

OTC Symbol Assignment

FINRA Requests Comment on Its Policy Relating to the Assignment of OTC Symbols to Unlisted Equity Securities

Comment Period Expires: November 15, 2021

Summary

FINRA requests comment on a proposed change to its current policy relating to the assignment of OTC symbols to unlisted equity securities. Specifically, FINRA is considering whether it should begin assigning OTC symbols to unlisted equity securities that do not have a valid CUSIP identifier, in the limited circumstance where a member firm demonstrates its best efforts to obtain a CUSIP identifier and provides documentation to identify the security.

Questions concerning this *Notice* should be directed to:

- ▶ Dave Chapman, Vice President, Market Regulation, at (240) 386-4995 or Dave.Chapman@finra.org;
- ▶ Patricia Casimates, Vice President, Market Operations, at (240) 386-4994 or Patricia.Casimates@finra.org; or
- ▶ Joaquin Gubb, Associate General Counsel, at (240) 386-5102 or Joaquin.Gubb@finra.org.

Action Requested

FINRA encourages all interested parties to comment on the proposal. Comments must be received by November 15, 2021.

Comments must be submitted through one of the following methods:

- ▶ Online using FINRA's comment form for this *Notice*;
- ▶ Emailing comments to pubcom@finra.org; or
- ▶ Mailing comments in hard copy to:
Jennifer Piorko Mitchell
Office of the Corporate Secretary
FINRA
1735 K Street, NW
Washington, DC 20006-1506

September 14, 2021

Notice Type

- ▶ Request for Comment

Suggested Routing

- ▶ Compliance
- ▶ Legal
- ▶ Operations
- ▶ Senior Management
- ▶ Systems
- ▶ Trading

Key Topics

- ▶ CUSIP
- ▶ OTC Equity Securities
- ▶ OTC Reporting Facility (ORF)
- ▶ OTC Symbols
- ▶ Restricted Equity Securities
- ▶ Trade Reporting

Referenced Rules and Notices

- ▶ FINRA Rule 6420
- ▶ FINRA Rule 6432
- ▶ FINRA Rule 6622
- ▶ Regulatory Notice 18-32
- ▶ Securities Act Rule 144A
- ▶ Trade Reporting Notice 9/23/2011

To help FINRA process comments more efficiently, persons should use only one method to comment on the proposal.

Important Notes: Comments received in response to this *Notice* will be made available to the public on the FINRA website. In general, FINRA will post comments as they are received.¹

Before becoming effective, FINRA will publish notice of the updated policy discussed herein.

Background and Discussion

FINRA rules require firms to report trades in OTC equity securities² and trades in restricted equity securities effected pursuant to Securities Act Rule 144A (Rule 144A) to the OTC Reporting Facility (ORF). As a general matter, trades in OTC equity securities reported to the ORF are publicly disseminated, integrated into FINRA's audit trail and, at the option of the reporting firm, submitted to the National Securities Clearing Corporation (NSCC) for clearance and settlement. Trades in restricted equity securities effected pursuant to Rule 144A are reported to the ORF for regulatory purposes only and are not publicly disseminated or sent to NSCC.³

To facilitate firms' compliance with their obligations to report trades to the ORF, and in connection with the initiation of quoting in an unlisted equity security,⁴ FINRA Market Operations assigns OTC symbols to OTC equity securities and Rule 144A restricted equity securities. Pursuant to long-standing policy, FINRA requires that a security have a valid CUSIP identifier before an OTC symbol will be assigned to it. FINRA Market Operations validates OTC symbol requests using the CUSIP identifier and other information, including any requested supporting documentation.⁵

Frequently Asked Question (FAQ) #105.1 of FINRA's equity trade reporting FAQs⁶ states, in pertinent part:

Q105.1: What should a member do if it executes a trade in a security that is reportable to the ORF under Rule 6622, but does not have a symbol?

A105.1: In those situations where a security does not have a valid U.S. symbol assigned, the member must promptly request that FINRA Market Operations assign a symbol to the security so that the member can fulfill its trade reporting obligations. Members should submit such request on the OTC Equity Symbol Request Form via the FINRA Member Firm Gateway and must provide all requested information, including a CUSIP number for the security. If there is no symbol at the time the trade is executed, the trade should be reported to the ORF immediately upon the issuance of the symbol and be marked late, as applicable. If the trade is not reported on trade date, it should be reported on an "as/of" basis using the original execution date as the trade date. See *Trade Reporting Notice 9/23/2011: Trade Reporting Transactions in OTC Equity Securities and Restricted Equity Securities*.

