

requirements of Section 15A(b)(5) of the Act,¹⁹ which requires that FINRA rules provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities.

The Commission believes that it is reasonable for FINRA to amend Rule 7001E to adjust the percentage of market data revenue shared with NASD/NYSE TRF participants, effective retroactively to April 18, 2007, the date the NASD/NYSE TRF began operation. FINRA seeks to increase the rebate of market data revenue to NASD/NYSE TRF participants. Neither the costs incurred in collecting that market data, nor the calculation of market data fees is directly at issue in this filing. The fact that NYSE, as the Business Member, has determined to rebate a greater percentage of market data revenue does not establish that the underlying fees are excessive. The SIFMA letter does not raise any other issue that would preclude approval of the FINRA proposal.

V. Conclusion

The Commission finds that the proposed rule change is consistent with the requirements of the Act and, in particular, Section 15A of the Act and the rules and regulations thereunder.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,²⁰ that the proposed rule change (SR-NASD-2007-031), as modified by Amendment Nos. 1, 2, and 3, be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²¹

Florence E. Harmon,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-57764; File No. SR-NASD-2007-043]

Self-Regulatory Organizations; National Association of Securities Dealers, Inc. (n/k/a Financial Industry Regulatory Authority, Inc.); Order Approving Proposed Rule Change as Modified by Amendment No. 1 Thereto To Amend NASD Rule 7001C To Increase the Percentage of Market Data Revenue Shared With NASD/NYSE TRF Participants

May 1, 2008.

I. Introduction

On June 29, 2007, the National Association of Securities Dealers, Inc. ("NASD") (n/k/a Financial Industry Regulatory Authority, Inc.), 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 adjust the percentage of market data revenue shared with NASD/NYSE TRF participants.³ On October 29, 2007, NASD filed Amendment No. 1 to the proposed rule change. The proposed rule change, as amended, was published for comment in the **Federal Register** on November 14, 2007.⁴ The Commission received one comment letter regarding the proposal.⁵ FINRA responded to the comment letter on March 27, 2008.⁶ National Stock Exchange, Inc. ("NSX") subsequently submitted a response to the comment letter.⁷ This order approves the proposed rule change, as modified by Amendment No. 1.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ Effective July 30, 2007, Financial Industry Regulatory Authority, Inc. ("FINRA") was formed through the consolidation of NASD and the member regulatory functions of NYSE Regulation, Inc.

⁴ See Securities Exchange Act Release No. 56752 (November 6, 2007), 72 FR 64099.

⁵ See letter from Christopher Gilkerson and Gregory Babyak, Co-Chairs, Market Data Subcommittee of the SIFMA Technology and Regulation Committee, to Nancy M. Morris, Secretary, Commission, dated December 5, 2007 ("SIFMA letter"). This comment letter also addressed the proposal, filed by NASD, to increase the percentage of market data revenue shared with participants in the NASD/NYSE TRF. See Securities Exchange Act Release No. 56754 (November 6, 2007), 72 FR 64101 (November 14, 2007) (SR-NASD-2007-031).

⁶ See letter from Lisa C. Horrigan, Associate General Counsel, FINRA, to Nancy M. Morris, Secretary, Commission, dated March 27, 2008 ("FINRA letter").

⁷ See letter from Philip M. Pinc, Vice President, Counsel, National Stock Exchange, Inc., to Nancy M. Morris, Secretary, Commission, dated April 2, 2008 ("NSX letter").

II. Description of the Proposed Rule Change

FINRA proposes to amend NASD Rule 7001C to increase the percentage of market data revenue that is shared with FINRA members that report trades in New York Stock Exchange ("Tape A"), American Stock Exchange ("Tape B"), and Nasdaq Exchange ("Tape C") stocks to the NASD/NYSE TRF Reporting Facility (the "NASD/NYSE TRF").⁸ Currently, FINRA members that report trades in Tape A, Tape B, and Tape C stocks to the NASD/NYSE TRF receive a 50% *pro rata* credit on the gross market data revenue earned by the NASD/NYSE TRF.⁹

The proposed rule change increases from 50% to 75% the percentage of market data revenue that is shared with members. FINRA members that report trades in Tape A, Tape B and Tape C stocks to the NASD/NYSE TRF will thus receive a 75% *pro rata* credit on gross market data revenue earned by the NASD/NYSE TRF.

