

Commission finds that the proposal is consistent with Section 6(b)(4) of the Act,<sup>7</sup> which requires that an exchange have rules that provide for the equitable allocation of reasonable dues, fees, and other charges among its members and other persons using its facilities and the requirements under Section 6(b)(5)<sup>8</sup> that the rules of an exchange be designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest, and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Commission also finds that the proposed rule change is consistent with the provisions of Section 6(b)(8) of the Act,<sup>9</sup> which requires that the rules of an exchange not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. Finally, the Commission finds that the proposed rule change is consistent with Rule 603(a) of Regulation NMS,<sup>10</sup> adopted under Section 11A(c)(1) of the Act, which requires an exclusive processor that distributes information with respect to quotations for or transactions in an NMS stock to do so on terms that are fair and reasonable and that are not unreasonably discriminatory.<sup>11</sup>

Under this proposal, the Exchange would charge a \$500 monthly fee to recipients of the NYSE Amex Order Imbalance Information datafeed. The \$500 monthly fee would allow vendors to redistribute NYSE Amex Order Imbalance Information: (1) Without having to differentiate between professional subscribers and nonprofessional subscribers; (2) without having to account for the extent of access to data; (3) without having to procure contracts with its subscribers for the benefit of the Exchange; and (4) without having to report the number of its subscribers.

The Commission has reviewed the proposal using the approach set forth in the NYSE Arca Order for non-core

market data fees.<sup>12</sup> In the NYSE Arca Order, the Commission stated that “when possible, reliance on competitive forces is the most appropriate and effective means to assess whether the terms for the distribution of non-core data are equitable, fair and reasonable, and not unreasonably discriminatory.”<sup>13</sup> It noted that the “existence of significant competition provides a substantial basis for finding that the terms of an exchange’s fee proposal are equitable, fair, reasonable, and not unreasonably or unfairly discriminatory.”<sup>14</sup> If an exchange “was subject to significant competitive forces in setting the terms of a proposal,” the Commission will approve a proposal unless it determines that “there is a substantial countervailing basis to find that the terms nevertheless fail to meet an applicable requirement of the Exchange Act or the rules thereunder.”<sup>15</sup>

There are a variety of alternative sources of information that impose significant competitive pressures on the NYSE Amex in setting the terms for distributing its market data. The Commission believes that the availability of those alternatives, as well as the NYSE Amex’s compelling need to attract order flow, imposed significant competitive pressure on the NYSE Amex to act equitably, fairly, and reasonably in setting the terms of its proposal. In addition, the Commission recently determined that NYSE was subject to significant competitive forces in setting fees for a substantially similar non-core market data product—NYSE Order Imbalance Information datafeed.<sup>16</sup>

Because the NYSE Amex was subject to significant competitive forces in setting the terms of the proposal, the Commission will approve the proposal in the absence of a substantial countervailing basis to find that its terms nevertheless fail to meet an applicable requirement of the Act or the rules thereunder. An analysis of the proposal does not provide such a basis.

#### IV. Conclusion

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>17</sup> that the proposed rule change (SR–NYSEAmex–2009–26) is hereby approved.

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

**Florence E. Harmon,**

*Deputy Secretary.*

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#### SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–60377; File No. SR–FINRA–2009–031]

#### Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Order Approving Proposed Rule Change as Amended, Relating to the Reporting of Over-the-Counter Transactions in Equity Securities Executed Outside Normal Market Hours

July 23, 2009.

#### I. Introduction

On May 8, 2009, 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 amend FINRA trade reporting rules relating to over-the-counter transactions in equity securities executed outside normal market hours to (1) require that any trades executed during the hours that a FINRA Facility (the Alternative Display Facility (“ADF”), a Trade Reporting Facility (“TRF”) or the OTC Reporting Facility (“ORF”)) is closed be reported within 15 minutes of the opening of the Facility, *i.e.*, 8:15 a.m. Eastern Time; and (2) conform the trade reporting requirements applicable to “outside normal market hours” transactions across FINRA Facilities. On May 29, 2009, FINRA filed Amendment No. 1 to the proposed Rule Change. The proposed rule change was published for comment in the **Federal Register** on June 9, 2009.<sup>3</sup> The Commission received no comment letters on the proposed rule change.

proposed rule’s impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

<sup>7</sup> 15 U.S.C. 78f(b)(4).

<sup>8</sup> 15 U.S.C. 78f(b)(5).

