

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-57763; File No. SR-NASD-2007-031)

May 1, 2008

Self-Regulatory Organizations; National Association of Securities Dealers, Inc. (n/k/a Financial Industry Regulatory Authority, Inc.); Order Approving Proposed Rule Change as Modified by Amendment Nos. 1, 2 and 3 thereto to Amend NASD Rule 7001E to Increase the Percentage of Market Data Revenue Shared with NASD/NYSE TRF Participants

I. Introduction

On April 24, 2007, the National Association of Securities Dealers, Inc. (“NASD”) (n/k/a Financial Industry Regulatory Authority, Inc.), filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder,² a proposed rule change to adjust the percentage of market data revenue shared with NASD/NYSE TRF participants.³ On June 1, 2007, NASD filed Amendment No. 1 to the proposed rule change. On October 29, 2007, FINRA filed Amendment No. 2 to the proposed rule change. The proposed rule change, as amended, was published for comment in the Federal Register on November 14, 2007.⁴ The Commission received one comment letter regarding the proposal.⁵ On February 4, 2008, FINRA filed Amendment No. 3 to respond to the comment letter

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ Effective July 30, 2007, Financial Industry Regulatory Authority, Inc. (“FINRA”) was formed through the consolidation of NASD and the member regulatory functions of NYSE Regulation, Inc.

⁴ See Securities Exchange Act Release No. 56754 (November 6, 2007), 72 FR 64101.

⁵ 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 December 5, 2007 (“SIFMA letter”).

and to propose a technical change to the original rule filing.⁶ This order approves the proposed rule change, as modified by Amendment Nos. 1, 2, and 3.

II. Description of the Proposed Rule Change

FINRA proposes to amend NASD Rule 7001E to increase the market data revenue that is shared with FINRA members that report trades in Tape A, Tape B, and Tape C stocks to the NASD/NYSE Trade Reporting Facility (the “NASD/NYSE TRF”).⁷ Currently, FINRA members that report trades in Tape A, Tape B, and Tape C stocks to the NASD/NYSE TRF receive a 50% pro rata credit on the gross market data revenue earned by the NASD/NYSE TRF.⁸

The proposed rule change increases from 50% to 100% the percentage of gross market data revenue that is shared with members. FINRA members that report trades in Tape A, Tape B and Tape C stocks to the NASD/NYSE TRF will thus receive a 100% pro rata credit on gross market data revenue earned by the NASD/NYSE TRF.

III. Summary of Comments

The Commission received one comment letter in response to the proposed rule change.⁹ The commenter stated that the proposed rebate demonstrated that market data fees are excessive,

⁶ Amendment No. 3 clarifies that the Tape B revenue sharing program includes both the American Stock Exchange LLC and regional exchanges. Because it is technical in nature, it is not subject to notice and comment (“Amendment No. 3”).

⁷ In establishing the NASD/NYSE TRF, NASD and NYSE Market, Inc. (“NYSE”) entered into the Limited Liability Company Agreement of NASD/NYSE Trade Reporting Facility LLC. Under that agreement, NASD, as the “SRO Member,” has the sole regulatory responsibility for the NASD/NYSE TRF. As the “Business Member,” NYSE is responsible for the management of the business affairs of the NASD/NYSE TRF, to the extent those activities are not inconsistent with FINRA’s regulatory functions.

⁸ “Gross revenue” is defined as the revenue received by the NASD/NYSE TRF from the three tape associations after the tape associations deduct allocated support costs and unincorporated business costs.

⁹ Supra note 5.

and do not have a fair and reasonable basis.¹⁰ The commenter noted that, in its capacity as the “SRO Member,” FINRA allocates and deducts costs before passing market data revenue to each TRF. The commenter asserted that 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.¹¹ The commenter also said that the filing did not address the competitive impact of the proposed rebates, and that any short-term benefits from the rebates could be diminished by the long-term impact of less competition.¹² Finally, the commenter stated that the issue of transparency regarding market data costs and revenues, which constitutes part of the NetCoalition Petition,¹³ is also present in this filing.¹⁴

FINRA responded that the arguments made by the commenter were not germane to the proposed rule change. For example, FINRA said 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.¹⁵ According to FINRA, the costs of collecting and distributing market data are not necessarily determinative of the reasonableness of the proposed rebate.¹⁶ Finally, FINRA stated that the proposed rebate does not constitute an undue burden on competition that is not in furtherance of the purposes of the Act.¹⁷

¹⁰ SIFMA letter at 2.

¹¹ Id.

¹² Id. at 3.

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

¹⁴ SIFMA letter at 3.

¹⁵ See Amendment No. 3, at 4.

¹⁶ Id.

¹⁷ Id.

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 association¹⁸ and, in particular, the requirements of Section 15A(b)(5) of the Act,¹⁹ 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 7001E to adjust the percentage of market data revenue shared with NASD/NYSE TRF participants, effective retroactively to April 18, 2007, the date the NASD/NYSE TRF began operation. FINRA seeks to increase the rebate of market data revenue to NASD/NYSE 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 NYSE, as the Business Member, has determined to rebate a greater percentage of market data revenue does not establish that the underlying fees are excessive. The SIFMA letter does not raise any other issue that would preclude approval of the FINRA proposal.

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.

¹⁸ 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).

¹⁹ 15 U.S.C. 78o-3(b)(5).

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,²⁰ that the proposed rule change (SR-NASD-2007-031), as modified by Amendment Nos. 1, 2, and 3, be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²¹

Florence E. Harmon
Deputy Secretary

²⁰ 15 U.S.C. 78s(b)(2).

²¹ 17 CFR 200.30-3(a)(12).