

part of the NetCoalition Petition,<sup>13</sup> also present in this filing.<sup>14</sup>

FINRA responded that none of the arguments made by the commenter was germane to the proposed rule change.<sup>15</sup> 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.<sup>16</sup> FINRA also asserted that the costs of collecting and distributing market data are not necessarily determinative of the reasonableness of the proposed rebate.<sup>17</sup>

In its response, NSX stated that it generally agreed with the SIFMA letter.<sup>18</sup> In particular, NSX agreed with SIFMA's assertion that the proposal to rebate 100% of market data revenue for participants of the NASD/NYSE TFF<sup>19</sup> might drive smaller TRFs, such as the NASD/NSX TRF, out of business.<sup>20</sup> 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.<sup>21</sup>

#### 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 association<sup>22</sup> and, in particular, the requirements of Section 15A(b)(5) of the Act,<sup>23</sup> 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.<sup>24</sup>

**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”))<sup>1</sup> filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities

Exchange Act of 1934 (“Act”),<sup>2</sup> and Rule 19b–4 thereunder,<sup>3</sup> 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;<sup>4</sup> 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.<sup>5</sup> 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.<sup>6</sup> 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.<sup>7</sup>

<sup>2</sup> 15 U.S.C. 78s(b)(1).

<sup>3</sup> 17 CFR 240.19b–4.

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

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

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

<sup>7</sup> 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

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

<sup>14</sup> SIFMA letter at 3.

<sup>15</sup> FINRA letter at 1.

<sup>16</sup> *Id.* at 2.

<sup>17</sup> *Id.*

<sup>18</sup> NSX letter at 2.

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

<sup>20</sup> NSX letter at 2.

<sup>21</sup> *Id.*

<sup>22</sup> 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).

<sup>23</sup> 15 U.S.C. 78o–3(b)(5).

<sup>24</sup> 17 CFR 200.30–3(a)(12).

<sup>1</sup> 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).

Currently under the Rule 9700 Series, a party that is aggrieved by the operation of a FINRA automated system may request a review by a hearing panel. In accordance with the Rule 9700 Series, the aggrieved party may also request a review of the hearing panel's decision by a Committee designated by FINRA's Board of Governors ("Board").<sup>8</sup> With respect to OTCBB eligibility reviews, both of these reviews pursuant to the Rule 9700 Series are solely to determine whether the issuer filed a complete report by the applicable due date and, thus, whether the security of the issuer is eligible for continued quotation. The Rule 9700 Series does not provide discretion to grant extensions of time for ineligible securities to become eligible or any other form of relief.

Given that these reviews focus on one narrow issue, FINRA proposes to amend the Rule 9700 Series to streamline the review process. Specifically, reviews of staff determinations under the Rule 9700 Series would be adjudicated by a Hearing Officer<sup>9</sup> appointed by FINRA's Office of Hearing Officers, subject to discretionary review by the NAC, acting through the NAC's Review Subcommittee.<sup>10</sup>

After the review hearing, the Hearing Officer would prepare a written decision and provide it to the NAC's Review Subcommittee, which would have the ability to call the decision for review during certain specified timeframes.<sup>11</sup> As is currently the case with most expedited actions under the Rule 9550 Series, aggrieved parties would not have the right to appeal the

appropriate regulator) and are current in their reporting. FINRA staff monitors the submission of such periodic reports to determine an issuer's initial and continued eligibility for quotation on the OTCBB and, pursuant to Rule 6530, restricts the quoting of securities of issuers that are late or delinquent in filing periodic reports.

<sup>8</sup> Currently, the Nasdaq Listing and Hearing Review Council ("NLHRC") has authority to review hearing panel decisions and has only ever conducted one such review, which upheld the decision of the hearing panel. NLHRC decisions have been subject to further review by FINRA's Board solely upon the request of one or more Governors. The proposed rule change would eliminate the NLHRC's role.

<sup>9</sup> For purposes of the proposed rule change, the term "Hearing Officer" will have the meaning set forth in Rule 9120(p).

<sup>10</sup> Subject to the NAC's discretionary review (acting through the NAC's Review Subcommittee), a Hearing Officer currently acts as the adjudicator in expedited actions involving (1) a failure to pay FINRA dues, fees or other charges and (2) a failure to pay an arbitration award or related settlement, pursuant to Rules 9553 and 9554, respectively.

