

substantive changes. The Commission believes that these proposed changes should better conform NASDAQ OMX's Charter and By-Laws with current practice and legal requirements. Further, the proposed non-substantive clarifying changes should help to make the Charter and By-Laws more current and concise.<sup>50</sup>

#### IV. Conclusion

For the foregoing reasons, the Commission finds that the proposed rule changes are consistent with the Act and the rules and regulations thereunder applicable to a national securities exchange, in the case of BX, NASDAQ and Phlx, and to a registered clearing agency, in the case of BSECC and SCCP.

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act<sup>51</sup> that the proposed rule changes (SR-BSECC-2013-001; SR-BX-2013-057; SR-NASDAQ-2013-148; SR-Phlx-2013-115; SR-SCCP-2013-01) are approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>52</sup>

**Kevin M. O'Neill,**  
*Deputy Secretary.*

[FR Doc. 2014-01406 Filed 1-23-14; 8:45 am]

**BILLING CODE 8011-01-P**

Compensation Committee is required to be comprised of Independent Directors (as defined in NASDAQ Rule 5605(a)(2)) and meet the additional compensation committee requirements as set forth in NASDAQ Rule 5605(d)(2). *See also* NASDAQ IM 5605-6, and Section 10C of the Act and Rule 10C-1 thereunder.

<sup>50</sup> As noted above, however, after the non-substantive changes, the SROs acknowledge that remaining text of Article Fourth, Paragraph C(6) of the Charter includes an obsolete cross-reference to Section 6(b) of Article Fourth, Paragraph C in the second sentence, which begins "The Board, however, may not approve an exemption under Section 6(b). . . ." *See, e.g.,* NASDAQ Notice, 78 FR at 75620, at note 9. The Commission notes that the SROs have committed that: (i) Under no circumstances will NASDAQ OMX read the obsolete cross-reference to imply that the Board could grant an exemption to the ownership limitation in Article Fourth, Paragraph C(6) of the Charter for a registered broker or dealer or an Affiliate thereof, or an individual or entity that is subject to a statutory disqualification under Section 3(a)(39) of the Exchange Act; and (ii) as soon as feasible, NASDAQ OMX plans to present a proposal to the stockholders to conform this provision of the Charter to the correct language in Section 12.5 of the By-Laws.

<sup>51</sup> 15 U.S.C. 78s(b)(2).

<sup>52</sup> 17 CFR 200.30-3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-71341; File No. SR-FINRA-2013-042]

### Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc; Notice of Filing of Amendment No. 1 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 1, To Require Alternative Trading Systems To Report Volume Information to FINRA and Use Unique Market Participant Identifiers

January 17, 2014.

#### I. Introduction

On September 30, 2013, the Financial Industry Regulatory Authority, Inc. ("FINRA") filed with the Securities and Exchange Commission ("Commission"), 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> a proposed rule change to require each alternative trading system ("ATS") to report transaction volume information to FINRA and to obtain and use a unique market participant identifier ("MPID") when reporting trade information to FINRA. The proposed rule change was published for comment in the **Federal Register** on October 22, 2013.<sup>3</sup> The Commission received ten comments on the proposal.<sup>4</sup>

On December 4, 2013, FINRA granted the Commission an extension of time to act on the proposal until January 20, 2014. On January 15, 2014, FINRA filed Amendment No. 1 with the Commission to respond to the comment letters and

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

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

<sup>3</sup> *See* Securities Exchange Act Release No. 70676 (October 11, 2013), 78 FR 62862 (October 22, 2013) ("Notice of Original Proposal").

<sup>4</sup> *See* Letters to the Commission from William White, Head of Electronic Trading, Barclays Capital Inc., dated November 12, 2013 ("Barclays Letter"); Scott C. Goebel, Senior Vice President & Deputy General Counsel, Fidelity Investments, dated November 12, 2013 ("Fidelity Letter"); Manisha Kimmel, Executive Director, Financial Information Forum, dated November 12, 2013 ("FIF Letter"); Donald Bollerman, Head of Market Operations, IEX Services, LLC, dated November 11, 2013 ("IEX Letter"); Ari Burstein, Senior Counsel, Investment Company Institute, dated November 12, 2013 ("ICI Letter"); Elizabeth K. King, Global Head of Regulatory Affairs, KCG Holdings, Inc., dated November 12, 2013 ("KCG Letter"); Howard Meyerson, General Counsel, Liquidnet, dated November 12, 2013 ("Liquidnet Letter"); Janet McGinness, EVP & Corporate Secretary, NYSE Euronext, dated November 15, 2013 ("NYSE Letter"); Theodore R. Lazo, Managing Director & Associate General Counsel, Securities Industry and Financial Markets Association, dated November 11, 2013 ("SIFMA Letter"); and James Toes, President & CEO, Securities Traders Association, dated November 12, 2013 ("STA Letter").

to propose additional clarifying guidance, including the addition of supplementary material to one of the proposed rules.<sup>5</sup> The Commission is publishing this notice and order to solicit comments on Amendment No. 1 and to approve the proposed rule change, as modified by Amendment No. 1, on an accelerated basis.