<sup>9</sup> 15 U.S.C. 78f(b)(8).

<sup>10</sup> 17 CFR 242.603(a).

<sup>11</sup> NYSE Amex is an exclusive processor of NYSE Amex depth-of-book data under Section 3(a)(22)(B) of the Act, 15 U.S.C. 78c(a)(22)(B), which defines an exclusive processor as, among other things, an exchange that distributes information with respect to quotations or transactions on an exclusive basis on its own behalf.

<sup>12</sup> Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770 (December 9, 2008) (SR–NYSEArca–2006–21). In the NYSE Arca Order, the Commission describes in great detail the competitive factors that apply to non-core market data products. The Commission hereby incorporates by reference the data and analysis from the NYSE Arca Order into this order.

<sup>13</sup> *Id.* at 74771.

<sup>14</sup> *Id.* at 74782.

<sup>15</sup> *Id.* at 74781.

<sup>16</sup> See Securities Exchange Act Release No. 59543 (March 9, 2009), 74 FR 11159 (March 16, 2009) (SR–NYSE–2008–132).

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

<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. 60022 (June 1, 2009), 74 FR 27361 (“Notice”).

This order approves the proposed rule change as amended.

## II. Description of the Proposed Rule Change

FINRA is proposing to amend the trade reporting rules<sup>4</sup> to require that trades executed during the hours that the FINRA Facility is closed be reported within 15 minutes of the opening of the facility (*i.e.*, 8:15 a.m. Eastern Time for all FINRA Facilities). Specifically, members would be required to report as follows: (1) Trades executed between midnight and 8 a.m. must be reported by 8:15 a.m. on trade date, and (2) trades executed between the close of the FINRA Facility (*i.e.*, either 6:30 p.m. or 8 p.m.) and midnight must be reported on an “as/of” basis the following business day by 8:15 a.m. These trades would be designated with the unique trade report modifier to denote their execution outside normal market hours. Any such trades not reported by 8:15 a.m. would be marked with the “outside normal market hours trade reported late” modifier.

FINRA also is proposing certain amendments to conform the requirements for reporting “outside normal market hours” trades across FINRA Facilities. First, under current rules and system functionality, members are not permitted to submit to the FINRA/Nasdaq TRF and ORF a trade report with the “outside normal market hours” modifier during normal market hours. For example, if a member executes a trade at 9:29:00 a.m. and reports the trade at 9:30:15 a.m. (in compliance with the 90-second reporting requirement under FINRA rules), the FINRA/Nasdaq TRF and ORF will reject the trade report; the trade cannot be reported, and will not be disseminated, until after 4 p.m. By contrast, the ADF and FINRA/NYSE TRF permit the submission of trade reports with the “outside normal market hours” modifier throughout the day. With this change, the trade described in the example above can be reported to the ADF or FINRA/NYSE TRF and disseminated at 9:30:15 a.m.

Accordingly, FINRA is proposing to amend Rules 6380A(a)(2)(A) and (a)(2)(C) relating to the FINRA/Nasdaq TRF and Rules 6622(a)(3)(A) and (a)(3)(C)(i) relating to the ORF to delete the requirement that “outside normal market hours” transactions that are not reported by 9:30 a.m. be reported after 4 p.m. The proposed amendments are identical to the text of current Rules

6282(a)(2)(A) and (a)(2)(B)(i) relating to the ADF.

Additionally, FINRA is proposing conforming changes to Rules 6380B(a)(2)(A) and (C) relating to the FINRA/NYSE TRF. Today, members submit trade reports with the “outside normal market hours” modifier to the FINRA/NYSE TRF throughout the day. However, FINRA stated that when the rules for this TRF were originally adopted, these provisions inadvertently were based on the rules relating to the FINRA/Nasdaq TRF, rather than the ADF. Thus, FINRA stated that the proposed amendments for the FINRA/NYSE TRF do not represent a departure from current member reporting practices and systems functionality.<sup>5</sup>

In this regard, FINRA also is proposing to amend Rules 6380A(a)(2)(D), 6380B(a)(2)(D) and 6622(a)(3)(C)(ii) to require expressly that “as/of” reports submitted pursuant to these provisions include the unique trade report modifier, as specified by FINRA, to denote their execution outside normal market hours. The proposed amendments conform to the text of current Rule 6282(a)(2)(C)(ii).