Similarly, Trade Reporting FAQ #105.4 states:

Q105.4: Does FINRA assign symbols for equity securities that do not have a CUSIP number?

A105.4: No, FINRA does not issue symbols for any equity security that does not have a CUSIP number.

FINRA understands that to obtain a CUSIP identifier, firms must have a relationship with, and make the request on behalf of, the issuer. For example, the online application form for a new CUSIP identifier requires that the requesting firm make the following representation:

By submitting a request for a CUSIP identifier, the applicant (a) *warrants that it has the legal authority to request a CUSIP identifier on behalf of the issuer* and all information it supplies is true and correct in all material respects; and (b) acknowledges and agrees to the Disclaimer and Other Terms above.⁷

Many firms have been able to work with an issuer to obtain a CUSIP identifier, resulting in FINRA assigning an OTC symbol to the security.

However, if an issuer is unwilling to work with a firm to obtain a CUSIP identifier, FINRA will not assign an OTC symbol. In that instance, firms cannot report their trades through the ORF and instead would satisfy their trade reporting obligations under FINRA rules by reporting via “Form T.” There are a number of drawbacks to the Form T reporting process, which can be cumbersome and time-consuming for firms and FINRA alike. In addition, trades reported on Form T are not publicly disseminated and are not integrated into FINRA’s audit trail on an automated basis.

FINRA notes that this issue may arise in the context of several types of unlisted equity securities, including:

- ▶ previously restricted equity securities after the statutory holding period has expired (once freely tradable, the security is an OTC equity security and trades must be reported accordingly);⁸
- ▶ Rule 144A restricted equity securities;
- ▶ non-listed direct participation programs (DPPs) and real estate investment trusts (REITs);
- ▶ equity securities issued under Section 1145 of the Bankruptcy Code by companies emerging from bankruptcy; and
- ▶ more recently, digital asset securities.

Since securities that do not have a valid CUSIP identifier are not assigned an OTC symbol—and thus are not reported to the ORF—there is no transparency to investors and other market participants in the trading and pricing of these securities. As more capital is being raised through private offerings rather than traditional capital formation processes (such as initial public offerings), particularly using digital asset securities, this may impact an increasingly larger segment of the marketplace.

Proposed Policy

FINRA is considering changing its policy to permit the assignment of OTC symbols to OTC equity securities and Rule 144A restricted equity securities that do not have a valid CUSIP identifier in limited circumstances. Firms requesting OTC symbols for such securities would be required to:

- (1) demonstrate their best efforts to obtain a CUSIP identifier, and
- (2) provide documentation sufficient to identify and categorize the security, including, *e.g.*, that it is an unrestricted equity security (unless traded pursuant to Rule 144A).

To demonstrate its best efforts to obtain a CUSIP identifier, the firm could submit copies of correspondence with the issuer or a written summary of its attempts to work with the issuer. Documentation to identify and categorize the security could include the prospectus or other pertinent offering documents, or a numeric or other publicly available identifier for the security, *e.g.*, ISIN, if applicable. If documentation provided by the firm is not sufficient to identify and categorize the security, FINRA staff also may require that the firm provide an opinion of counsel.

FINRA notes that the assignment of an OTC symbol may suggest to market participants that the instrument is an equity security. For example, a product may present a threshold question about whether it meets the definition of “security” under the federal securities laws, and if so, whether it is equity or debt. Thus, in connection with a request for an OTC symbol for such products, including a digital asset, firms generally would be expected to provide an opinion of counsel that the instrument is an unrestricted equity security or a Rule 144A restricted equity security (and thus reportable to the ORF).⁹ FINRA notes that the assignment of an OTC symbol would not necessarily mean that FINRA agrees with the requesting firm that the instrument is an equity security.¹⁰

FINRA would retain discretion to deny a firm’s request for an OTC symbol if the documentation that the firm provides does not adequately demonstrate that the security is an unrestricted equity security (unless traded pursuant to Rule 144A) or is otherwise insufficient or unreliable. In addition, after an OTC symbol has been assigned, circumstances may arise that could make it difficult for FINRA—in the absence of a valid CUSIP identifier—to continue to identify the security and ensure that it is not actively trading under one or more other symbols. For example, a security may undergo a corporate action, such as a name change or reverse split,¹¹ or FINRA may receive conflicting

information from multiple sources regarding the security. In such instances, FINRA would retain discretion to remove the security from the active Symbol Directory and Daily List until FINRA could obtain reliable information (either from the issuer or other sources) sufficient to definitively identify the security.

