

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-57986; File No. SR-FINRA-2008-016)

June 18, 2008

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of Proposed Rule Change to Align the Reporting Requirements and Dissemination Protocols for OTC Equity Transactions Involving Foreign Securities with All Other OTC Equity Securities

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder,² notice is hereby given that on April 25, 2008, the 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 substantially prepared by FINRA. On June 12, 2008, FINRA submitted Amendment No. 1 to the proposed rule change. The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

FINRA is proposing to: (1) amend NASD Rule 6620 to align the reporting requirements for over-the-counter (“OTC”) equity transactions involving foreign securities with the reporting requirements for other OTC equity transactions; and (2) align the dissemination protocols for all last sale reports of OTC equity transactions. The text of the proposed rule change is available on FINRA’s Web site at www.finra.org, at FINRA’s principal office, and at the Commission’s Public Reference Room.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

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

NASD Rule 6620(a) generally requires that transactions in OTC Equity Securities that are executed between 8:00 a.m. and 8:00 p.m. Eastern Time be reported to the OTC Reporting Facility within 90 seconds of execution.³ This 90-second reporting requirement currently applies to transactions in OTC Equity Securities that are domestic equity securities, ADRs, and Canadian issues.⁴ Thus, all ADRs and Canadian issues, including those that are not registered with the Commission and otherwise subject to financial reporting, are subject to 90-second reporting under NASD Rule 6620. All other foreign equity securities are excluded from the 90-second reporting requirement and instead must be reported by 1:30 p.m. Eastern Time the day

³ For purposes of the NASD Rule 6600 Series, "OTC Equity Securities" means equity securities for which real-time trade reporting is not otherwise required. See NASD Rule 6600. NASD Rule 6610(d) further defines "OTC Equity Security" as "any non-exchange-listed security and certain exchange-listed securities that do not otherwise qualify for real-time trade reporting."

⁴ An ADR is a negotiable instrument that represents an ownership interest in a specified number or fraction of securities that have been deposited with a depositary. The deposited securities are typically equity securities of a foreign issuer, and the depositary is usually a U.S. bank or trust company. See Securities Exchange Act Release No. 48482 (September 11, 2003), 68 FR 54644 (September 17, 2003) (File No. S7-16-03).

after the transaction is executed.⁵ Although not required, a member may choose to report transactions in foreign securities within 90 seconds of execution.⁶

In addition to the disparity in the trade reporting requirements under NASD Rule 6620, there is also a disparity in the way last sale information of OTC equity transactions is disseminated to the marketplace. Although last sale information for transactions in domestic OTC Equity Securities reported pursuant to Rule 6620 is disseminated on a real-time basis, irrespective of whether the security is registered with the Commission, there is no uniformity regarding the dissemination of last sale information for transactions in ADRs and foreign securities. Last sale reports of ADRs and Canadian issues that are quoted on the OTC Bulletin Board (“OTCBB”), which requires registration with the Commission, are disseminated on a real-time basis. However, only summary information is disseminated at the end of each trading day for OTC ADRs and Canadian issues that are not quoted on the OTCBB, whether or not they are registered with the Commission. Transactions in foreign securities, other than Canadian issues and ADRs, that are quoted on the OTCBB are disseminated on a real-time basis if they are received on the day of the trade. However, as noted above, there is no current requirement to report these trades to FINRA within 90 seconds of execution, or even on the trade date. If an OTC transaction in a foreign security is not reported on the trade date, last sale information for that transaction is not disseminated.

The bifurcation with respect to dissemination of OTC ADRs and foreign securities arose in the broader context of the establishment and evolution of the OTCBB. When real-time reporting for OTC Equity Securities, including ADRs and Canadian securities, was proposed in

⁵ See NASD Rule 6620(a)(3)(C)(iii).

⁶ See NASD Rule 6620 n.1.

1992, FINRA agreed not to publish quotations and trade reports of foreign securities and ADRs in order to avoid any reconsideration of the exemption from registration pursuant to SEC Rule 12g3-2(b).⁷ In connection with the permanent approval of the OTCBB in 1997, unregistered ADRs and foreign securities became ineligible for quotation on the OTCBB, and at that time, real-time dissemination of transactions in those securities was limited to only those quoted on the OTCBB.⁸ Since the Commission approved FINRA's assumption of direct authority for the activities related to OTC trading, including but not limited to the OTCBB,⁹ FINRA staff has been reviewing, among other areas, the trade reporting and dissemination requirements for OTC Equity Securities.