#### II. Description of the Proposal

##### Overview

FINRA filed the proposed rule change to impose certain reporting requirements on trading venues that have filed a Form ATS with the Commission.<sup>6</sup> The purpose of the proposal is to make information about ATS trading volume publicly available and thus more transparent. The proposal is also meant to enhance FINRA's ability to monitor ATSs to determine whether they are complying with the requirements of Regulation ATS.

Specifically, FINRA states that the proposal would allow it to better determine whether an ATS is subject to the provisions of Regulation ATS that are triggered by exceeding certain volume thresholds. For instance, Regulation ATS requires an ATS to provide to a national securities exchange or association for display the prices and sizes of orders at the ATS's highest buy price and lowest sell price for any NMS stock, displayed to more than one person in the ATS, with respect to which the ATS has had an average daily trading volume of 5% or more of the aggregate average daily share volume for such NMS stock during at least four of the preceding six calendar months.<sup>7</sup> Regulation ATS also requires any such ATS to provide broker-dealers with fair access to the

<sup>5</sup> *See* Letter to the Commission from Brant K. Brown, Associate General Counsel, FINRA, dated January 15, 2014 ("FINRA Response Letter"). The FINRA Response Letter was submitted into the public comment file for SR-FINRA-2013-042.

<sup>6</sup> Under Regulation ATS, an alternative trading system is defined as "any organization, association, person, group of persons, or system: (1) That constitutes, maintains, or provides a market place or facilities for bringing together purchasers and sellers of securities or for otherwise performing with respect to securities the functions commonly performed by a stock exchange within the meaning of [Exchange Act Rule 3b-16]; and (2) That does not: (i) Set rules governing the conduct of subscribers other than the conduct of such subscribers' trading on such organization, association, person, group of persons, or system; or (ii) Discipline subscribers other than by exclusion from trading." 17 CFR 242.300(a). FINRA stated in its Notice of Original Proposal that the proposed rule change would apply to any alternative trading system, as that term is defined in Regulation ATS, that has filed a Form ATS with the Commission.

<sup>7</sup> *See* 17 CFR 242.301(b)(3).

ATS's services to effect a transaction in any such NMS stock.<sup>8</sup>

To achieve these objectives, the proposal would impose two new requirements on ATSs. First, ATSs would be required to report aggregate weekly trade volume information to FINRA, some of which data FINRA would then make publicly available. Second, the proposal would require each ATS to obtain and use a unique MPID in its regulatory reporting to FINRA.

#### Self-Reporting Requirement

Proposed Rule 4552 would require each FINRA member that operates an ATS that has filed a Form ATS with the Commission to report to FINRA its aggregate weekly volume information<sup>9</sup> and number of trades, by security, in securities subject to FINRA trade reporting requirements. The self-reporting requirement would thus apply to any NMS stock,<sup>10</sup> any OTC Equity Security,<sup>11</sup> or any debt security subject to FINRA's Trade Reporting and Compliance Engine ("TRACE") rules ("TRACE-Eligible Securities").<sup>12</sup> The proposed rule change would require this information to be reported to FINRA on a security-by-security basis within seven business days after the end of each calendar week. An ATS that did not execute any trades in a given week would need to submit a report that affirmatively indicated the ATS did not transact any volume that week.

The proposed rule change contains guidance on how ATSs should calculate their volumes to ensure consistency and to avoid potential over-counting of volume. Proposed Rule 4552 provides that, "[w]hen calculating and reporting the volume of securities traded and the number of trades, an alternative trading system shall include only those trades executed within the alternative trading system. If two orders are crossed by the alternative trading system, the volume shall include only the number of shares or par value of bonds crossed as a single trade (e.g., crossing a buy order of 1,000 shares with a sell order of 1,000 shares would be calculated as a single trade of

1,000 shares of volume)." Thus, for example, an ATS would be required to report only trades executed within the ATS<sup>13</sup> (not individual orders routed out of the ATS that might be executed at another venue), and only the volume of each executed trade once (not double-counting for the buy and sell side of the trade).

