

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-94498; File No. SR-FINRA-2022-006)

March 23, 2022

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Modify the Trade Reporting Fees Applicable to Participants that Use the FINRA/NYSE Trade Reporting Facility

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 March 16, 2022, the Financial Industry Regulatory Authority, Inc. (“FINRA”) filed with the Securities and Exchange Commission (“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 is proposing to amend FINRA Rule 7620B (Trade Reporting Facility Reporting Fees) to modify the trade reporting fees applicable to participants that use the FINRA/NYSE Trade Reporting Facility (“FINRA/NYSE TRF”).

The text of the proposed rule change is available on FINRA’s website 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

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

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

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

The FINRA/NYSE TRF, which is operated by NYSE Market (DE), Inc. (“NYSE Market (DE)”), is one of four FINRA facilities<sup>3</sup> that FINRA members can use to report over-the-counter (“OTC”) trades in NMS stocks. While members are required to report all OTC trades in NMS stocks to FINRA, they may choose which FINRA Facility (or Facilities) to use to satisfy their trade reporting obligations.<sup>4</sup>

NYSE Market (DE) proposes to modify the trade reporting fees applicable to FINRA members that use the FINRA/NYSE TRF (“Participants”). NYSE Market (DE) proposes to subject each Participant to a monthly fee that will be based on whether that Participant submitted trade reports to the FINRA/NYSE TRF during the relevant month, and if so, how many trade reports it submitted. FINRA is proposing to amend FINRA Rule 7620B (FINRA/NYSE Trade

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<sup>3</sup> The four FINRA facilities are the FINRA/NYSE TRF, two FINRA/Nasdaq Trade Reporting Facilities (together, the “FINRA/Nasdaq TRF”), and the Alternative Display Facility (“ADF” and together, the “FINRA Facilities”).

<sup>4</sup> Members can use the FINRA/NYSE TRF as a backup system and reserve bandwidth if there is a failure at another FINRA Facility that supports the reporting of OTC trades in NMS stocks. As set forth in Trade Reporting Notice 1/20/16 (OTC Equity Trading and Reporting in the Event of Systems Issues), a firm that routinely reports its OTC trades in NMS stocks to only one FINRA Facility must establish and maintain connectivity and report to a second FINRA Facility, if the firm intends to continue to support OTC trading as an executing broker while its primary facility is experiencing a widespread systems issue.

Reporting Facility Reporting Fees) accordingly. There is no new product or service accompanying the proposed fee change.

### Background

#### The FINRA/NYSE TRF

Under the governing limited liability company agreement,<sup>5</sup> the FINRA/NYSE TRF has two members: FINRA and NYSE Market (DE). FINRA, the “SRO Member,” has sole regulatory responsibility for the FINRA/NYSE TRF. NYSE Market (DE), the “Business Member,” is primarily responsible for the management of the FINRA/NYSE TRF’s business affairs to the extent those affairs are not inconsistent with the regulatory and oversight functions of FINRA.

The Business Member establishes pricing applicable to FINRA/NYSE TRF Participants for use of the FINRA/NYSE TRF. That pricing is then implemented pursuant to FINRA rules that FINRA must file with the Commission and that must be consistent with the Act. Specifically, FINRA/NYSE TRF Participants are charged fees pursuant to Rule 7620B and may qualify for transaction credits under Rule 7610B (Securities Transaction Credit) (such credits, “Securities Transaction Credits”).<sup>6</sup> The relevant FINRA rules are administered by NYSE Market

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<sup>5</sup> See the Second Amended and Restated Limited Liability Company Agreement of FINRA/NYSE Trade Reporting Facility LLC. The limited liability company agreement, which was submitted as part of the rule filing to establish the FINRA/NYSE TRF and was subsequently amended and restated, can be found in the FINRA Manual.

<sup>6</sup> Pursuant to Rule 7630B (Aggregation of Activity of Affiliated Members), affiliated members can aggregate their activity for purposes of fees and credits that are dependent upon the volume of their activity. No change is proposed to be made to Rules 7610B or 7630B, and so there will be no change to the requirements for, or process of, securities transaction credits and the aggregation of affiliated member activity.