FINRA staff believes that the different treatment with respect to the reporting and dissemination of trade reports for OTC equity transactions in domestic securities, foreign securities, ADRs, and Canadian issues should be eliminated and that all transactions in OTC Equity Securities should be reported within 90 seconds of execution and that last sale information regarding those transactions should be disseminated on a real-time basis. FINRA

⁷ See Securities Exchange Act Release No. 31695 (January 6, 1993), 58 FR 4189 (January 13, 1993) (notice of filing of proposed rule change SR-NASD-92-48). FINRA notes that, during the OTCBB pilot phase, the Commission had permitted the quotation of unregistered foreign securities on the OTCBB, but raised concerns that quotation of such securities on the OTCBB would provide an active secondary trading market in unregistered securities and could result in such securities no longer meeting the terms of the SEC Rule 12g3-2(b) exemption, which is not available for securities quoted in an automated inter-dealer quotation system. Therefore, the quotation of foreign securities on the OTCBB was limited at that time to "non-firm" quotations that could be updated a maximum of two times per day (thus, quotes in foreign securities on the OTCBB were effectively stale), and trade report information was not publicly disseminated. See, e.g., Securities Exchange Act Release No. 38456 (March 31, 1997), 62 FR 16635 (April 7, 1997) (order approving SR-NASD-92-7).

⁸ See id.

⁹ See Securities Exchange Act Release No. 52508 (September 26, 2005), 70 FR 57346 (September 30, 2005) (order approving SR-NASD-2005-089).

created the exclusion to the 90-second reporting requirement for foreign securities in the early 1990s in response to concerns that requiring 90-second reporting for transactions in foreign equity securities could pose significant and costly operational problems for firms.¹⁰ Currently, FINRA receives an overwhelming majority of reports for OTC transactions in foreign securities within 90 seconds of execution. FINRA believes that the operational issues that may have been present when the exclusion was adopted are no longer applicable. Consequently, the proposed rule change would eliminate the distinctions between domestic, foreign, ADR, and Canadian securities and would treat all OTC transactions in the same manner, from both a reporting and a dissemination standpoint.¹¹

By requiring 90-second reporting for foreign securities transactions, FINRA can uniformly disseminate that information on a real-time basis as well, providing improved transparency to the OTC market. Accordingly, the proposed rule change would not only eliminate the exclusion to the 90-second reporting requirement for transactions in foreign securities (and thus impose the same reporting requirements on all transactions in OTC equity securities), but would also provide for the real-time dissemination of this information.¹² FINRA believes that moving to a transaction reporting regime where all transactions in OTC Equity

¹⁰ See Securities Exchange Act Release No. 32647 (July 16, 1993), 58 FR 39262 (July 22, 1993) (order approving SR-NASD-92-48).

¹¹ The single exception would be for transactions in foreign equity securities executed over-the-counter in a foreign country and reported to the regulator of securities markets for that country. See NASD Rule 6620(g)(2)(B). Transactions in foreign equity securities executed on and reported to a foreign securities exchange also are excepted from the FINRA reporting requirements. See NASD Rule 6620(g)(2)(A).

¹² With the exception of NASD Rule 6250, which applies to dissemination of transaction information for TRACE-eligible securities, dissemination of trade reports is typically not governed by FINRA's rules, but rather by its protocols. Thus, FINRA is not proposing to amend any rules to effectuate the changes to the dissemination protocols discussed in this rule filing.

Securities are subject to prompt last sale reporting and real-time dissemination would substantially improve the transparency of the OTC market.¹³

FINRA believes that prompt last sale reporting and real-time dissemination of trade reports for all OTC transactions in ADRs, foreign securities, and Canadian issues will enhance the amount of market information available to investors and better enable investors to monitor the executions they receive in these securities. FINRA believes that it would not be providing a vehicle for quoting or trading unregistered securities, a prior concern raised by the Commission.¹⁴ Instead, FINRA would merely be disseminating, on a real-time basis, reports of transactions that have already occurred in the OTC market and have been submitted to FINRA by its members within 90 seconds of execution. FINRA believes that real-time dissemination is wholly consistent with the Commission's own views stated in its order approving the OTCBB on a permanent basis:

[FINRA] could increase transparency with less customer confusion by requiring transaction reporting for foreign securities traded over-the-counter in the U.S. Transaction reporting information has the potential to greatly enhance the amount of market information available to investors

¹³ Section 31 of the Act requires FINRA to pay transaction fees and assessments to the Commission for sales transacted by or through its members otherwise than on a national securities exchange of securities subject to prompt last sale reporting (pursuant to the rules of the Commission or FINRA). This fee is designed to recover the costs related to the government's supervision and regulation of the securities markets and securities professionals. To recover the costs of FINRA's Section 31 obligation, FINRA assesses a regulatory transaction fee on its members under Section 3 of Schedule A to the FINRA By-Laws, the amount of which is set in accordance with Section 31. Because transactions in foreign securities (other than ADRs and Canadian issues) are not currently required to be reported "promptly," they are excluded from the regulatory transaction fee. The requirement to report transactions in foreign securities to FINRA within 90 seconds of execution would result in those transactions being subject to the regulatory transaction fee.