In addition, FINRA would make some of this reported ATS trade data available to the public. Specifically, FINRA would publish on its Web site the trading information (volume and number of trades) reported for each equity security, with appropriate disclosures that the information is based on ATS-submitted reports and not on reports produced or validated by FINRA. FINRA would do so on a delayed basis: aggregate information concerning trades in NMS stocks in Tier 1 of the NMS Plan to Address Extraordinary Market Volatility<sup>14</sup> would be published on a two-week delayed basis, and aggregate information on all other NMS stocks and all OTC Equity Securities subject to FINRA trade reporting requirements on a four-week delayed basis.<sup>15</sup>

While the reporting obligations in the proposal would apply to transactions in both equity securities (NMS stocks and OTC Equity Securities) and debt securities (TRACE-Eligible Securities), FINRA would not initially publish the data that it receives concerning transaction volume in TRACE-Eligible Securities. FINRA stated that it would not intend to begin publishing self-reported data for TRACE-Eligible Securities "until it has had the opportunity to evaluate the data received from such ATSs and the differences between the existing trade reporting regimes applicable to equity and debt securities."<sup>16</sup>

#### MPID Requirement

The proposed rule change also would require a member operating an ATS to obtain for each such ATS a single, unique MPID that is designated for exclusive use for reporting the ATS's transactions. Members that operate multiple ATSs or engage in other lines

of business requiring the use of MPIDs would therefore be required to obtain and use multiple MPIDs. A firm would not be permitted to use multiple MPIDs for a single ATS, and if a firm operates multiple ATSs, each ATS would be required to have its own MPID.

The proposal would prohibit a member from using a separate MPID assigned to an ATS to report any transaction that is not executed within the ATS and require members to have policies and procedures in place to ensure that trades reported with a separate MPID obtained under the rules are restricted to trades executed within the ATS. FINRA noted that this feature of the proposal would be consistent with obligations that already exist for ATSs, which are required by Regulation ATS "to have in place safeguards and procedures to . . . separate alternative trading system functions from other broker-dealer functions, including proprietary and customer trading."<sup>17</sup>

FINRA currently has three rules that permit the use of multiple MPIDs on FINRA facilities: Rule 6160 (Multiple MPIDs for Trade Reporting Facility Participants), Rule 6170 (Primary and Additional MPIDs for Alternative Display Facility Participants), and Rule 6480 (Multiple MPIDs for Quoting and Trading in OTC Equity Securities). All three rules are permissive, and none of the rules currently requires the use of multiple MPIDs. These three rules would be revised to include language that affirmatively requires any participant of any of these facilities that operates an ATS to obtain a unique MPID for each ATS.<sup>18</sup> In cases where a facility participant wished to use multiple MPIDs, or was required to do so under the proposal, each rule would require the facility participant to submit a written request to FINRA. The three rules, which currently operate on a pilot basis, would also be made permanent.

FINRA noted that member firms currently are required to notify FINRA before changing the usage of the MPID in any way (for example, repurposing an MPID from reflecting ATS activity to other trading activity at the firm). After an ATS is provided its MPID, any reporting by the ATS (either reporting trades to a FINRA TRF, the ADF, the ORF, TRACE, or reporting orders to the Order Audit Trail System ("OATS")) would need to include the MPID assigned to the particular ATS, and the member would need to use the

<sup>8</sup> See 17 CFR 242.301(b)(5). The fair access requirement also applies to other types of securities, including certain unlisted equity securities, municipal securities, and corporate debt securities. See *id.* Certain ATSs are excluded from the fair access requirement. See 17 CFR 242.301(b)(5)(iii).

<sup>9</sup> Volume information for NMS stocks and OTC Equity Securities means the aggregate number of shares traded in each security for the week. Volume information for TRACE-Eligible Securities means the aggregate par value of trades in each security for the week. See proposed Rule 4552(d)(5).

<sup>10</sup> See FINRA Rule 6110.

<sup>11</sup> See FINRA Rule 6410.

<sup>12</sup> See FINRA Rules 6710 and 6730(a).

<sup>13</sup> In response to comments, FINRA submitted Amendment No. 1 to propose additional guidance, in the form of Supplementary Material .01 to the rule, on what it means for a trade to be executed "within the ATS." See *infra* Section III.

<sup>14</sup> Tier 1 includes those NMS stocks in the S&P 500 Index or the Russell 1000 Index and certain ETPs. See NMS Plan to Address Extraordinary Market Volatility.

<sup>15</sup> The delay would be from the week in which the trades occurred, rather than the week the trades were reported to FINRA. See Notice of Original Proposal, 78 FR at 62864 n.17.

<sup>16</sup> Notice of Original Proposal, 78 FR at 62864.

<sup>17</sup> Securities Exchange Act Release No. 40760 (December 8, 1998), 63 FR 70844, 70879 (December 22, 1998).