(DE), in its capacity as the Business Member and operator of the FINRA/NYSE TRF on behalf of FINRA,<sup>7</sup> and the Business Member collects all fees on behalf of the FINRA/NYSE TRF.

According to the Business Member, the FINRA/NYSE TRF operates in a competitive environment. The FINRA Facilities have different pricing<sup>8</sup> for their respective participants and compete for FINRA members' trade report activity. The FINRA/NYSE TRF is smaller than the FINRA/Nasdaq TRF in terms of reported volume. For the month of December 2021, FINRA members used the FINRA/NYSE TRF to report approximately 17% of shares in NMS stocks traded OTC, compared to approximately 83% for the FINRA/Nasdaq TRF.

#### Operating Costs

The overall costs of operating and maintaining the FINRA/NYSE TRF involve both fixed and variable components. The variable component constitutes the majority of the cost and largely relates to the number of reports that the FINRA/NYSE TRF, on behalf of its subscribers, reports for public dissemination (or "tape") purposes. It also reflects the number of reports submitted to the FINRA/NYSE TRF that are not published to the tape. Specifically, if the number of tape reports increases, the Business Member's variable costs increase, and conversely, if the number of tape reports decreases, the Business Member's variable costs decrease. The variable costs associated with tape reports are not related to the size (number of shares) of the reported transaction. Accordingly, the variable costs relating to a tape report for a trade for one

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<sup>7</sup> FINRA's oversight of this function performed by the Business Member is conducted through a recurring assessment and review of the FINRA/NYSE TRF operations by an outside independent audit firm.

<sup>8</sup> Because the FINRA/NYSE TRF and FINRA/Nasdaq TRF are operated by different business members competing for market share, FINRA does not take a position on whether the pricing for one TRF is more favorable or competitive than the pricing for the other TRF.

share (or even less than one share) are the same as the variable costs relating to a tape report for 100,000 shares reported to the FINRA/NYSE TRF.

The Business Member is entitled to any profits and must cover any losses that arise from operating the FINRA/NYSE TRF. According to the Business Member, the profits or losses generally are the difference between:

1. the revenue (“Revenue”) from: (a) subscriber fees charged in accordance with FINRA Rule 7620B (“Subscriber Fee Revenue”), and (b) market data revenue for the transaction information provided to the securities information processors (“SIPs”) via the FINRA/NYSE TRF less the Securities Transaction Credits (together, “Net Market Data Revenue”); and
2. the costs of operating and maintaining the FINRA/NYSE TRF.

According to the Business Member, in 2020 and 2021, costs of operating and maintaining the FINRA/NYSE TRF were greater than Revenues, causing the FINRA/NYSE TRF to run at a loss. According to the Business Member, during that time, the number of tape reports increased (particularly for smaller-sized transactions) and total Subscriber Fee Revenue decreased, without a relative change to the difference in total share volume reported to the FINRA/NYSE TRF as compared to other FINRA Facilities. More specifically, compared to the 2018 monthly average, as of December 31, 2021, monthly average tape report activity for the FINRA/NYSE TRF had increased by 329% and monthly average costs had increased by 146%. At the same time, monthly average Subscriber Fee Revenue had decreased by 19%. Net Market Data Revenue varied during the period, but overall it decreased as compared to the first quarter of 2018. Ultimately, the Business Member believes that the FINRA/NYSE TRF would continue to incur a

significant loss if the current fee and credit structure remained in place, and that such losses would make the FINRA/NYSE TRF unsustainable in the long term.

Accordingly, the Business Member proposes to amend the fees set forth in FINRA Rule 7620B. By so doing, it has proposed a change that it believes should allow the monthly Subscriber Fee Revenue to cover the total costs of operating and maintaining the FINRA/NYSE TRF. The proposed changes are expected to allow the FINRA/NYSE TRF to continue operating without amassing losses similar to those it currently has.

