

### III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing rule change establishes or changes a due, fee, or other charge imposed by the Exchange, it has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>11</sup> and subparagraph (f)(2) of Rule 19b-4<sup>12</sup> thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

### 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 e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-CBOE-2008-52 on the subject line.

#### *Paper Comments*

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

All submissions should refer to File Number SR-CBOE-2008-52. This file number should be included on the subject line if e-mail 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 inspection and copying in the Commission's Public Reference

Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 am and 3 pm. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. 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 available publicly. All submissions should refer to File No. SR-CBOE-2008-52 and should be submitted on or before June 3, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>13</sup>

Nancy M. Morris,  
Secretary.

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-57765; File No. SR-FINRA-2007-041]

### Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Order Approving Proposed Rule Change To Amend NASD Rule 7001B To Increase the Percentage of Market Data Revenue Shared With NASD/Nasdaq TRF Participants

May 1, 2008.

#### I. Introduction

On December 21, 2007, 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 adjust the percentage of market data revenue shared with participants in the NASD/Nasdaq Trade Reporting Facility ("NASD/Nasdaq TRF"). The proposed rule change was published for comment in the **Federal Register** on January 24, 2008.<sup>3</sup> The Commission received one comment letter regarding the proposal.<sup>4</sup>

<sup>13</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> See Securities Exchange Act Release No. 57164 (January 17, 2008), 73 FR 4295.

<sup>4</sup> See letter from Christopher Gilkerson and Gregory Babyak, Co-Chairs, Market Data Subcommittee of the SIFMA Technology and Regulation Committee, to Nancy M. Morris, Secretary, Commission, dated February 14, 2008 ("SIFMA letter").

On March 27, 2008, FINRA submitted its response to the comment letter.<sup>5</sup> This order approves the proposed rule change.

### II. Description of the Proposed Rule Change

FINRA proposes to amend NASD Rule 7001B (Securities Transaction Credit) to modify the percentage of market data revenue that is shared with FINRA members that report trades to the NASD/Nasdaq TRF for transactions on the New York Stock Exchange ("Tape A"), American Stock Exchange and regional exchanges ("Tape B"), and Nasdaq Exchange ("Tape C"). At present, FINRA members that report trades in Tape A, Tape B, and Tape C securities to the NASD/Nasdaq TRF receive a 50% *pro rata* credit on market data revenue that is earned by the NASD/Nasdaq TRF.<sup>6</sup>

The proposed rule change establishes a tiered rebate schedule whereby a participant in the NASD/Nasdaq TRF will receive from 0% to 100% of attributable market data revenue, depending upon the tape and the participant's market share. For example, a participant will receive 100% of the attributable market data revenue for trades in Tape A-listed stocks if its trade reports for those stocks are greater than or equal to 0.25% of the total consolidated volume of those stocks. In contrast, a participant will receive 100% of the attributable market data revenue for trades in Tape C-listed stocks if its trade reports for those stocks are greater than or equal to 0.75% of the total consolidated volume of those stocks. Similarly, a participant will receive 80% of the attributable market data revenue for trades in Tape A-listed stocks if its trade reports for those stocks are less than 0.25%, but greater than or equal to 0.15%, of the total consolidated volume of those stocks. A participant will receive 80% of the attributable market data revenue for trades in Tape C-listed stocks if its trade reports for those stocks are less than 0.75%, but greater than or equal to 0.25% of the total consolidated volume of those stocks.

In its filing with the Commission, FINRA stated that according to Nasdaq, it based the percentage of revenue that

<sup>5</sup> See letter from Lisa C. Horrigan, Associate General Counsel, FINRA, to Nancy M. Morris, Secretary, Commission, dated March 27, 2008 ("FINRA letter").

<sup>6</sup> The market data revenue consists of the revenue received by the NASD/Nasdaq TRF from the Consolidated Tape Association or the Nasdaq Securities Information Processor minus any charge for capacity usage. The proposed rule eliminates the deduction for capacity usage.

<sup>11</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>12</sup> 17 CFR 240.19b-4(f)(2).

it would share on different levels of market share because of the extent to which members use the NASD/Nasdaq TRF to report trades in different stocks. For example, FINRA stated that members report higher volumes of trades in Tape C stocks than in Tape A or Tape B stocks, justifying a higher level of market share for Tape C transactions.

FINRA will calculate a participant's market share separately for each tape. To calculate a participant's market share, FINRA will divide the total number of shares represented by trades reported by members to the NASD/Nasdaq TRF during a calendar quarter by the total number of shares represented by all trades reported to the Consolidated Tape Association or Securities Information Processor during that quarter.