<sup>18</sup> FINRA also proposed to amend Rule 6720, which governs reporting to TRACE, to include similar language.

particular MPID to report all transactions executed within the ATS to the appropriate reporting facility.<sup>19</sup>

FINRA noted further that it would leave in place a voluntary program it adopted in 2010 that allows allow members operating an ATS dark pool to have their daily aggregate trading data published by the TRFs.<sup>20</sup> FINRA believes that the program, which is set forth in Supplementary Material .02 to Rule 6160(c), would largely be eclipsed by the proposal, as all ATSs would now be subject to mandatory reporting requirements. The voluntary program differs slightly from the mandatory requirements of the proposal, however, because it provides for the publication of aggregate daily—rather than weekly—trading volume information. FINRA noted in its proposal that no member has participated in the voluntary program yet.

#### Implementation Schedule

FINRA stated that it would announce the implementation date of the proposed rule change in a *Regulatory Notice* to be published no later than 30 days following Commission approval. The implementation date for the self-reporting requirement would be no later than 90 days following publication of the *Regulatory Notice*. The implementation date for the MPID requirement would be no later than 270 days following publication of the *Regulatory Notice*.

The Commission points out that, in the Notice of Original Proposal, FINRA stated that it would announce the “effective date” of the proposed rule change by *Regulatory Notice* within 30 days of Commission approval. In Amendment No. 1, FINRA revised this language to clarify its intent to specify that it will announce the “implementation date,” rather than the “effective date,” of the proposed rule change. FINRA clarified further that the proposed rule change will become effective when it is approved by the Commission. Thus, rules that permit FINRA members to use multiple MPIDs

<sup>19</sup> OATS Reporting Members currently are required to include MPIDs on OATS reports. See, e.g., FINRA Rule 7440(b)(3), (c)(1)(B), (c)(2)(A)(ii), and (c)(2)(A)(iii). The proposed rule change would not amend the OATS rules; however, current OATS guidance issued by FINRA provides that “[a]n order that is transferred between two valid MPIDs within the same firm is also considered routed.” See *OATS Reporting Technical Specifications*, at 4–3 (ed. December 11, 2012). Consequently, FINRA noted, after the proposed rule change is implemented, an order routed to an ATS would require the submission of a Route Report, which must reflect the unique MPID of the ATS to which the order was routed. See FINRA Rule 7440(c).

<sup>20</sup> See Securities Exchange Act Release No. 61658 (March 5, 2010), 75 FR 11972 (March 12, 2010).

would immediately convert from operating on a pilot to a permanent basis.

### III. Summary of Comments, FINRA’s Response, and Proposed Additional Supplementary Material in Amendment No. 1

As noted above, the Commission received ten comment letters concerning the proposal.<sup>21</sup> Eight of the ten commenters expressed general support for the purpose of the proposal—namely, to increase transparency of ATS trade data.<sup>22</sup> For instance, one commenter stated that it “encourage[d] efforts to standardize ATS transparency across the industry and feel[s] that FINRA is well-positioned to do so.”<sup>23</sup> Another commenter expressed its belief “that quantitative, publicly available information regarding ATS trading can provide market participants, regulators and policymakers a greater understanding of the role ATSs play in the equity marketplace, as well as provide a factual foundation for key discussions and decisions concerning equity market structure issues.”<sup>24</sup>

Several of these commenters, in fact, expressed support for an even broader proposal that would apply to all trading venues, rather than only to ATSs.<sup>25</sup> One such commenter argued that “the proposal should be expanded to include trade information for other off-exchange executions and this information should be made public in the same manner as proposed for ATS trade information.”<sup>26</sup> According to another commenter, “including the entire universe of non-exchange trading is important because while ATSs make up approximately 14% of volume, other dark trading venues account for over 22% of volume and receive a significant portion of the retail order flow in the market.”<sup>27</sup> A different commenter, while supporting a broader effort that would include off-exchange venues not limited to ATSs, stated that such an effort should be coupled with an increase in the transparency of information concerning executions that occur on exchanges against non-displayed trading interest.<sup>28</sup>

In response to these comments concerning the scope of the proposal, FINRA noted that it considered various alternatives and concluded that ATS trade information was an appropriate

first step toward increased transparency in the off-exchange, OTC market. FINRA stated further that it would consider additional steps, including those suggested by the commenters, in the future.<sup>29</sup>

Some commenters voiced concern with certain elements of the proposal or sought further guidance on how the new requirements would be applied. Of these commenters, a majority argued that the self-reporting requirement should be limited in some fashion because it would soon become unnecessary in light of the proposal’s MPID requirement.<sup>30</sup> For example, five commenters asked FINRA to make an affirmative commitment that it will eliminate the reporting requirement once the MPID requirement is fully implemented.<sup>31</sup> Additionally, three commenters suggested that FINRA align the proposal’s reporting requirement with Rule 605 of Regulation NMS, meaning that ATSs would report monthly to FINRA rather than weekly.<sup>32</sup> Lastly, four commenters urged FINRA to facilitate compliance with the reporting requirement by establishing a standard, simple format for data transmission.<sup>33</sup>