Once an OTC symbol has been assigned, trades in OTC equity securities that do not have a CUSIP identifier would be reported to the ORF and publicly disseminated. However, FINRA would not send trades in such securities to NSCC for clearance and settlement. FINRA understands that NSCC's system is CUSIP identifier-driven, and as such, NSCC will not clear and settle trades in a security that does not have a valid CUSIP identifier.¹²

FINRA believes that the proposed policy would facilitate firms' compliance with FINRA's trade reporting rules, enhance market transparency and provide a more accurate and complete audit trail.

Economic Implications

FINRA's current process for assigning an OTC symbol to an unlisted equity security requires that the security have a valid CUSIP identifier. Thus, if a firm is unable to work with the issuer to get a CUSIP identifier, the security will not be assigned an OTC symbol, and the firm would be unable to report trades in that security to the ORF.

Without a valid OTC symbol, the firm can report trades in the security to FINRA only via Form T. As discussed above, filing a Form T can be cumbersome and time-consuming for firms, and trades reported via Form T are not integrated into FINRA's audit trail on an automated basis. Incomplete information on trades in unlisted equity securities reduces transparency for market participants and may impact FINRA's surveillance process. The average number of trades accepted from Form T filings per year over the period 2016 to 2020 is 7,029.¹³ For the first three months of 2021, FINRA accepted 10,487 trades reported in Form T filings. Virtually all of the trades in 2021 reported via Form T were due to the firms' inability to acquire valid CUSIP identifiers.

The proposed policy change would ease burdens on firms when reporting trades in OTC equity securities with no valid CUSIP identifier and increase transparency to market participants. These impacts would lead to lower costs to firms for trading in OTC equity securities and may improve pricing efficiency.

The proposed policy may introduce a new risk to firms and investors. CUSIP identifiers, which are unique to each offering and never reused,¹⁴ identify the name of the issuer as well as indicate the type of financial instrument being issued. The existence of a valid CUSIP identifier may provide additional assurances to FINRA regarding the existence and uniqueness of the security. To the extent that these assurances are valuable and reduce risk, FINRA must rely more heavily on the documentation and information provided by the firm. FINRA requests comment below on any unintended consequences and increased risks associated with the proposed policy.

Request for Comment

FINRA requests comments on the proposed policy outlined above as well as feedback on the following specific questions:

- ▶ In addition to those listed above, are there other types of OTC equity securities that may not have a CUSIP identifier to which FINRA should consider applying the proposed policy?
- ▶ Do commenters believe that trades in OTC equity securities that do not have a valid CUSIP identifier should be publicly disseminated?
 - ▶ If no, why not?
 - ▶ If yes, does your answer apply to all OTC equity securities that do not have a CUSIP identifier or only certain types? Please be specific and explain the basis for your answer.
- ▶ Is there any concern that quoting or disseminating trades in OTC equity securities that do not have a valid CUSIP identifier could be harmful or confusing to market participants?
 - ▶ If so, what steps could FINRA take to address or mitigate these concerns?
- ▶ Should OTC equity securities that do not have a valid CUSIP identifier be denoted with, *e.g.*, an additional character appended to the OTC symbol, to enable market participants to readily identify and distinguish them from other securities? Would this help mitigate concerns about potential harm or confusion?
- ▶ As noted above, firms generally would be expected to provide an opinion of counsel in connection with a request for an OTC symbol for a digital asset security. Are there additional factors or documents that FINRA should consider when reviewing symbol requests for digital assets?
- ▶ Are there any alternatives to the proposed policy that FINRA should consider?
- ▶ What due diligence do firms perform to identify and categorize an unlisted equity security that does not have a valid CUSIP identifier before trading such security?
- ▶ Why would an issuer not want to obtain a CUSIP identifier for its security?
- ▶ As noted above, in connection with a request by the issuer or its duly authorized representative to process a corporate action, FINRA generally would expect the issuer to obtain a CUSIP identifier for its security. Do commenters agree with this position? Are corporate actions frequently effected for such securities?
- ▶ Would the proposed policy relating to the assignment of OTC symbols to unlisted equity securities that do not have a valid CUSIP identifier have any unintended consequences or increased risks for issuers or investors?
- ▶ Are there any costs or benefits stemming from the proposed policy that are not already discussed above?

FINRA requests that commenters provide empirical data or other factual support for their comments wherever possible.

