

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-57764; File No. SR-NASD-2007-043)

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 No. 1 Thereto to Amend NASD Rule 7001C to Increase the Percentage of Market Data Revenue Shared with NASD/NSX TRF Participants

I. Introduction

On June 29, 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/NSX TRF participants.³ On October 29, 2007, NASD filed Amendment No. 1 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 FINRA responded to the comment letter on March 27, 2008.⁶ National

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. 56752 (November 6, 2007), 72 FR 64099.

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”). This comment letter also addressed the proposal, filed by NASD, to increase the percentage of market data revenue shared with participants in the NASD/NYSE TRF. See Securities Exchange Act Release No. 56754 (November 6, 2007), 72 FR 64101 (November 14, 2007) (SR-NASD-2007-031).

⁶ See letter from Lisa C. Horrigan, Associate General Counsel, FINRA, to Nancy M. Morris, Secretary, Commission, dated March 27, 2008 (“FINRA letter”).

Stock Exchange, Inc. (“NSX”) subsequently submitted a response to the comment letter.⁷ This order approves the proposed rule change, as modified by Amendment No. 1.

II. Description of the Proposed Rule Change

FINRA proposes to amend NASD Rule 7001C to increase the percentage of market data revenue that is shared with FINRA members that report trades in New York Stock Exchange (“Tape A”), American Stock Exchange (“Tape B”), and Nasdaq Exchange (“Tape C”) stocks to the NASD/NSX Trade Reporting Facility (the “NASD/NSX TRF”).⁸ Currently, FINRA members that report trades in Tape A, Tape B, and Tape C stocks to the NASD/NSX TRF receive a 50% pro rata credit on the gross market data revenue earned by the NASD/NSX TRF.⁹

The proposed rule change increases from 50% to 75% the percentage of 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/NSX TRF will thus receive a 75% pro rata credit on gross market data revenue earned by the NASD/NSX TRF.

III. Summary of Comments

The Commission received one comment letter in response to the proposed rule change.¹⁰ The commenter stated that the proposed rebate demonstrated that market data fees are excessive,

⁷ See letter from Philip M. Pinc, Vice President, Counsel, National Stock Exchange, Inc., to Nancy M. Morris, Secretary, Commission, dated April 2, 2008 (“NSX letter”).

⁸ In establishing the NASD/NSX TRF, NASD and NSX entered into the Limited Liability Company Agreement of NASD/NSX Trade Reporting Facility LLC. Under that agreement, NASD, as the “SRO Member,” has the sole regulatory responsibility for the NASD/NSX TRF. As the “Business Member,” NSX is responsible for the management of the business affairs of the NASD/NSX TRF, to the extent those activities are not inconsistent with FINRA’s regulatory functions.

⁹ “Gross revenue” is defined as the revenue received by the NASD/NSX TRF from the three tape associations after the tape associations deduct allocated support costs and unincorporated business costs.

¹⁰ SIFMA letter, supra note 5.

and do not have a fair and reasonable basis.¹¹ The commenter noted that, in its capacity as “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 could not be allocated, and should thus not be a basis for determining the reasonableness of market data fees.¹² Finally, the commenter asserted 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 none of the arguments made by the commenter was germane to the proposed rule change.¹⁵ 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.¹⁶ FINRA also asserted that the costs of collecting and distributing market data are not necessarily determinative of the reasonableness of the proposed rebate.¹⁷

In its response, NSX stated that it generally agreed with the SIFMA letter.¹⁸ In particular, NSX agreed with SIFMA’s assertion that the proposal to rebate 100% of market data revenue for

¹¹ SIFMA letter at 2.

¹² Id.

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 FINRA letter at 1.

¹⁶ Id. at 2.

¹⁷ Id.

¹⁸ NSX letter at 2.

participants of the NASD/NYSE TFF¹⁹ might drive smaller TRFs, such as the NASD/NSX TRF, out of business.²⁰ NSX requested that the Commission approve the proposed rebate of market data revenue to participants in the NASD/NSX TRF, as it was consistent with NSX's policy of rebating market data revenues to investors.²¹

IV. Discussion and Commission Findings

The Commission has carefully reviewed the proposed rule change, the comment letter, and the responses of both FINRA and NSX 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 association²² and, in particular, the requirements of Section 15A(b)(5) of the Act,²³ 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 7001C to adjust the percentage of market data revenue shared with NASD/NSX TRF participants, effective retroactively to April 1, 2007. FINRA seeks to increase the rebate of market data revenue to NASD/NSX TRF participants. Neither the costs incurred in collecting that market data, nor the

¹⁹ See Securities Exchange Act Release No. 56754 (November 6, 2007), 72 FR 64101 (November 14, 2007) (SR-NASD-2007-031).

²⁰ NSX letter at 2.

²¹ Id.

²² 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).

²³ 15 U.S.C. 78o-3(b)(5).

calculation of market data fees are directly at issue in this filing. The fact that NSX, 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.

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act, that the proposed rule change (SR-NASD-2007-043), as modified by Amendment No. 1, be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁴

Florence E. Harmon
Deputy Secretary

²⁴ 17 CFR 200.30-3(a)(12).