In its response to these comments, FINRA reiterated that it intends to evaluate the necessity of the self-reporting requirement after the MPID requirement is in place. However, FINRA noted that it would plan to use, for comparison purposes, data reported by ATSs under the self-reporting requirement even when those ATSs have unique MPIDs used exclusively to report trades for the ATS. Moreover, FINRA said that the self-reporting requirement would allow the proposal to more quickly recognize its objective of enhancing ATS transparency. Accordingly, FINRA believes that the self-reporting requirement is a necessary first phase of the proposal. FINRA stated that it would eliminate the self-reporting requirement for ATSs subject to FINRA trade reporting requirements

<sup>29</sup> See FINRA Response Letter at 5. FINRA noted however, that any commenter’s discussion of enhancing the transparency of on-exchange, non-displayed interest was beyond FINRA’s regulatory jurisdiction.

<sup>30</sup> See Barclays, Fidelity, FIF, KCG, SIFMA, and STA Letters. No commenter appeared to take issue with the MPID requirement, and four commenters expressly supported it. See Barclays, Fidelity, IEX, and KCG Letters.

<sup>31</sup> See Fidelity, FIF, KCG, SIFMA, and STA Letters.

<sup>32</sup> See IEX, SIFMA, and STA Letters.

<sup>33</sup> See FIF, Fidelity, IEX, and SIFMA Letters. The FIF Letter additionally requested guidance on several other specific, technical aspects concerning the proposal’s implementation. FINRA noted in response that, if the proposal were approved, it would issue guidance that addressed technical details like and including those raised by FIF.

<sup>21</sup> See *supra* note 4.

<sup>22</sup> See Barclays, Fidelity, IEX, ICI, KCG, NYSE, SIFMA, and STA Letters.

<sup>23</sup> Barclays Letter at 1.

<sup>24</sup> Fidelity Letter at 1–2.

<sup>25</sup> See Fidelity, ICI, KCG, and NYSE Letters.

<sup>26</sup> Fidelity Letter at 2.

<sup>27</sup> NYSE Letter at 1.

<sup>28</sup> See KCG Letter at 5.

if the MPID requirement is implemented and operating as anticipated.<sup>34</sup>

Aside from the self-reporting requirement, several commenters also expressed concern with FINRA's intent to charge a fee for professionals to access and use the data.<sup>35</sup> These comments ranged from questioning the need for FINRA to charge a fee for data that it would not validate to flatly opposing the imposition of any fee on the data. In response, FINRA noted that it would make available for free on its Web site the most recently reported data, as well as limited historic reports. FINRA also reiterated its plan to charge profession users and data vendors a fee to access professional, downloadable reports; however, FINRA stated it would submit a separate filing to propose the specifics of this data product.<sup>36</sup>

Additionally, one commenter took the position that, if the proposal is approved, FINRA should open up a second formal comment period one year after the rule is implemented to allow for an empirical "retrospective review" of the proposal's costs and benefits.<sup>37</sup> In its response, FINRA disagreed and pointed to the Notice of the Original Proposal, in which FINRA said it "intends periodically to assess the reporting and publication of information to consider whether modifications to the scope of securities covered, the delay between the activity and publication, or the frequency of publication of the information are appropriate."<sup>38</sup> Moreover, FINRA claimed that it discussed the terms of the proposed rules with a number of ATS operators prior to submitting the proposal, and "continues to believe that the burdens imposed by the Proposal will be minimal for many firms and that the proposed delays in dissemination are sufficient to avoid potentially damaging information leakage of trading information."<sup>39</sup>

Lastly, one commenter questioned how the proposal would apply to fixed income ATSs in light of the fact that trades from fixed income ATSs may be

reported to FINRA by one of the trade counterparties, rather than by the ATS.<sup>40</sup> In response, FINRA pointed out that various of its equity and debt trade reporting rules impose a trade reporting obligation on an ATS, as the "executing party" under FINRA rules, where the transaction is executed by the ATS. FINRA also noted that, under the proposal, it would not publish the trade data reported by fixed income ATSs until it could evaluate the data for consistency.