Second, FINRA is proposing to amend Rules 6282(a), 6380A(a), 6380B(a) and 6622(a) to consolidate the provisions relating to late trade reporting and make clear that trades that are required to be reported on trade date, but are not reported on trade date, must be reported on an “as/of” basis on a subsequent date (T+N) and shall be designated as late. This requirement applies to trades executed during normal market hours, as well as those “outside normal market hours” trades that are required by rule to be reported on trade date (*i.e.*, trades executed between midnight and 9:30 a.m. and between 4 p.m. and the close of the FINRA Facility at either 6:30 or 8 p.m.). The proposed amendments also would make clear the requirement that “outside normal market hours” trades that are required to be reported on an “as/of” basis the following business day (T+1), but are not reported T+1, must be reported on a subsequent date (T+N) and shall be designated as late.<sup>6</sup> Accordingly, FINRA is proposing to amend Rules 6380A(a)(2)(B), 6380B(a)(2)(B) and 6622(a)(3)(B) to delete the duplicative requirement that transactions not reported by 8 p.m. on trade date must be reported on an “as/of” basis the following business day (T+1).

<sup>5</sup> See Notice, *supra*, note 3.

<sup>6</sup> FINRA is proposing to amend paragraph (a)(1) and adopt new paragraph (a)(6) of Rule 6282 to conform to Rules 6380A(a)(4), 6380B(a)(4) and 6622(a)(5).

Third, FINRA is proposing certain technical, non-material changes to conform the text of the rules relating to the reporting of trades executed outside normal market hours across FINRA Facilities. For example, FINRA is proposing to amend Rule 6282(a)(2) relating to the ADF and Rule 6622(a)(3) relating to the ORF to delete the specific references to the “.T” trade report modifier. This conforms to the trade reporting rules relating to the TRFs, as well as the other provisions of the ADF trade reporting rules, which do not refer to specific trade report modifier labels.<sup>7</sup> Additionally, FINRA is proposing to renumber the subparagraphs in Rule 6282(a)(2) relating to the ADF and Rule 6622(a)(3) relating to the ORF to conform to the numbering of the subparagraphs in Rules 6380A(a)(2) and 6380B(a)(2) relating to the TRFs.

## III. Discussion and Findings

After careful review, the Commission 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>8</sup> In particular, the Commission finds that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,<sup>9</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 proposed rule change will enhance market transparency by ensuring that these “outside normal market hours” trades are reported and disseminated closer to the actual execution time rather than reported at some later time during the trading day. As a result, market participants will have better information about the time of execution for such trades. For example, under current rules, a trade with the “outside normal market hours” modifier that is reported and disseminated at 9:20 a.m. could have been executed and reported real-time at 9:20 a.m., or it could have been executed at some point between midnight and the opening of the FINRA Facility at 8 a.m. There is currently nothing to distinguish a trade executed and reported at 9:20 a.m. from a trade executed between midnight and 8 a.m.

<sup>7</sup> See, *e.g.*, Rules 6282(a)(4), 6380A(a)(2) and (5) and 6380B(a)(2) and (5).

<sup>8</sup> In approving this proposal, the Commission has considered the proposed rule’s impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>9</sup> 15 U.S.C. 78o-3(b)(6).

<sup>4</sup> See Rules 6282(a)(2)(B); 6380A(a)(2)(C) and (D); 6380B(a)(2)(C) and (D); and 6622(a)(3)(C).

and reported at 9:20 a.m. Under the proposed rule change, a trade executed between midnight and 8 a.m. that is reported at 9:20 a.m. would be marked late, thus distinguishing it from a trade executed and reported real-time at 9:20 a.m. The Commission believes that this change will enhance market transparency by eliminating systematically imposed delays in the reporting of "outside normal market hours" trades to the FINRA/Nasdaq TRF and ORF.