¹⁴ Quotations in unregistered ADRs and foreign securities, including some Canadian issues, already are published via the Electronic Pink Sheets.

and better enable investors to monitor the executions they receive in foreign securities.¹⁵

Because FINRA would simply be collecting and disseminating trade reports and not providing a vehicle for quoting or trading securities, FINRA does not believe that the proposed rule change gives rise to the concerns previously voiced by the Commission in the context of the OTCBB regarding the quotation of “unregistered securities on a visible U.S. market operated by a self-regulatory organization.”¹⁶ Nor would it produce what the Commission has sought to avoid: “a regulated public marketplace for unregistered securities.”¹⁷

FINRA intends to announce the effective date of the proposed rule change in a Regulatory Notice to be published no later than 60 days following Commission approval of this proposed rule change. The effective date will be 30 days following publication of the Regulatory Notice announcing Commission approval.

2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,¹⁸ which requires, among other things, that FINRA rules must 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. In addition, Section 11A(a)(1) of the Act¹⁹ articulates the Congressional findings and policy goals and

¹⁵ See Securities Exchange Act Release No. 38456 (March 31, 1997), 62 FR 16635 (April 7, 1997) (order approving SR-NASD-92-7).

¹⁶ See id.

¹⁷ See id.

¹⁸ 15 U.S.C. 78o-3(b)(6).

¹⁹ 15 U.S.C. 78k-1(a)(1).

objectives with respect to the development of a national market system.²⁰ Essentially, Congress found that new data processing and communication techniques should be applied to improve the efficiency of market operations, broaden the distribution of market information, enhance opportunities to achieve best execution and promote competition among market participants. FINRA believes that the proposed rule change will enhance transparency in foreign securities and promote pricing efficiency. Investors and other market participants will be afforded greater market information and be better able to monitor the executions they receive in these securities.

B. Self-Regulatory Organization's Statement on Burden on Competition

FINRA does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants or Others

Written comments were neither solicited nor received. However, in connection with two other rule filings, SR-NASD-2005-089 and SR-NASD-2007-039, the Commission received eight written comment letters,²¹ in which the commenters urged the Commission to require real-time

²⁰ Although Section 11A does not provide the Commission with authority to approve a self-regulatory organization's proposal, it is relevant in that it sets forth the Act's general policy goals for securities markets.

²¹ See Letter dated August 26, 2005 from R. Cromwell Coulson, Pink Sheets LLC, to Jonathan Katz; Letter dated September 19, 2005 from William Vance and Kimberly Unger, The Security Traders Association of New York, Inc., to Jonathan Katz; Letter dated August 13, 2007 from R. Cromwell Coulson, Pink Sheets LLC, to Nancy Morris ("Coulson Letter"); Letter dated August 13, 2007 from Stephen Kay and Kimberly Unger, The Security Traders Association of New York, Inc., to Nancy Morris ("Kay/Unger Letter"); Letter dated August 13, 2007 from Lisa Utasi and John Giese, Security Traders Association, to Nancy Morris ("Utasi/Giese Letter"); Letter dated August 17, 2007 from Bryce Engel, TD Ameritrade, Inc., to Nancy Morris ("Engel Letter"); Letter dated August 23, 2007 from Xin Ye to Nancy Morris ("Ye Letter"); and Letter dated August 30, 2007 from Leonard Amoruso, Knight Capital Group Inc., to Nancy Morris.

dissemination of OTC-traded ADRs. For example, several commenters noted that real-time trade information enables investors to evaluate the quality of executions they receive and deters “trading ahead” of orders and other improper trading practices.²² One commenter argued that the “assertion that the dissemination of this data will encourage trading in unregistered securities is unsustainable, given the fact that FINRA already releases real-time data on unregistered domestic issues. Especially as regards unregistered ADRs, more information, delivered in a more timely way, can only serve to benefit investors.”²³ Another commenter, in discussing the delisting of an ADR from the NYSE, stated that “[d]eprived of access to real time trading information, I, a market participant, just lost the ability to monitor the quality and firmness of quotation and executions of the security, thus hampering my ability to have a full grasp of the pulse of its trading.”²⁴

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

Within 35 days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding, or (ii) as to which the self-regulatory organization consents, the Commission will:

- (A) by order approve the proposed rule change, or
- (B) institute proceedings to determine whether the proposed rule change should be disapproved.

²² See Coulson Letter; Kay/Unger Letter; Engel Letter.

²³ Utasi/Giesea Letter. See also Coulson Letter.

²⁴ Ye Letter.

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. Specifically, the Commission requests comment as to whether the proposed rule change would significantly change the factors considered by foreign private issuers in deciding whether to list on a U.S. securities exchange and register with the Commission, and whether the proposed rule change would serve to promote the U.S. over-the-counter market for unregistered foreign securities.

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. Please include File Number SR-FINRA-2008-016 on the subject line.

Paper Comments:

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

All submissions should refer to File Number SR-FINRA-2008-016. 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 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the self-regulatory organization. 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 Number SR-FINRA-2008-016 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁵

Florence E. Harmon
Acting Secretary

²⁵ 17 CFR 200.30-3(a)(12).