Furthermore, FINRA submitted Amendment No. 1 to adopt supplementary material to FINRA Rule 4552 to clarify when trades should be considered to have occurred "within an ATS." Specifically, the proposed supplementary material would provide that a trade should be considered to have occurred within the ATS for purposes of the rule "if the ATS (i) executes the trade; (ii) is considered the 'executing party' to the trade under FINRA rules; or (iii) otherwise matches orders constituting the trade in a manner as contemplated by SEC Rule 3b-16 or SEC Regulation ATS."<sup>41</sup> So, for example, a trade would be considered to have occurred "within an ATS" if the ATS "uses established, non-discretionary methods under which orders interact with each other, and the buyers and sellers entering the orders agree to the terms of the trade."<sup>42</sup>

The proposed supplementary material would further provide a non-exhaustive list of scenarios to illustrate how the "within an ATS" standard would be applied. The list would include: if the trade was executed as a result of the ATS bringing together the purchaser and seller on or through its systems; if the trade was executed by an ATS's subscribers where the subscribers used the ATS system to negotiate the trade, even if the ATS did not itself execute the trade; if the ATS takes either side of the trade for clearance or settlement or in any other way inserts itself into a trade. The supplementary material would also provide that a trade would not be considered to have occurred "within the ATS" if an ATS were to route an order to another member firm or execution venue for handling or execution where that initial order matches against interest resident at the other venue.<sup>43</sup>

<sup>40</sup> See KCG Letter at 4.

<sup>41</sup> FINRA Response Letter at 10 (internal citations omitted).

<sup>42</sup> *Id.*

<sup>43</sup> The supplementary material would additionally state that trades would still be considered to have occurred "within an ATS" for purposes of reporting volume under the proposal even if the ATS has been granted an exemption

#### 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-2013-042 on the subject line.

##### Paper Comments

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

All submissions should refer to File Number SR-FINRA-2013-042. 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 comments on the Commission's Internet Web site (<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 Web site 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 the filing will also be available for inspection and copying at the principal office of FINRA. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make publicly available. All submissions should refer to File Number SR-FINRA-2013-042 and should be submitted on or before February 14, 2014.

#### V. Commission Findings

After carefully considering the proposed rule change, as modified by

from its trade reporting obligations under FINRA Rules 6183, 6625, or 6731.

<sup>34</sup> See FINRA Response at 6-7. FINRA noted that, under FINRA rules, an ATS may be granted an exemption from its trade reporting requirements. FINRA said that, in such a case, it would likely need to continue requiring the ATS to self-report, even after the MPID requirement were implemented, because the exempt ATS would not be using the MPID to report its volume (due to its trade reporting exemption). See *id.* at 7 n.13.

<sup>35</sup> See Barclays, Fidelity, FIF, IEX, ICI, Liquidnet, and STA Letters.

<sup>36</sup> See FINRA Response Letter at 8.

<sup>37</sup> See STA Letter at 2-3.

<sup>38</sup> FINRA Response Letter at 8. The Commission notes that this quoted language in FINRA's response appears in the Notice of Original Proposal, 78 FR at 62864.

<sup>39</sup> FINRA Response Letter at 8-9.

Amendment No. 1, the comments submitted, and FINRA's response to the comments, the Commission finds that the proposed rule change, as modified by Amendment No. 1, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities association.<sup>44</sup> In particular, the Commission finds that the proposed rule change, as modified by Amendment No. 1, is consistent with Section 15A(b)(6) of the Act,<sup>45</sup> which requires, among other things, that FINRA rules 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.

The Commission believes that the stated objectives of the proposal—to enhance FINRA's regulatory capabilities with respect to ATSs and to increase public transparency with respect to ATS activity—would further the purposes of the Act. By better enabling FINRA to surveil ATSs for compliance with Regulation ATS, and the display and fair access requirements applicable to ATSs that exceed certain volume thresholds, the proposal is reasonably designed to help prevent fraudulent and manipulative acts and practices and to protect investors and the public interest. By collecting and publishing weekly volume statistics (first, through the self-reporting requirement, and later, potentially, through the MPID requirement), the proposal would increase the amount of information that is publicly available concerning trades that occur in equity ATSs. As many commenters noted, such added transparency would allow regulators and the public to more fully understand the role that equity ATSs play in the marketplace.

The Commission further believes that the proposal is reasonably tailored to achieve these objectives. The self-reporting requirement, which is meant to constitute the first phase of the proposal, will more quickly deliver the benefits of the proposal, and also provide a comparison for the data that FINRA will receive once the MPID requirement is fully in effect. While the Commission acknowledges that some commenters took issue with the additional costs that could potentially be incurred as a result of the weekly self-reporting requirement, the Commission notes, as FINRA did in its

Notice of Original Proposal, that ATSs are already required by Regulation ATS to maintain daily summaries of their trading activities.<sup>46</sup>

In addition, the method of making the ATS trade data publicly available—a two-week delay for Tier 1 NMS stocks and a four-week delay for all other NMS stocks and OTC Equity Securities—appears reasonably designed to balance the desire to inform the public about ATS trading activity with the desire to protect the trading strategies of ATS subscribers. The Commission notes that three commenters supported this element of the proposal,<sup>47</sup> and no commenter objected to the proposed delays for publishing the trade data.<sup>48</sup>

