Regulatory Notice 22-30

Trading Activity Fee (TAF)

FINRA Re-opens Comment Period for Regulatory Notice 15-13 Seeking Comment on TAF Exemption for Proprietary Trading Firms

Comment Period Expires: March 17, 2023

Summary

In support of the Securities and Exchange Commission's re-proposal to amend Rule 15b9-1 under the Securities Exchange Act of 1934,[1] FINRA is issuing this *Notice* to re-open the comment period for *Regulatory Notice 15-13*. Rule 15b9-1 currently provides proprietary trading firms with an exemption from membership in a national securities association. If the SEC re-proposal is adopted, the amendments generally would require a proprietary trading firm relying on the current exemption to register with FINRA if the firm continues to effect transactions other than on an exchange of which it is a member, with limited exceptions. FINRA membership would, among other things, apply FINRA's existing fee structure to these firms, including FINRA's Trading Activity Fee. FINRA is re-opening the comment period for *Regulatory Notice 15-13*, which had previously proposed an exemption to exclude from FINRA's Trading Activity Fee transactions by a proprietary trading firm on exchanges of which the firm is a member.

Questions concerning this *Notice* should be directed to:

- Carrie DiValerio, Sr. Vice President, Finance, at (240) 386-5299 or carrie.divalerio@finra.org;
- Jacqueline Gorham, Associate General Counsel, Office of General Counsel (OGC), at (212) 858-4119 or jacqueline.gorham@finra.org; or
- Faisal Sheikh, Principal Counsel, OGC, at (202) 728-8370 or faisal.sheikh@finra.org.

Action Requested

FINRA encourages all interested parties to comment on the proposal. Comments must be received by March 17, 2023.

December 15, 2022

Notice Type

- Request for Comment

Suggested Routing

- Compliance
- Institutional
- Legal
- Operations
- Senior Management
- Trading

Key Topics

- Market Making
- Proprietary Trading Firms
- Trading Activity Fee

Referenced Rules & Notices

- FINRA Rule 0160
- Regulatory Notice 15-13
- Schedule A to FINRA By-Laws, Section 1
- SEA Rule 15b9-1
- Section 15(b)(8) of the Exchange Act

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

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

Important Notes: Comments received in response to this *Regulatory Notice* and *Regulatory Notice 15-13* will be made available to the public on the FINRA website. In general, FINRA will post comments as they are received.[2]

Before becoming effective, any proposed rule change must be filed with the SEC pursuant to Section 19(b) of the Securities Exchange Act of 1934 (SEA or Exchange Act).[3]

Background & Discussion

Section 15(b)(8) of the Securities Exchange Act of 1934 requires that a registered broker-dealer be a member of a national securities association unless the broker-dealer effects transactions in securities solely on a national securities exchange of which it is a member.[4] Rule 15b9-1, however, provides an exemption to Section 15(b)(8) if a broker-dealer:

1. is a member of a national securities exchange;
2. carries no customer accounts; and
3. has annual gross income derived from purchases and sales of securities otherwise than on a national securities exchange of which it is a member in an amount no greater than $1,000, provided, however, that the gross income limitation does not apply to income derived from transactions for the dealer's own account with or through another registered broker or dealer.

In March 2015, the SEC proposed amendments to SEA Rule 15b9-1[5] that would have significantly narrowed the exemption from association membership and, in connection with that proposal, the SEC stated that "FINRA may need to consider reassessing the structure of its fees, including its Trading Activity Fee, in order to assure that it is fairly and equitably applied to many of the [non-FINRA member firms] that, as a result of the amendments to Rule 15b9-1, may join FINRA."[6] As a result, in May 2015, FINRA issued *Regulatory Notice 15-13*, proposing an exemption from its Trading Activity Fee (TAF) for proprietary firms' transactions on exchanges of which they are a member (including non-market making trades).[7] In the 2015 *Notice*, FINRA proposed to define a "proprietary trading firm" as a member that trades its own capital and that does not have "customers," as that term is defined in FINRA Rule 0160(b)(4). The proposal also provided that funds used by a proprietary trading firm must be exclusively firm funds, and all trading must be in the firm's accounts. In addition, traders must be owners of, employees of, or contractors to the firm.[8]

Similar to the 2015 SEC proposal, the SEC re-proposal would significantly narrow the exemption from association membership.[9] In connection with the re-proposal, the SEC stated that "[g]iven FINRA's prior consideration of amendments to its TAF, FINRA may again evaluate its TAF to ensure that it appropriately reflects the activities of, and regulatory responsibilities towards, broker-dealer proprietary trading firms that would be required to join FINRA if the proposed amendments to Rule 15b9-1 are adopted." Thus, FINRA is re-opening the comment period for *Regulatory Notice 15-13* to obtain feedback on the proposed exemption to the TAF for proprietary trading firms, as described in *Regulatory Notice 15-13*.