#### Proposed Amendments to Rule 7620B

Under the current fee structure,<sup>9</sup> Participants are either “Retail Participants”<sup>10</sup> or Participants that are not Retail Participants (“Non-Retail Participants”). The former are exempt from the monthly fee, while the latter are subject to a monthly fee based, where applicable, on the Participant’s “FINRA/NYSE TRF Market Share.”<sup>11</sup> The fees set forth in Rule 7620B are tiered.

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<sup>9</sup> See Securities Exchange Act Release No. 88324 (March 5, 2020), 85 FR 14275 (March 11, 2020) (SR-FINRA-2020-006) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Modify the Trade Reporting Fees Applicable to the FINRA/NYSE Trade Reporting Facility). Under Rule 7620B, Participants are charged a flat fee for access to the complete range of functionality offered by the FINRA/NYSE TRF rather than a separate fee for each activity (e.g., a per trade or per side fee for reporting a trade, a separate per trade fee for canceling a trade, etc.) or a separate fee for connectivity. See, e.g., Rules 7510(a) and 7520 (trade reporting fees and connectivity charges for the ADF) and Rule 7620A (trade reporting fees for the FINRA/Nasdaq TRF).

<sup>10</sup> A Participant “is a ‘Retail Participant’ if substantially all of its trade reporting activity on the FINRA/NYSE Trade Reporting Facility comprises Retail Orders.” In turn, a “Retail Order” is “an order that originates from a natural person, provided that, prior to submission, no change is made to the terms of the order with respect to price or side of market and the order does not originate from a trading algorithm or any other computerized methodology.” FINRA Rule 7620B(a).

<sup>11</sup> See FINRA Rule 7620B(b). “The rate of the monthly fee for participants that are not Retail Participants will be based, where applicable, on the participant’s ‘FINRA/NYSE TRF Market Share,’ which is defined as the percentage calculated by dividing the total number of shares reported to the FINRA/NYSE Trade Reporting Facility for public

Under the proposed, simplified fee structure, the monthly fee would no longer depend on whether a Participant were a Retail Participant or its FINRA/NYSE TRF Market Share, and the current tiered structure would be removed. Rather, if a Participant submitted one or more trade reports to the FINRA/NYSE TRF during a given calendar month, the Participant would pay a monthly fee equal to the sum of (a) \$1,000 plus (b) \$0.0055 per published tape report. If a Participant submitted no trade reports to the FINRA/NYSE TRF during that calendar month, the Participant would pay a monthly fee of \$2,000.

To effect the change, Rule 7620B would be amended as follows. First, the text “with the exception that Retail Participants shall not be subject to a monthly fee” would be deleted from the first paragraph. Second, the following text would be added to the end of the first paragraph:

The monthly fee will be calculated as follows:

- (a) If the participant submits one or more trade reports to the FINRA/NYSE Trade Reporting Facility during a given calendar month, the participant will pay a monthly fee equal to the sum of (i) \$1,000 plus (ii) \$0.0055 per published tape report.
- (b) If the participant submits no trade reports to the FINRA/NYSE Trade Reporting Facility during a given calendar month, the participant will pay a monthly fee of \$2,000.

Finally, the current subsections (a) and (b), including the table in subsection (b), would be deleted.

The monthly fee would continue to be charged at the end of the calendar month. As is true now, if a new FINRA/NYSE TRF Participant submitted the participant application

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dissemination (or ‘tape’) purposes during a given calendar month that are attributable to the participant by the total number of all shares reported to the CTA or UTP SIP, as applicable, during that period.”

agreement and reported no shares traded in a given month, the Participant would not be charged the monthly fee for the first two calendar months in order to provide time to connect to the FINRA/NYSE TRF.<sup>12</sup> The monthly fees paid by FINRA/NYSE TRF Participants would continue to include unlimited use of the Client Management Tool, as well as full access to the FINRA/NYSE TRF and supporting functionality, e.g., trade submission, reversal and cancellation.<sup>13</sup>

#### Application of Proposed Fee Schedule

The Business Member believes that pricing is the key factor for FINRA members when choosing which FINRA Facility to use. The Business Member expects that the proposed change would result in a fee increase for most FINRA/NYSE TRF Participants. In this competitive environment, FINRA members can report their OTC trades in NMS stocks to the FINRA/NYSE TRF's competitors if they deem pricing levels at the other FINRA Facilities to be more favorable, so long as they are participants of such other facilities. As a result, the Business Member believes that the proposed fee change will likely reduce its reported volumes. It is not possible to fully predict the number of FINRA members that would reduce their use of the FINRA/NYSE TRF or cease being a FINRA/NYSE TRF Participant as a result of the fee increase. Similarly, it is not possible to predict what the change in reporting to the FINRA/NYSE TRF would be.