The Commission believes that by conforming the reporting requirements and systems functionality with respect to "outside normal market hours" trades across FINRA Facilities, the proposed rule change will promote more consistent trade reporting by members and a more complete and accurate audit trail.<sup>10</sup>

#### IV. Conclusion

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>11</sup> that the proposed rule change (SR-FINRA-2009-031), as amended, be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>12</sup>

<sup>10</sup> The Commission notes that in connection with these changes to the trade reporting rules FINRA is also moving language from Rule 6282(a)(1) to Rule 6282(a)(6) concerning patterns or practices of late trade reporting. Rule 6282(a)(1) currently states that "[a] pattern or practice of late trade reporting without exceptional circumstances shall be considered conduct inconsistent with high standards of commercial honor and just equitable principles of trade violation of Rule 2010." The change FINRA is proposing would replace the word "shall" with "may," and applies the lower standard not only to a pattern or practice of late trade reporting outside of normal market hours, but to a pattern or practice of late trade reporting during normal market hours. Rule 6282 concerns transactions reported only to TRACS, and FINRA has informed the Commission staff that the change is designed to make the rule consistent with the FINRA/NASDAQ, FINRA/NYSE, and OTC Trade Reporting Facilities, all of which currently have the identical language to proposed Rule 6282(a)(6). Telephone call between Stephanie Dumont, Senior Vice President and Director of Capital Markets Policy, FINRA, and Kathy England, Assistant Director, Commission, May 29, 2009. The Commission expects FINRA to continue pursuing violations of its trade reporting rules and to continue, as appropriate, charging violations of Rule 2010 (Standards of Commercial Honor and Principles of Trade). The Commission notes that it has routinely upheld appeals from FINRA disciplinary actions when FINRA has charged respondents with violations of Rule 2010 based solely on an underlying violation of another SRO rule. *See e.g.*, Stephen J. Gluckman, 54 S.E.C. 175, 185 (1999), Exchange Act Release No. 41628 (July 20, 1999).

<sup>11</sup> 15 U.S.C. 78s(b)(2).

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

**Florence E. Harmon,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-60386; File No. SR-OCC-2009-13]

### Self-Regulatory Organizations; The Options Clearing Corporation; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to the Clearance and Settlement of Treasury Futures Contracts

July 24, 2009.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),<sup>1</sup> notice is hereby given that on July 1, 2009, The Options Clearing Corporation ("OCC") filed with the Securities and Exchange Commission the proposed rule change as described in Items I, II, and III below, which Items have been prepared primarily by OCC. OCC filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act<sup>2</sup> and Rule 19b-4(f)(4) thereunder<sup>3</sup> so that the proposal was effective upon filing with 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

The proposed rule change will establish parameters for OCC to clear and settle futures contracts based on U.S. Treasury Notes and Bonds ("Treasury Futures").

#### II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, OCC 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. OCC has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

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

<sup>2</sup> 15 U.S.C. 78s(b)(3)(A)(iii).

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

#### A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

The purpose of this proposed rule change is to establish new provisions to OCC's rules in order for OCC to provide clearance and settlement services for Treasury Futures transactions that are proposed to be traded by ELX Futures LP. ("ELX"), an electronic futures market that was designated as a contract market by the Commodity Futures Trading Commission ("CFTC") on May 22, 2009.<sup>4</sup> Under the terms of its clearing agreement with ELX dated December 5, 2008,<sup>5</sup> OCC will operate as the exclusive provider of clearance and settlement services through physical delivery for Treasury Futures and other futures, futures options, or commodity options that may be traded on ELX. As such, ELX will send OCC matched trade data so that OCC can margin the contracts and inform ELX members their payment and securities delivery obligations.

##### 1. Delivery of Underlying Treasury Securities

As detailed in proposed modifications to Chapter 13 of its Rules, OCC clearing members may satisfy their delivery obligations with respect to Treasury Futures by delivering different treasury securities provided the securities meet certain specifications. Since there is not an established delivery date to deliver the underlying treasury securities, OCC proposes to permit a seller of Treasury Futures to elect to deliver on any business day during the delivery month, which, in the case of certain Treasury Futures, includes up to the third business day of the following month.

Delivery of the treasury securities underlying Treasury Futures will be effected directly between OCC clearing members rather than through the facilities of OCC. The delivery process will occur over a period of three business days and will be initiated by the submission of a delivery intent by the clearing member holding a short position in the Treasury Futures. After a delivery intent is submitted to OCC, OCC will assign the delivery intent to an open long position in Treasury Futures beginning with long positions with the oldest trading date. On the second business day of the delivery process, the delivering clearing members will be

<sup>4</sup> Commodity Futures Trading Commission Release No. 5662-09 (May 28, 2009).

<sup>5</sup> The clearing agreement is attached as Exhibit 5A to OCC's rule filing with the Commission. OCC states that the clearing agreement is generally similar to corresponding agreements between OCC and other futures exchanges.