### III. Summary of Comments

The Commission received one comment letter in response to the proposed rule change.<sup>7</sup> The commenter stated that the proposed rebate demonstrated that market data fees are excessive, and do not have a fair and reasonable basis.<sup>8</sup> The commenter noted that, in its capacity as the "SRO Member," FINRA allocates and deducts costs before passing market data revenue to each TRF. According to the commenter, this ability to allocate costs in the context of a TRF rebuts earlier arguments, made by the exchanges, that costs of collection and distribution of market data cannot be allocated, and should thus not be a basis for determining the reasonableness of market data fees.<sup>9</sup> The commenter also asserted that the proposed rule change did not address the competitive impact of the filing, and that any short-term benefits from the market data revenue rebates could be diminished by the long-term impact of less competition.<sup>10</sup> Finally, the commenter said that the proposal addresses issues that are also present in the NetCoalition Petition.<sup>11</sup>

FINRA responded that the arguments made by the commenter were not germane to the proposed rule change. 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>12</sup> FINRA also stated that the costs of collecting and distributing market data are not necessarily determinative of the reasonableness of the proposed rebate.<sup>13</sup> Finally, FINRA stated that the proposed rebate does not constitute an undue burden on competition that is not in furtherance of the Act.<sup>14</sup>

### IV. Discussion and Commission Findings

The Commission has carefully reviewed the proposed rule change, the comment letter, and FINRA's response 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>15</sup> and, in particular, the requirements of Section 15A(b)(5) of the Act,<sup>16</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 7001B to adjust the percentage of market data revenue shared with NASD/Nasdaq TRF participants, effective retroactively to January 1, 2008. FINRA seeks to modify the rebate of market data revenue to NASD/Nasdaq TRF participants. Neither the costs incurred in collecting that market data, nor the calculation of market data fees is directly at issue in this filing. The fact that Nasdaq, as the Business Member, has determined to adjust its rebate schedule such that participants may receive a greater percentage of market data revenue does not establish that the fees are excessive. The SIFMA letter does not raise any other issue that would preclude approval of the FINRA proposal.

### V. Conclusion

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

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>17</sup> that the proposed rule change (SR-FINRA-2007-041) be, and hereby is, approved.

<sup>12</sup> See FINRA letter at 2.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</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>16</sup> 15 U.S.C. 78o-3(b)(5).

<sup>17</sup> 15 U.S.C. 78s(b)(2).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>18</sup>

**Florence E. Harmon,**  
*Deputy Secretary.*

[FR Doc. E8-10569 Filed 5-12-08; 8:45 am]

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-57784; File No. SR-FINRA-2007-039]

### Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Order Approving Proposed Rule Change as Modified by Amendment Nos. 1 and 2 Thereto To Establish an Exemption for Certain Regulation NMS-Compliant Intermarket Sweep Orders from the Requirements in IM-2110-2 (Trading Ahead of Customer Limit Order) and Rule 2111 (Trading Ahead of Customer Market Orders)

May 6, 2008.

#### I. Introduction

On December 21, 2007, Financial Industry Regulatory Authority, Inc. ("FINRA") (f/k/a National Association of Securities Dealers, Inc. ("NASD")), 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 establish an exemption for certain Regulation NMS-compliant Intermarket Sweep Orders ("ISOs") from the requirements governing trading ahead of customer limit orders and customer market orders. On February 11, 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 5, 2008.<sup>3</sup> The Commission received one comment letter regarding the proposal.<sup>4</sup> FINRA responded to the comment letter on March 26, 2008.<sup>5</sup> On April 30, 2008, FINRA filed Amendment No. 2 to the proposed rule change.<sup>6</sup>

<sup>18</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> See Securities Exchange Act Release No. 57388 (February 27, 2008), 73 FR 11963.

<sup>4</sup> See submission via SEC WebForm from Craig Carlino, Monroe Securities, dated March 13, 2008.

<sup>5</sup> See letter from Andrea D. Orr, Assistant General Counsel, FINRA, to Nancy M. Morris, Secretary, Commission, dated March 26, 2008 ("FINRA letter").

<sup>6</sup> In Amendment No. 2, FINRA deleted definitions that were either unnecessary or duplicative from

Continued

<sup>7</sup> *Supra* note 4.

<sup>8</sup> SIFMA letter at 1.

<sup>9</sup> *Id.* at 2.

<sup>10</sup> *Id.* at 3.

<sup>11</sup> SIFMA letter at 1. See Securities Exchange Act Release No. 55011 (December 27, 2006) (order granting petition for review of SR-NYSEArca-2006-21).