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<sup>12</sup> As is the case today, after the first two calendar months, the Participant will be charged regardless of connectivity.

<sup>13</sup> See Securities Exchange Act Release No. 87205 (October 3, 2019), 84 FR 54219 (October 9, 2019) (SR-FINRA-2019-024) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend FINRA Rule 7620B to Modify the Trade Reporting Fees Applicable to Participants That Use the FINRA/NYSE Trade Reporting Facility).

As stated above, under the proposed fee structure, the monthly fee would no longer depend on whether a Participant were a Retail Participant or its FINRA/NYSE TRF Market Share, and the current tiered structure would be removed. The proposed fee schedule would be applied in the same manner to all FINRA members that are, or elect to become, FINRA/NYSE TRF Participants and would not apply differently to different sizes or types of Participants. Participants that are currently Retail Participants would be subject to the same monthly fee for not submitting any trade reports in a given month as current Non-Retail Participants.

By setting a base flat fee and tying the remainder of the fee to the number of tape reports a Participant submits to the FINRA/NYSE TRF during a given month, if any, the Business Member believes that the resulting fee would relate to the cost of operating and maintaining the facility more closely. Specifically, the Business Member's total cost of operating the FINRA/NYSE TRF does not differ based on whether the Participant is a Retail Participant or not. As a general matter, the flat portions of the proposed fees are designed to address the fixed costs, while the portion that is charged per published tape report is meant to address variable costs. The proposed rule is designed to have the monthly Subscriber Fee Revenue generally cover total costs, which would allow the FINRA/NYSE TRF to continue operating without amassing losses similar to those it recently has amassed.

Tying the fee directly to the number of trade reports the Participant submits to the FINRA/NYSE TRF during the month means that the Participant's fee will increase or decrease in line with any changes in the volume of such trade reports. This makes the proposed fee more directly tied to the Participant's usage of the FINRA/NYSE TRF, matching a Participant's fee with its activity and the related costs. For example, under the proposal, if a Participant submitted 6,000,000 trade reports to the FINRA/NYSE TRF during one month, it would have a monthly

fee of \$34,000. If it then submitted a lower volume of 6,000 trade reports to the FINRA/NYSE TRF during the following month, its fee would be reduced to \$1,033. In recent years, there has been an increase in the volume of trade reports submitted. If that trend should abate, the fees would decrease as well.

#### Current Retail Participants

Under the proposed change, there would no longer be a distinction between Retail Participants and other Participants. Based on experience, the Business Member believes that most, if not all, of the current Retail Participants do not report any trades to the FINRA/NYSE TRF during a given month. For example, using December 2021 data, two of the three current Retail Participants were inactive. Currently, all Retail Participants are exempt from the monthly fee.

That would change under the proposed rule change, as the current Retail Participants would become subject to a monthly fee. If, like most current Retail Participants, a Participant submitted no trade reports to the FINRA/NYSE TRF during a calendar month, it would pay a monthly fee of \$2,000. Using December 2021 data, the two Retail Participants that were inactive, under the proposed fee change, would be assessed a fee of \$2,000 for the month (compared to \$0 under the current fee structure). If a Participant submitted one or more trade reports to the FINRA/NYSE TRF during a given calendar month, the Participant would pay a monthly fee equal to the sum of (a) \$1,000 plus (b) \$0.0055 per published tape report. The Retail Participant that was active in December 2021 would be assessed a fee of \$1,799 for the month based on its reporting activity (compared to \$0 under the current fee structure).

Current Non-Retail Participants

Participants that currently are Non-Retail Participants would no longer be subject to a fee that varied based on their FINRA/NYSE TRF Market Share. Rather, they would be subject to the same fees as all other Participants, as described above.

