of timely reporting and reminds members that a pattern and practice of late reporting may be considered inconsistent with high standards of commercial honor and just and equitable principles of trade in violation of FINRA Rule 2010.

90-second reporting requirement (just like any other OTC trade in an NMS stock).<sup>9</sup> The inconsistency in the reporting and dissemination of DPPs can create confusion for market participants, especially when an exchange-listed DPP is delisted and dissemination of trading in the security goes from real-time to only twice daily.

FINRA is proposing to amend the trade reporting rules to require that transactions in non-exchange-listed DPP securities be reported within 30 seconds of execution to conform to the reporting requirements applicable to other OTC transactions, including those in exchange-listed DPP securities. Specifically, the proposed rule change would delete the FINRA Rule 6640 Series (Reporting Transactions in Direct Participation Program Securities) in its entirety, and secondary market transactions in non-exchange-listed DPPs would be reported to FINRA as any other OTC Equity Security pursuant to the FINRA Rule 6620 and 7300 Series. In addition, the proposed rule change would amend (1) FINRA Rule 6610 to clarify that secondary market transactions in non-exchange-listed DPPs are included in the OTC Equity Security transactions that must be reported to the ORF; (2) FINRA Rule 6420 to add “direct participation program” as a defined term (the proposed definition is identical to the definition in current FINRA Rule 6642); (3) FINRA Rule 6622 to include as Supplementary Material the definitions of “date of execution” and “time of execution” for DPP transactions (the proposed definitions are identical to the definitions in current FINRA Rule 6642); and (4) FINRA Rules 6530, 6550, 7310, 7330 and 7410 to delete or replace references to DPPs and the FINRA Rule 6640 Series, as applicable.

FINRA notes that transactions in non-exchange-listed DPPs currently are not subject to regulatory transaction fees under Section 3 of Schedule A to the FINRA By-Laws (“Section 3”)

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<sup>9</sup> See FINRA Rules 6282(a), 6380A(a) and 6380B(a).

because they are not subject to prompt last sale reporting under FINRA rules.<sup>10</sup> As a result of the proposed rule change, transactions in non-exchange-listed DPPs would become subject to Section 3 regulatory transaction fees.

FINRA believes the proposed rule change would enhance market transparency and promote consistency in trade reporting and dissemination.

#### Proposed Conforming Amendments

The proposal to reduce the reporting time to 30 seconds requires amendments to a number of subparagraphs within paragraph (a) of FINRA Rule 6622 relating to the ORF. In this filing, FINRA is proposing certain additional changes to these subparagraphs to conform, to the extent practicable, to the rules relating to the ADF and TRFs.

Specifically, FINRA is proposing to reorganize FINRA Rule 6622(a) (When and How Transactions are Reported) to conform to the current format and structure of the rules relating to the ADF and TRFs.<sup>11</sup> The requirements in paragraphs (a)(1) and (a)(2), which apply separately to OTC Market Makers and Non-Market Makers, respectively, would be combined in paragraph (a)(1) and apply to all “OTC Reporting Facility Participants,” as defined in proposed paragraph (n) of FINRA Rule 6420. Additionally, consistent with the ADF and TRF rules, FINRA is proposing to amend FINRA Rule 6622(a) to delete the labels (e.g., “.W”) for the trade report modifiers that members are required to use when reporting trades to the ORF. FINRA Rule 6622(a) would identify the types of transactions that must have a unique modifier associated with

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<sup>10</sup> Pursuant to Section 31 of the Act, FINRA and the national securities exchanges are required to pay transaction fees and assessments to the SEC that are designed to recover the costs related to the government’s supervision and regulation of the securities markets and securities professionals. FINRA obtains its Section 31 fees and assessments from its membership in accordance with Section 3.

<sup>11</sup> See FINRA Rules 6282(a), 6380A(a) and 6380B(a).

them and such modifiers would be labeled in the ORF technical specifications rather than in the rules.