III. Summary of Comments

The Commission received one comment letter in response to the proposed rule change.¹⁰ The commenter stated that the proposed rebate demonstrated that market data fees are excessive, and do not have a fair and reasonable basis.¹¹ The commenter noted that, in its capacity as "SRO Member," FINRA allocates and deducts costs before passing market data revenue to each TRF. According to the commenter, this ability to allocate costs in the context of a TRF rebuts earlier arguments made by the exchanges that costs of collection and distribution of market data could not be allocated, and should thus not be a basis for determining the reasonableness of market data fees.¹² Finally, the commenter asserted that the issue of transparency regarding market data costs and revenues, which constitutes

⁸ In establishing the NASD/NYSE TRF, NASD and NSX entered into the Limited Liability Company Agreement of NASD/NYSE TRF Reporting Facility LLC. Under that agreement, NASD, as the "SRO Member," has the sole regulatory responsibility for the NASD/NYSE TRF. As the "Business Member," NSX is responsible for the management of the business affairs of the NASD/NYSE TRF, to the extent those activities are not inconsistent with FINRA's regulatory functions.

⁹ "Gross revenue" is defined as the revenue received by the NASD/NYSE TRF from the three tape associations after the tape associations deduct allocated support costs and unincorporated business costs.

¹⁰ SIFMA letter, *supra* note 5.

¹¹ SIFMA letter at 2.

¹² *Id.*

¹⁹ 15 U.S.C. 78o-3(b)(5).

²⁰ 15 U.S.C. 78s(b)(2).

²¹ 17 CFR 200.30-3(a)(12).

part of the NetCoalition Petition,¹³ also present in this filing.¹⁴

FINRA responded that none of the arguments made by the commenter was germane to the proposed rule change.¹⁵ For example, FINRA stated that the issue of the reasonableness of market data fees and the purported lack of transparency regarding the cost of collecting market data are at issue in the NetCoalition Petition and need not be resolved in connection with this filing.¹⁶ FINRA also asserted that the costs of collecting and distributing market data are not necessarily determinative of the reasonableness of the proposed rebate.¹⁷

In its response, NSX stated that it generally agreed with the SIFMA letter.¹⁸ In particular, NSX agreed with SIFMA's assertion that the proposal to rebate 100% of market data revenue for participants of the NASD/NYSE TRF¹⁹ might drive smaller TRFs, such as the NASD/NSX TRF, out of business.²⁰ NSX requested that the Commission approve the proposed rebate of market data revenue to participants in the NASD/NSX TRF, as it was consistent with NSX's policy of rebating market data revenues to investors.²¹

IV. Discussion and Commission Findings

The Commission has carefully reviewed the proposed rule change, the comment letter, and the responses of both FINRA and NSX to the comment letter, and 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 association²² and, in particular, the requirements of Section 15A(b)(5) of the Act,²³ which requires that FINRA rules provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities.

The Commission believes that it is reasonable for FINRA to amend Rule

7001C to adjust the percentage of market data revenue shared with NASD/NSX TRF participants, effective retroactively to April 1, 2007. FINRA seeks to increase the rebate of market data revenue to NASD/NSX TRF participants. Neither the costs incurred in collecting that market data, nor the calculation of market data fees are directly at issue in this filing. The fact that NSX, as the Business Member, has determined to rebate a greater percentage of market data revenue does not establish that the underlying fees are excessive. The SIFMA letter does not raise any other issue that would preclude approval of the FINRA proposal.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act, that the proposed rule change (SR–NASD–2007–043), as modified by Amendment No. 1, be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁴

Florence E. Harmon,
Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–57786; File No. SR–NASD–2007–052]

Self-Regulatory Organizations; National Association of Securities Dealers, Inc. (n/k/a Financial Industry Regulatory Authority, Inc.); Order Approving Proposed Rule Change as Modified by Amendment No. 1, Relating to Amendments to the NASD Rule 9700 Series To Streamline the Procedural Rules Applicable to General Grievances Related to FINRA Automated Systems

May 6, 2008.