To facilitate comparison, the following table shows the estimated effect of the proposed change on the current Non-Retail Participants.

FINRA/NYSE TRF Market Share	Count of Tape Reports to FINRA/NYSE TRF	Current Monthly Participant Fee	Estimated New Monthly Participant Fee
Greater than or equal to 1.25%	More than 25,000 trade reports	\$30,000	\$83,598*
Greater than or equal to 1.00% but less than 1.25%	More than 25,000 trade reports	\$25,000	\$69,828*
Greater than or equal to 0.75% but less than 1.00%	More than 25,000 trade reports	\$20,000	\$43,156*
Greater than or equal to 0.50% but less than 0.75%	More than 25,000 trade reports	\$15,000	\$47,815*
Greater than or equal to 0.25% but less than 0.50%	More than 25,000 trade reports	\$10,000	\$36,793*
Greater than or equal to 0.20% but less than 0.25%	More than 25,000 trade reports	\$7,500	\$28,821**
Greater than or equal to 0.10% but less than 0.20%	More than 25,000 trade reports	\$5,000	\$20,849*

FINRA/NYSE TRF Market Share	Count of Tape Reports to FINRA/NYSE TRF	Current Monthly Participant Fee	Estimated New Monthly Participant Fee
Less than 0.10%	More than 25,000 trade reports	\$2,000	\$4,559*
n/a	Between 15,001 and 25,000 trade reports	\$2,000	\$1,237***
n/a	Between 5,001 and 15,000 trade reports	\$1,000	\$1,038*
n/a	Between 101 and 5,000 trade reports	\$750	\$1,010*
n/a	Between 1 and 100 trade reports	\$250	\$1,001*
n/a	No trade reports	\$2,000	\$2,000

\* Based on the monthly average of published tape reports submitted to the FINRA/NYSE TRF by Participants in the relevant tier for 2021.

\*\* There was no activity within the tier in 2021. The value represented is the average of the prior tier (greater than or equal to 0.25% but less than 0.50%) and the subsequent tier (greater than or equal to 0.10% but less than 0.20%).

\*\*\* There was no activity in this tier in 2021. Estimate assumes the highest number of trade reports in the range.

Based on the assumptions made in the table, current Non-Retail Participants that have no trade reports would not see a change in their fee, Non-Retail Participants with between 15,001 and 25,000 trade reports would see a decrease in their fee, and all other current Non-Retail Participants would see fee increases. As reflected in the table, based on the stated assumptions, Non-Retail Participants with fee increases would be subject to a monthly fee approximately

equal to just over one to four times their current fee. If there were no change in reporting to the FINRA/NYSE TRF, such that Non-Retail Participants' reported volume stayed the same as it was in the first six months of 2021, under the proposed fee schedule, current Non-Retail Participants that have no trade reports would not see a change in their fee, but most other current Non-Retail Participants would see fee increases.

FINRA has filed the proposed rule change for immediate effectiveness. The operative date will be June 1, 2022.

## 2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b) of the Act,<sup>14</sup> in general, and Section 15A(b)(5) of the Act,<sup>15</sup> in particular, which requires, among other things, that FINRA rules provide for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility or system that FINRA operates or controls. FINRA also believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,<sup>16</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 also believes that the proposed rule change is consistent with the provisions of Section 15A(b)(9) of the Act,<sup>17</sup> which requires that FINRA rules not impose any burden on competition that is not necessary or appropriate.

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<sup>14</sup> 15 U.S.C. 78q-3(b).

<sup>15</sup> 15 U.S.C. 78q-3(b)(5).

<sup>16</sup> 15 U.S.C. 78q-3(b)(6).

<sup>17</sup> 15 U.S.C. 78q-3(b)(9).

As a general matter, the proposed fee schedule will be assessed in the same manner for all FINRA members that are, or elect to become, FINRA/NYSE TRF Participants. It will not be applied differently to different sizes or types of Participants. Access to the FINRA/NYSE TRF is offered on fair and non-discriminatory terms.