Proposed paragraph (a)(5) of FINRA Rule 6622 would enumerate the transactions for which members must use a special trade report modifier and would clarify that members must include such modifiers on all trade reports, including reports of “as/of” trades.<sup>12</sup> In addition, proposed paragraph (a)(5) would expressly provide that in the event that the rules require multiple modifiers on any given trade report, members are to report in accordance with guidance published by FINRA regarding priorities among modifiers.<sup>13</sup> Members that report in accordance with such guidance will not be in violation of the trade reporting rules for failing to use a particular modifier.

FINRA notes that most of the trade report modifiers referred to in proposed paragraph (a)(5) already are required under current FINRA Rule 6622(a). However, proposed subparagraphs (B) through (D) would require members to use special trade report modifiers for Seller’s Option, Cash and Next Day trades,<sup>14</sup> and proposed subparagraph (E) would require members to use a special trade report modifier for trades that occur at a price based on an average weighting or another special pricing formula.<sup>15</sup> Although not required under current FINRA Rule 6622(a), members can use these modifiers when reporting to the ORF today. In addition, a separate modifier would be used for Stop Stock Transactions, as defined in FINRA Rule 6420, pursuant to proposed subparagraph (F).<sup>16</sup> Such transactions would be disseminated

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<sup>12</sup> See, e.g., FINRA Rules 6282(a)(4), 6380A(a)(5) and 6380B(a)(5).

<sup>13</sup> See, e.g., FINRA Rules 6380A(a)(5) and 6380B(a)(5).

<sup>14</sup> See, e.g., FINRA Rules 6282(a)(4)(B) – (D), 6380A(a)(5)(B) – (D) and 6380B(a)(5)(B) – (D).

<sup>15</sup> See, e.g., FINRA Rules 6282(a)(4)(E), 6380A(a)(5)(E) and 6380B(a)(5)(E).

<sup>16</sup> See, e.g., FINRA Rules 6282(a)(4)(F), 6380A(a)(5)(F) and 6380B(a)(5)(F).

to the public with the weighted average price modifier, which is consistent with the current dissemination policy with respect to Stop Stock Transactions that are submitted to the ADF and TRFs. Members currently are required to report Stop Stock Transactions with the .W trade report modifier, in accordance with FINRA Rule 6622(a)(8).

Current paragraphs (a)(3), (a)(4), (a)(5), (a)(7) and (a)(9) of FINRA Rule 6622 would be renumbered as paragraphs (a)(2), (a)(3), (a)(4), (a)(6) and (a)(7), respectively, without substantive change.

In addition to the proposed amendments to FINRA Rule 6622, FINRA is proposing to amend FINRA Rule 6420 to add “normal market hours” and “OTC Reporting Facility Participant” as defined terms.<sup>17</sup>

By conforming the trade reporting requirements to the extent practicable, the proposed rule change will promote more consistent trade reporting by members and a more complete and accurate audit trail. FINRA notes that most of the proposed conforming changes to FINRA Rule 6622(a) are technical in nature; however, some members may need to make systems changes to comply with some of the requirements that are not included expressly in the current rule.

FINRA will announce the effective date of the proposed rule change in a Regulatory Notice. To allow members sufficient time to make the necessary systems changes, FINRA is proposing that the implementation date will be between six and nine months following the date of Commission approval.

## 2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section

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<sup>17</sup> See, e.g., FINRA Rules 6320A and 6320B. The proposed definition of “normal market hours” is identical to the TRF rules, and the proposed definition of “OTC Reporting Facility Participant” is substantially similar to the definition of “Trade Reporting Facility Participant” in the TRF rules.



15A(b)(6) of the Act,<sup>18</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 the proposed rule change will enhance market transparency and price discovery and promote more consistent trade reporting by members.

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:

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<sup>18</sup> 15 U.S.C. 78q-3(b)(6).

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-2009-061 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-2009-061. 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<sup>19</sup>, 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 such 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

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<sup>19</sup> The text of the proposed rule change is available on the Commission's Web site at <http://www.sec.gov/>.

information that you wish to make publicly available. All submissions should refer to File Number SR-FINRA-2009-061 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>20</sup>

Florence E. Harmon  
Deputy Secretary

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<sup>20</sup> 17 CFR 200.30-3(a)(12).