The Commission believes that requiring a member operating an ATS to obtain for each such ATS a single, unique MPID that is designated for exclusive use by the ATS is consistent with the Act. This aspect of the proposal is reasonably designed to create a more reliable and consistent audit trail for ATS activity, from the time an order is received until the time it is executed or cancelled. This is especially important for firms that conduct both ATS and other broker-dealer activities. Currently, if a member uses a single MPID for both its ATS activity and traditional broker-dealer activity, or uses a single MPID to report the activity of two or more ATSs, it could be difficult if not impossible to track the flow of orders through these systems. The Commission agrees with FINRA's assessment that the fact that many firms already use separate MPIDs in the manner now required by this proposed rule change is evidence that the costs of using multiple MPIDs as contemplated by the proposal is not unduly burdensome. Because the proposal requires some firms to obtain and use multiple MPIDs, FINRA has proposed to make permanent certain rules, currently operating on a pilot basis, that allow firms to use multiple MPIDs. The Commission also believes that it is consistent with the Act to make those rules permanent.

Lastly, the Commission believes that the supplementary material included in Amendment No. 1 is consistent with the Act. In response to the initial proposal, one commenter questioned how the proposal would apply to fixed income ATSs, where it is common practice for trades to be given up to the broker-

dealer counterparties.<sup>49</sup> FINRA responded by providing new Supplementary Material .01 to proposed Rule 4552 explaining when transactions are attributable to the ATS for purposes of the proposal's volume reporting provisions. In general, the supplementary material would require a transaction to be included in its reporting to FINRA if the ATS executes the trade, is the "executing party" to the trade under FINRA rules,<sup>50</sup> or if the ATS otherwise matches orders constituting the trade in a manner contemplated by Rule 3b-16 under the Exchange Act<sup>51</sup> and Regulation ATS. The Commission believes that it is consistent with the Act for FINRA to attribute volume to an ATS when the transactions underlying that volume would cause the entity itself to meet the criteria of Rule 3b-16.<sup>52</sup>

## VI. Accelerated Approval

The Commission finds good cause, pursuant to Section 19(b)(2) of the Act,<sup>53</sup> for approving the proposed rule change, as modified by Amendment No. 1 thereto, prior to the 30th day after publication of Amendment No. 1 in the **Federal Register**. The new supplementary material proposed in Amendment No. 1 responds to a specific issue raised in one comment letter received by the Commission in response to the Notice of Original Proposal and clarifies when trading volume is attributed to an ATS for purposes of this proposal's volume reporting requirements. Amendment No. 1 also proposed a revision to the language describing the timeframe for FINRA's implementation of the proposal; this revision is technical in nature and better clarifies FINRA's original intent. The Commission notes that, beyond two other minor technical revisions that simply update statutory references,<sup>54</sup> the rest of the proposed rule change is not being amended and was subject to a full notice-and-comment period. These revisions add clarity to the

<sup>49</sup> See KCG Letter at 4.

<sup>50</sup> See FINRA Rules 6282, 6830A, 6930B, and 6622. See also FINRA Response Letter at 9-10 (discussing when an ATS is considered an "executing party" to a trade under these rules).

<sup>51</sup> 17 CFR 240.3b-16.

<sup>52</sup> Meeting the criteria of Rule 3b-16 would in turn would cause the entity to have to register with the Commission as a national securities exchange or seek an alternative to exchange registration, such as registering as a broker-dealer and complying with Regulation ATS.

<sup>53</sup> 15 U.S.C. 78s(b)(2).

<sup>54</sup> Specifically, Amendment No. 1 would: (1) amend FINRA Rules 4552, 6160, 6170, 6480, and 6720 to replace "SEA Rule 300" with "Rule 300 of SEC Regulation ATS"; and (2) amend proposed Rule 4552 to replace "SEA Rule 600(b)(47)" with "Rule 600(b)(47) of SEC Regulation NMS.

<sup>44</sup> In approving this proposed rule change, the Commission has considered the proposed rule change's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>45</sup> 15 U.S.C. 78o-3(b)(6).

<sup>46</sup> See 17 CFR 242.301(b)(8); 17 CFR 242.302.

<sup>47</sup> See Fidelity Letter at 3, ICI Letter at 2, and KCG Letter at 3.

<sup>48</sup> The Commission notes that one commenter that advocated monthly, rather than weekly, reporting also recommended a two-week publishing delay from the end of each month when the information is reported. See STA Letter at 5.

proposal and do not raise any novel regulatory concerns. Accordingly, the Commission finds that good cause exists to approve the proposal, as modified by Amendment No. 1, on an accelerated basis.

## VII. Conclusion

*It is therefore ordered* pursuant to Section 19(b)(2) of the Act<sup>55</sup> that the proposed rule change (SR-FINRA-2013-042), as modified by Amendment No. 1, be and hereby is approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>56</sup>

**Kevin M. O'Neill,**

*Deputy Secretary.*

[FR Doc. 2014-01395 Filed 1-23-14; 8:45 am]

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-71350; File No. SR-FINRA-2014-002]

### Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Adopt FINRA Rule 7640A (Data Products Offered By Nasdaq)

January 17, 2014.