Endnotes

1. Parties should submit in their comments only personally identifiable information, such as phone numbers and addresses, that they wish to make available publicly. FINRA, however, reserves the right to redact or edit personally identifiable information from comment submissions. FINRA also reserves the right to redact, remove or decline to post comments that are inappropriate for publication, such as vulgar, abusive or potentially fraudulent comment letters.
2. Under FINRA Rule 6420, “OTC equity security” means any equity security that is not an “NMS stock” as that term is defined in Rule 600(b) of SEC Regulation NMS; provided, however, that the term “OTC Equity Security” shall not include any restricted equity security. “Restricted Equity Security” is defined under FINRA Rule 6420 as any equity security that meets the definition of “restricted security” under Securities Act Rule 144(a)(3).
3. Trades in restricted equity securities that are not effected pursuant to Rule 144A are not reportable under FINRA rules.
4. See FINRA Rule 6432.
5. For example, the OTC Equity Symbol Request Form requires a CUSIP identifier, and if the request is made for, *e.g.*, a Rule 144A restricted equity security, the requesting firm must certify that the security is freely tradable. The form states, in pertinent part:

Note: To the extent that this security has not been registered under the Securities Act of 1933, but is nonetheless publicly tradable in the U.S. (due to its being traded as part of an exempt transaction or otherwise), a letter of tradability must be submitted with this OTC Equity Symbol Request Form explaining in detail the grounds for its public tradability.

6. The equity trade reporting FAQs can be found at www.finra.org/filing-reporting/market-transparency-reporting/trade-reporting-faq#105.
7. See www.cusip.com/apply (emphasis added).
8. See *Trade Reporting FAQ #106.1*, which states:

Q106.1: Member BD1 buys at a discount a large block of previously restricted securities in XYZ Corp. from an XYZ Insider in compliance with SEC Rule 144, and then sells the block in pieces into the marketplace at market price (*e.g.*, to BD2 and BD3). Is the sale from

the XYZ Insider to BD1 reportable? Are the sales from BD1 to BD2 and BD3 reportable?

A106.1: If all applicable conditions of SEC Rule 144 are satisfied, BD1 has received unrestricted stock for purposes of the trade reporting rules and, therefore, the sale from the XYZ Insider to BD1 should be reported to the tape. The sales from BD1 to BD2 and BD3 are also tape reportable. Note, however, that this guidance may not address all administrative steps that must be taken before a restricted security can be sold freely (*e.g.*, CUSIP conversion from restricted to unrestricted status and symbol creation for a security that was not otherwise publicly traded).

9. If the security is a TRACE-eligible debt security, it would be reportable to TRACE, which does not require a CUSIP identifier for reporting purposes. In most, but not all, instances where a TRACE-eligible security is added without a CUSIP identifier, there is an alternative identifier, *e.g.*, ISIN, that can be used for purposes of tracking the life of the security.
10. FINRA further notes that the assignment of an OTC symbol does not otherwise represent a review by FINRA of the tradability of the security or the adequacy of any disclosures. See, *e.g.*, *Trade Reporting Notice 9/23/2011* (Trade Reporting Transactions in OTC Equity Securities and Restricted Equity Securities). The assignment of an OTC symbol is not a substitute for a firm’s responsibility to fully discharge its obligations under other applicable rules or regulations, including complying with the provisions of Section 5 of the Securities Act of 1933, or otherwise determining whether a particular transaction in a security is permissible. See *Regulatory Notice 18-32* (September 24, 2018).
11. Pursuant to FINRA Rule 6490(b)(1), an issuer, or other duly authorized representative of the issuer, may request that FINRA process documentation related to an SEA Rule 10b-17 Action or Other Company-Related Action by submitting a signed request in the manner and form required by FINRA. FINRA is unable to process a corporate action unless the submission is accompanied by sufficient information and documentation, including regarding the identity of the security. Thus, FINRA may be unable to process a corporate action for a security that does not have a CUSIP identifier. FINRA generally would expect issuers to obtain a CUSIP identifier prior to submitting a Rule 6490 corporate action request.

12. Firms must have a means of settling these trades “ex-clearing.”
13. Not all trades accepted from Form T filings were missing an OTC symbol because the security did not have a valid CUSIP identifier. Other reasons may exist that prohibit a firm from reporting a trade to the ORF. Thus, 7,029 is an upper bound on the annual number of trades that may have been impacted by the proposed policy.
14. CUSIP Global Services (CGS) began originating CUSIP identifiers in 1964. According to CGS’s website, CGS reviews offering documents and extracts data elements to guarantee uniqueness.