I. Introduction

On July 23, 2007, the National Association of Securities Dealers, Inc. (“NASD”) (n/k/a Financial Industry Regulatory Authority, Inc. (“FINRA”))¹ filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities

Exchange Act of 1934 (“Act”),² and Rule 19b–4 thereunder,³ a proposed rule change to amend the NASD Rule 9700 Series (“Rule 9700 Series”) to streamline the existing procedural rules applicable to general grievances related to FINRA automated systems; to provide discretionary review by the National Adjudicatory Council (“NAC”), acting through the NAC’s Review Subcommittee;⁴ and to delete certain text that is no longer necessary. On February 7, 2008, FINRA filed Amendment No. 1 to the proposed rule change. The proposed rule change, as amended, was published for comment in the **Federal Register** on March 21, 2008.⁵ The Commission received no comment letters on the proposed rule change. This order approves the proposed rule change, as modified by Amendment No. 1.

II. Description of the Proposed Rule Change

The proposed rule change seeks to amend the NASD Rule 9700 Series to streamline the existing procedural rules applicable to general grievances related to FINRA automated systems, to provide discretionary review by NAC, acting through the NAC’s Review Subcommittee, and to delete certain text that is no longer necessary.

The NASD Rule 9700 Series, Procedures on Grievances Concerning the Automated Systems, provides redress, where justified, for persons aggrieved by the operations of any automated quotation, execution or communication system owned or operated by FINRA that is not otherwise provided for under the Code of Procedure (“Rule 9000 Series”) or the Uniform Practice Code (“Rule 11000 Series”). The Rule 9700 Series was established to ensure adequate procedural protections to users of FINRA systems.⁶ Although by its terms the Rule 9700 Series has potentially broader application, it historically has been used only for appeals of Over-the-Counter Bulletin Board (“OTCBB”) eligibility determinations made by FINRA staff pursuant to Rule 6530.⁷

² 15 U.S.C. 78s(b)(1).

³ 17 CFR 240.19b–4.

⁴ For purposes of the proposed rule change, the term “Review Subcommittee” will have the meaning set forth in NASD Rule 9120(aa).

⁵ See Securities Exchange Act Release No. 57504 (March 14, 2008), 73 FR 15239 (March 21, 2008).

⁶ See Securities Exchange Act Release No. 27867 (April 2, 1990), 55 FR 12978 (April 6, 1990) (order approving SR–NASD–90–006).

⁷ The OTCBB is a facility for the publication of quotations in eligible over-the-counter equity securities of issuers that are subject to the filing of financial reports with the Commission (or other

¹³ See Securities Exchange Act Release No. 55011 (December 27, 2006) (order granting petition for review of SR–NYSEArca–2006–21).

¹⁴ SIFMA letter at 3.

¹⁵ FINRA letter at 1.

¹⁶ *Id.* at 2.

¹⁷ *Id.*

¹⁸ NSX letter at 2.

¹⁹ See Securities Exchange Act Release No. 56754 (November 6, 2007), 72 FR 64101 (November 14, 2007) (SR–NASD–2007–031).

²⁰ NSX letter at 2.

²¹ *Id.*

²² In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

²³ 15 U.S.C. 78o–3(b)(5).

²⁴ 17 CFR 200.30–3(a)(12).

¹ On July 26, 2007, the Commission approved a proposed rule change filed by the NASD to amend the NASD's Certificate of Incorporation to reflect its name change to Financial Industry Regulatory Authority, Inc., or FINRA, in connection with the consolidation of the member firm regulatory functions of NASD and NYSE Regulation, Inc. See Securities Exchange Act Release No. 56146 (July 26, 2007), 72 FR 42190 (August 1, 2007) (SR–NASD–2007–053).