<sup>11</sup> The NAC's Review Subcommittee would have the right to call the Hearing Officer's decision for review within 21 days after receipt of such decision, which is consistent with the timeframe for the Review Subcommittee's call right involving expedited actions under the Rule 9550 Series.

decision to the NAC's Review Subcommittee.<sup>12</sup> The Hearing Officer's decision, if not called for review by the NAC's Review Subcommittee, would constitute final FINRA action on the matter.<sup>13</sup>

If a decision is called for review by the NAC's Review Subcommittee, the NAC or NAC's Review Subcommittee would appoint a Subcommittee<sup>14</sup> of the NAC to conduct a review.<sup>15</sup> Based on its review, the Subcommittee would make a recommendation to the NAC and the NAC, in turn, would issue a decision on the matter. The decision of the NAC would constitute final FINRA action.

An aggrieved party also would continue to have the right to appeal the Hearing Officer's decision, or the NAC decision, as the case may be, to the Commission.

FINRA also proposes to make conforming and non-substantive changes to Rules 6530 and 9120 to reflect the amended review process contained in the Rule 9700 Series. There are no proposed changes to other aspects of the review process relating to OTCBB eligibility determinations under Rule 6530 (e.g., notifications and time periods for requesting review, the scope of review and the applicable fees for such review).<sup>16</sup>

In addition, FINRA proposes to make a technical change to the text of Rule 9710. to clarify that the scope of the Rule 9700 Series is to address general

<sup>12</sup> Under many of the existing rules with expedited components, respondents may not appeal the matter to a FINRA appellate body, such as the NAC. For example, the decision of the Hearing Officer under Rule 9553 (Failure to Pay Dues, Fees and Other Charges) is not appealable, at the request of a party, to the NAC or any other internal FINRA appellate body under the existing system.

<sup>13</sup> Currently under Rule 9780, FINRA's Board has a right to review NLHRC decisions issued pursuant to Rule 9770. The proposed rule change would provide the NAC (rather than the Board) with a call right, which is consistent with other expedited actions under the Rule 9550 Series.

<sup>14</sup> For purposes of the proposed rule change, the term "Subcommittee" has the meaning set forth in Rule 9120(cc). The Subcommittee would be comprised as set forth in Rule 9331(a)(1).

<sup>15</sup> If the NAC's Review Subcommittee calls a matter for review, the timelines for such review would be as set forth in proposed Rule 9760.

<sup>16</sup> In accordance with Rule 6530, an aggrieved party requesting a review of an OTCBB eligibility determination by a Hearing Officer would continue to be required to pay a \$4,000 fee for such review. Given that aggrieved parties would only have the right to appeal to the Office of Hearing Officers and any further level of review would be at the discretion of the NAC's Review Subcommittee, the additional \$4,000 fee currently provided for in Rule 6530(f)(3) would be eliminated.

Also in accordance with Rule 6530, a request for review would stay the OTCBB security's removal until the Hearing Officer issues a decision. If the NAC's Review Subcommittee calls a matter for review, the OTCBB security's removal will be stayed until the NAC issues a decision.

grievances not otherwise provided for by any other FINRA Rules.

Finally, FINRA proposes to delete language in Rule 6530(e), relating to an October 1, 2005 timeframe, that is no longer necessary.

FINRA will announce the effective date of the proposed rule change in a *Regulatory Notice* to be published no later than 60 days following Commission approval. The effective date will be the date of publication of the *Regulatory Notice* announcing Commission approval.

### III. Discussion

After careful review, the Commission finds that the proposed rule change is consistent with the Act and the rules and regulations thereunder applicable to a national securities association.<sup>17</sup> Specifically, the Commission finds that the proposed rule change is consistent with Section 15A(b)(6) of the Act<sup>18</sup> in that it is 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. In particular, the Commission finds that the revisions to the Rule 9700 Series governing the review process for OTCBB eligibility determinations under Rule 6530 strike a reasonable balance between the need to ensure fairness to aggrieved parties and the need for expedited action, and appropriately seek to clarify that the scope of the Rule 9700 Series is to address general grievances not otherwise provided for by any other FINRA Rules.

### IV. Conclusion

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act, that the proposed rule change (SR-NASD-2007-052), 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.<sup>19</sup>

**Nancy M. Morris,**

*Secretary.*

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<sup>17</sup> 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).

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

<sup>19</sup> 17 CFR 200.30-3(a)(12).