The Proposed Rule Change is an Equitable Allocation of Reasonable Fees

FINRA believes that the proposed rule change provides for an equitable allocation of reasonable fees for the following reasons.

The Business Member believes that the FINRA/NYSE TRF would incur a significant loss if the current fee and credit structure remained in place. Accordingly, it proposes amendments to FINRA Rule 7620B, as discussed herein.

The Business Member believes that the proposed rule change is a reasonable amendment to the fee structure to address the current rate of losses, which if they continued, the Business Member believes would make the FINRA/NYSE TRF unsustainable in the long term. By setting a base flat fee and tying the remainder of the fee to the number of tape reports a Participant submits to the FINRA/NYSE TRF during a given month, if any, the Business Member believes that the proposed fee structure would correlate more closely to the manner by which the Business Member incurs the total costs associated with operating and maintaining the Facility. As stated above, as a general matter, the flat portions of the proposed fees are designed to address the fixed costs, while the portion that is charged per published tape report is meant to address variable costs. The proposed rule is reasonably designed to achieve a fee structure whereby the monthly fee revenue generally covers total costs, which would allow the FINRA/NYSE TRF to continue operating without amassing losses similar to those it recently has amassed.

The Business Member believes that partially tying the fee directly to the number of trade reports the Participant submits to the FINRA/NYSE TRF during the month is equitable, because the Participant's fee will increase or decrease in line with any changes in the number of submitted trade reports. This aspect of the fee structure ties the proposed fee more directly to the Participant's usage of the FINRA/NYSE TRF. In recent years, there has been an increase in the number of trade reports submitted. If that trend should abate, the fees would decrease as well.

The Business Member also believes that it is reasonable and equitable to charge a Participant a flat fee even if it does not submit any tape reports to the FINRA/NYSE TRF during the relevant month. First, the FINRA/NYSE TRF bears costs for operating the FINRA/NYSE TRF, even when a Participant does not submit tape reports during a given month. Second, the Business Member believes that the fee for inactivity during a particular month, which has not changed for Non-Retail Participants and would now apply to Retail Participants, is a reasonable method of encouraging all Participants to utilize the FINRA/NYSE TRF.

Currently, all Retail Participants are exempt from fees under FINRA Rule 7620B for reporting to the FINRA/NYSE TRF, but would become subject to trade reporting fees under the proposed rule change. The Business Member believes that the proposed rule change would be equitable because it would treat all Participants the same and the applicable fee would no longer depend on whether a Participant were a Retail Participant.<sup>18</sup>

Similarly, the Business Member believes that applying the proposed fee structure, which is not based on the Participant's market share, also is equitable for Participants, including Retail

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<sup>18</sup> The Business Member also notes that Rule 7610B does not differentiate between Retail and Non-Retail Participants. As Rule 7610B would not change, all Retail Participants would continue to qualify for transaction credits in accordance with Rule 7610B as they do now.

Participants. As would be the case for a Non-Retail Participant, the proposed fee would be tied directly to the number of trade reports a Participant submits to the FINRA/NYSE TRF during the month and would not be tiered based on the Participant's FINRA/NYSE TRF Market Share. In this way, the proposed fee would be more directly tied to a Participant's access to and usage of the FINRA/NYSE TRF.

Thus, all Participants would be subject to monthly fees. The proposed fee schedule would be applied in the same manner to all firms that are, or elect to become, FINRA/NYSE TRF Participants. It would not apply differently to different sizes of Participants. By tying a portion of the fee directly to the number of trade reports that the Participant submits to the FINRA/NYSE TRF during the month, a Participant's trade reporting fees would in part correspond with a Participant's activity over the period.

The Business Member believes that the proposed change would significantly simplify Rule 7620B, removing the distinction between Retail Participants and Non-Retail Participants and removing the multiple fee tiers in current subsection (b). As a result, the proposed change would make it easier for market participants to determine their monthly fee and would add clarity to the rules.

#### The Proposed Rule Change is Not Unfairly Discriminatory

FINRA believes that the proposed rule change is not unfairly discriminatory for the following reasons.