Request for Comment

FINRA requests comment on the questions presented in *Regulatory Notice 15-13* as well as on the below additional questions:

- As discussed in *Regulatory Notice 15-13*, TAF is the only FINRA fee that is based on trading activity. Is it appropriate to provide a TAF exemption to proprietary trading firms? How would the proposed TAF exemption impact proprietary trading firms?
- The exemption proposed in *Regulatory Notice 15-13* would provide TAF relief to proprietary trading firms for all trades on an exchange of which they are members, thereby reducing TAF obligations for proprietary trading firms. By definition, the exemption would apply to new and existing proprietary trading firms, but not other firms that trade actively on exchanges, including for customers. Is this difference in treatment appropriate?

- With these proposed changes (or any recommended alternatives), would the TAF fee continue to be equitably allocated among FINRA members that engage in proprietary and customer trading? Would the balance between TAF and other FINRA fees that fund FINRA's operations continue to be equitable?
- Should an alternative TAF rate specific to proprietary trading firms be considered?
- Are broker-dealers, including current members and proprietary trading firms that would be scoped in by the SEC re-proposal, likely to alter their trading practices or business models based on the proposed TAF exemption (or any suggested alternatives)? If so, how would these firms alter their activity across trading venues (*e.g.,* would they shift their trading activities from the over-the-counter market to exchanges to avoid incurring the TAF)? What would be the consequences for investors if firms were to alter trade routing to affect their aggregate regulatory fees? What would the impact potentially be on liquidity and the functioning of the markets? Please provide comment on the economic impacts associated with any change in trading strategy or practice that might occur.
- FINRA member proprietary trading firms compete in the provision of liquidity with other FINRA members that would not meet the definition of "proprietary trading firm" under the proposed TAF exemption. To what extent is the trading activity of these two types of firms similar? Is it likely that members would reorganize their activities to separate proprietary trading firm functions into a separate entity to benefit from the proposed exemption?

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

Endnotes

1. *See* Exchange Act Release No. 95388 (July 29, 2022), 87 FR 49930 (August 12, 2022) (File. No. S7-05-15) ("SEC re-proposal") (re-proposing amendments to SEA Rule 15b9-1).
2. 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, remove or decline to post comments that are inappropriate for publication, such as vulgar, abusive or potentially fraudulent comment letters. FINRA also reserves the right to redact or edit personally identifiable information from comment submissions.
3. *See* SEA Section 19 and rules thereunder. After a proposed rule change is filed with the SEC, the proposed rule change generally is published for public comment in the *Federal Register*. Some proposed rule changes take effect immediately upon filing with the SEC. *See* SEA Section 19(b)(3) and SEA Rule 19b-4.
4. FINRA is currently the only registered national securities association.
5. *See* Exchange Act Release No. 74581 (March 25, 2015), 80 FR 18036 (April 2, 2015) (File. No. S7-05-10) ("2015 SEC proposal").
6. *See* 2015 SEC proposal at n.95.
7. *See Regulatory Notice 15-13* (May 2015) (Trading Activity Fee (TAF)) ("2015 Notice").
8. This proposed definition is based largely on existing exchange definitions of "proprietary trading firm." *See, e.g.*, MIAX Rule 100.
9. Specifically, the SEC re-proposal would eliminate the $1,000 *de minimis* allowance and replace it with a provision that exempts from membership in a national securities association "a registered broker or dealer that is an exchange member, carries no customer accounts, and effects securities transactions solely on a national securities exchange of which it is a member except in two narrow circumstances: (1) a broker or dealer effects transactions in securities otherwise than on an exchange to which it belongs as a member that result solely from orders that are routed by an exchange of which it is a member in order to comply with Rule 611 of Regulation NMS or the Options Order Protection and Locked/Crossed Market Plan; or (2) a broker or dealer effects transactions in securities otherwise than on an exchange to which it belongs as a member that are solely for the purpose of executing the stock leg of a stock-option order." *See* SEC re-proposal at 49940.

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