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 January 9, 2014, Financial Industry Regulatory Authority, Inc. (“FINRA”) (f/k/a National Association of Securities Dealers, Inc. (“NASD”)) filed with the Securities and Exchange Commission (“SEC” or “Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by FINRA. FINRA has designated the proposed rule change as constituting a “non-controversial” rule change under paragraph (f)(6) of Rule 19b-4 under the Act,<sup>3</sup> which renders the proposal effective upon receipt of this filing by the Commission. 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 adopt FINRA Rule 7640A (Data Products Offered By Nasdaq) to (1) describe FINRA’s practices relating to the distribution of market data for over-the-counter (“OTC”) transactions in NMS stocks generated through the operation of the FINRA/Nasdaq Trade Reporting Facility (“FINRA/Nasdaq TRF”) by The NASDAQ OMX Group, Inc. (“NASDAQ OMX”) and its affiliate, The NASDAQ Stock Market LLC (“Nasdaq”); and (2) identify Nasdaq rules relating to products that distribute FINRA/Nasdaq TRF data to third parties, and specifically Nasdaq Rules 7039 (Nasdaq Last Sale Data Feeds), 7047 (Nasdaq Basic) and 7037 (Nasdaq FilterView Service).

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

###### Background

The FINRA Trade Reporting Facilities (“TRFs”) are facilities solely for the reporting of OTC transactions in NMS stocks that allow the TRF “Business Members,” which themselves are affiliates of self-regulatory organizations (“SROs”), to retain commercial use of the market data reported to the respective TRFs.<sup>4</sup> The operation of each

TRF is governed by a Limited Liability Company Agreement (the “LLC Agreement”) between FINRA and the respective Business Member. (The LLC Agreements, which were submitted as part of the rule filings to establish the respective TRFs and were subsequently amended and restated, appear in the FINRA Manual.) Under the LLC Agreement, FINRA is the “SRO Member” and has sole regulatory responsibility for the TRF, including real-time monitoring and T+1 surveillance, development and enforcement of trade reporting rules and submission of proposed rule changes to the Commission. The Business Member under the LLC Agreement is primarily responsible for the management of the TRF’s business affairs, which may not be conducted in a manner inconsistent with the regulatory and oversight functions of FINRA. Among other things, the Business Member establishes pricing for the TRF and is obligated to pay the cost of regulation and is entitled to the profits and losses, if any, derived from operation of the TRF. The Business Member also provides the “user facing” front-end technology used to operate the TRF and transmit in real time trade report data directly to the NMS securities information processors (“SIPs”) and to FINRA for audit trail purposes.

Under the terms of the business arrangement between FINRA and the Business Members, each TRF owns data resulting from its operation. Each Business Member has a non-exclusive, irrevocable, worldwide, perpetual, royalty-free right and license to use market data generated by its TRF, other than data generated exclusively for regulatory purposes (“covered market data”),<sup>5</sup> consistent with all applicable laws, rules and regulations, and has a contractual right to sell covered market data to third parties.<sup>6</sup> Accordingly, although the TRFs are facilities of FINRA, the Business Members have the right under the contractual arrangements establishing the TRFs to develop market data products using covered market data. As each Business Member is an affiliate of an SRO, use of TRF data is conducted through the Business Member’s affiliated SRO, is

(Notice of Filing and Immediate Effectiveness of File No. SR-NASD-2007-011).

<sup>5</sup> For purposes of proposed Rule 7640A, “covered market data” would be defined as market data generated by the FINRA/Nasdaq Trade Reporting Facility, other than data generated exclusively for regulatory purposes.

<sup>6</sup> Under the TRF contracts, FINRA has a non-exclusive, irrevocable, worldwide, perpetual, royalty-free right and license to use the data generated by the TRF to fulfill its contractual rights and obligations, as well as its obligations as an SRO.

<sup>55</sup> 15 U.S.C. 78s(b)(2).

<sup>56</sup> 17 CFR 200.30-3(a)(12).

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

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

<sup>3</sup> 17 CFR 240.19b-4(f)(6).

<sup>4</sup> There currently are two TRFs in operation: the FINRA/Nasdaq TRF and the FINRA/NYSE TRF. The establishment of each TRF was subject to a proposed rule change filed with the Commission. See Securities Exchange Act Release No. 54084 (June 30, 2006), 71 FR 38935 (July 10, 2006) (Order Approving File No. SR-NASD-2005-087); and Securities Exchange Act Release No. 55325 (February 21, 2007), 72 FR 8820 (February 27, 2007)