The Business Member believes that the FINRA/NYSE TRF would incur a significant loss if the current fee structure remained in place. Accordingly, it proposes to amend the fees set forth in FINRA Rule 7620B. By so doing, the Business Member has proposed a change that it believes is not unfairly discriminatory, as it believes that the resulting fee would correspond

more closely with the total costs of operating and maintaining the Facility. The proposed rule is reasonably designed to tie the monthly fee revenue to the cost of operating and maintaining the FINRA/NYSE TRF, which would allow the FINRA/NYSE TRF to continue operating without amassing losses similar to those it recently has amassed.

The Business Member believes that it is not unfairly discriminatory to charge a Participant a flat fee even if it does not submit any tape reports to the FINRA/NYSE TRF during a given month. First, the FINRA/NYSE TRF bears ongoing costs for operating the FINRA/NYSE TRF, even when a Participant does not submit tape reports in a given month. Second, the Business Member believes that the inactivity fee, which has not changed, is a reasonable method of encouraging Participants to utilize the FINRA/NYSE TRF.

The Business Member believes that the proposed fee structure is not unfairly discriminatory because it would not differ for different types of Participants, and Retail Participants would be subject to the same fee structure as Non-Retail Participants. The Business Member believes that the proposed rule change would not be unfairly discriminatory because all FINRA member Participants would be treated the same.

Similarly, the Business Member believes that applying the proposed fee structure, which is not based on the Participant's market share, is not unfairly discriminatory. As would be the case for a Non-Retail Participant, the proposed fee would be tied directly to the number of trade reports a Participant submits to the FINRA/NYSE TRF during the month and would not be tiered based on the Participant's FINRA/NYSE TRF Market Share. Rather, the proposed fee would be more directly tied to a Participant's access to and usage of the FINRA/NYSE TRF Facility.

By tying a portion of the fee directly to the number of trade reports the Participant submits to the FINRA/NYSE TRF during the month, a Participant could reduce its monthly fee

simply by reducing the volume of such trade reports. This makes the proposed fee more directly tied to the Participant's usage of the FINRA/NYSE TRF, allowing variable fees to better correspond with a Participant's activity over the period.

The Business Member believes that the proposed change is not unfairly discriminatory because a Participant that saw an increase in its monthly fee would be able to utilize another FINRA Facility. FINRA members can report their OTC trades in NMS stocks to the FINRA/NYSE TRF's competitors if they deem pricing levels at the other FINRA Facilities to be more favorable, so long as they are participants of such other facilities.

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.

Intramarket Competition. For the month of December 2021, FINRA members used the FINRA/NYSE TRF to report approximately 17% of shares in NMS stocks traded OTC, compared to approximately 83% for the FINRA/Nasdaq TRF. The Business Member believes that pricing is the key factor for FINRA members when choosing which FINRA Facility to use. The Business Member expects that the proposed change would result in a fee increase for most Participants, which in turn could result in decreased use of the FINRA/NYSE TRF, if Participants were to shift to using other facilities.

Nonetheless, the Business Member does not believe that the proposed rule change would result in a burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. Simply put, the Business Member believes that the proposed change is a rational response to increased losses. According to the Business Member, in 2020 and 2021, costs of operating and maintaining the FINRA/NYSE TRF were greater than Revenues, causing

the FINRA/NYSE TRF to run at a loss. According to the Business Member, during that time, the volume of tape reports increased and the total Subscriber Fee Revenue decreased. More specifically, compared to the 2018 monthly average, as of December 31, 2021, monthly average tape report activity for the FINRA/NYSE TRF had increased by 329% and monthly average costs had increased by 146%. At the same time, monthly average Subscriber Fee Revenue had decreased by 19%. Net Market Data Revenue varied during the period, but overall it decreased as compared to the first quarter of 2018. Ultimately, the Business Member believes that the FINRA/NYSE TRF would continue to incur a significant loss if the current fee and credit structure remained in place.

The Business Member does not believe that such losses are sustainable in the long run. Accordingly, it proposes to amend the fees set forth in FINRA Rule 7620B. By so doing, the Business Member has proposed a change that it believes should ensure that the monthly fees cover the costs of operating and maintaining the FINRA/NYSE TRF, which would allow it to continue operating without amassing losses similar to those it currently has. The Business Member believes that the continued existence of the FINRA/NYSE TRF would be an asset to the competitive environment.

The Business Member does not believe that the proposed fee would place some market participants at a relative disadvantage compared to other market participants, because the proposed fee schedule would be applied in the same manner to all FINRA members that are, or elect to become, FINRA/NYSE TRF Participants. It would not apply differently to different sizes of Participants. Different types of Participants will be treated the same, and the amount of the monthly fee would no longer depend on whether a Participant were a Retail Participant or its FINRA/NYSE TRF Market Share.

As set forth above, if there were no change in reporting to the FINRA/NYSE TRF such that Participants' reporting volume stayed the same as it was in the first six months of 2021, under the proposed fee schedule, current Non-Retail Participants that have no trade reports would not see a change in their fee, but most Retail Participants would see fee increases. More specifically, currently there are three Retail Participants that will be impacted and would incur fee increases under the proposed rule change. Using December 2021 data, the two Retail Participants that were inactive, under the proposed fee change, would be assessed a fee of \$2,000 for the month (compared to \$0 under the current fee structure). The Retail Participant that was active in December 2021 would be assessed a fee of \$1,779 for the month based on its reporting activity (compared to \$0 under the current fee structure). The Business Member nonetheless believes that the proposed fee amendment is reasonable in light of the ongoing costs of operating and maintaining the FINRA/NYSE TRF and as a means of addressing the current losses.

Participants may potentially alter their trade reporting activity in response to the proposed rule change. Specifically, those Participants that would incur higher fees may refrain from reporting to the FINRA/NYSE TRF and may choose to report to another FINRA Facility. Alternatively, such firms may continue reporting or new firms may start reporting to the FINRA/NYSE TRF if they find that the proposed net cost of reporting and other functionalities provided represent the best value to their business.<sup>19</sup>

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<sup>19</sup> The FINRA/NYSE TRF does not impose a fee on new Participants, and so a FINRA member that opts to become a Participant would not incur an additional cost from the FINRA/NYSE TRF. In some cases, a new Participant may incur incidental costs to connect to the FINRA/NYSE TRF, but those are not charged by the FINRA/NYSE TRF. An existing Participant that ceases to be a Participant is not subject to any change fee by the FINRA/NYSE TRF.

Intermarket Competition. The FINRA/NYSE TRF operates in a competitive environment. The proposed fee would not impose a burden on competition on other FINRA Facilities that is not necessary or appropriate. The FINRA Facilities have different pricing and compete for FINRA members' trade report activity. The pricing structures of the FINRA/NYSE TRF and other FINRA Facilities are publicly available, allowing FINRA members to make informed decisions regarding which FINRA Facility they use to report OTC trades in NMS stocks.

The Business Member represents that the FINRA/NYSE TRF would continue to incur significant losses if the current fee and credit structure remained in place, and it does not believe that such losses are sustainable in the long run. Accordingly, it proposes to amend the fees set forth in FINRA Rule 7620B. By so doing, the Business Member has proposed a change that it believes will allow it to continue operating without amassing losses similar to those it currently has. The Business Member believes that its continued existence would be an asset to the competitive environment.

FINRA members can choose among four FINRA Facilities when reporting OTC trades in NMS stocks: the FINRA/NYSE TRF, the two FINRA/Nasdaq TRFs, or ADF. FINRA members can report their OTC trades in NMS stocks to a given FINRA Facility's competitors if they determine that the fees and credits of another FINRA Facility are more favorable, so long as they are participants of such other facility.

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

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>20</sup> and paragraph (f)(2) of Rule 19b-4 thereunder.<sup>21</sup> At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or 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 email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-FINRA-2022-006 on the subject line.

##### Paper Comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-FINRA-2022-006. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all

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<sup>20</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>21</sup> 17 CFR 240.19b-4(f)(2).

comments on the Commission's Internet website (<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 website viewing and printing 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. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-FINRA-2022-006 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>22</sup>

J. Matthew DeLesDernier  
Assistant Secretary

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<sup>22</sup> 17 CFR 200.30-3(a)(12).