fashion, with the exception of communications that are solely clerical or ministerial in nature and communications that occur after a trade has been executed. Second, all customers of the ATS, if any, must be SMMPs. Third, the ATS must adopt and comply with specified policies and procedures[68] that would, among other things, require that the ATS disclose the nature of its undertaking for the seller and bidders in bid-wanteds and offerings and the manner in which it will conduct bid-wanteds and offerings,[69] as well as prohibit the ATS from giving preferential information to bidders in bid-wanteds, including but not limited to ''last looks'' (*e.g.,* directions to a bidder that it ''review'' its bid or that its bid is ''sticking out'').[70] These policies and procedures are substantially similar to those applicable to broker's brokers. To the extent an ATS fails to meet any of the requirements of the exemption under MSRB Rule G–43(d)(iii), the ATS will be considered a broker's broker and thus subject to all of the requirements of MSRB Rule G–43. The Commission agrees with the MSRB that ATSs subject to the exemption from the definition of broker's broker will remain subject to most of the requirements of MSRB Rule G–43(c).[71] For these reasons, the Commission believes that the proposed exemption from the definition of broker's broker for certain ATSs does not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.[72]

V. Conclusion

For the foregoing reasons, the Commission finds that the proposed rule change, as modified by Amendment No. 1, is consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to the MSRB, and in particular, Section 15B(b)(2)(C)[73] of the Exchange Act. The proposal will become effective six months after the date of this order.

It is therefore ordered, pursuant to Section 19(b)(2) of the Exchange Act,[74] that the proposed rule change (SR–MSRB–2012–04), as modified by Amendment No. 1, is approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[75]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–15804 Filed 6–27–12; 8:45 am]

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[68] *See supra* note 12 and accompanying text.

[69] *See* MSRB Rule G–43(d)(iii)(C)(1)–(2). The Commission notes that a broker's broker also must disclose the nature of its undertaking for the seller and bidders in bid-wanteds and offerings and the manner in which it will conduct bid-wanteds and offerings, and describe in detail how such broker's broker will satisfy its obligations under the rule if it chooses not to conduct bid-wanteds in accordance with MSRB Rule G–43(b). *See* MSRB Rule G–43(c)(i)(A)–(B) and (G). The Commission believes broker's brokers and ATSs should provide clear and transparent disclosure sufficient to understand their conduct of bid-wanteds and offerings.

[70] *See* MSRB Rule G–43(d)(iii)(C)(3); MSRB Rule G–43(c)(i)(K).

[71] *See* Notice, 77 FR at 17550. *See also supra* note 65 and accompanying text (discussing the combined recordkeeping obligations of ATSs in MSRB Rule G–8 and Regulation ATS).

[72] 15 U.S.C. 78*o*–4(b)(2)(C).

[73] 15 U.S.C. 78*o*–4(b)(2)(C).

[74] 15 U.S.C. 78s(b)(2).

[75] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–67242; File No. SR–FINRA–2012–023]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Order Granting Approval of a Proposed Rule Change Relating to FINRA's Trading Activity Fee Rate for Transactions in Covered Equity Securities

June 22, 2012.

I. Introduction

On May 2, 2012, the 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 (the ''Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change relating to FINRA's Trading Activity Fee (''TAF'') rate for transactions in covered equity securities. The proposed rule change was published for comment in the **Federal Register** on May 10, 2012.[3] The Commission received four comments on the proposal.[4] On June 19, FINRA responded to the comments.[5] This order approves the proposed rule change.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 66924 (May 4, 2012), 77 FR 27527.

[4] *See* Letters to the Commission from Leonard J. Amoruso, General Counsel, Knight Capital Group, Inc., dated June 4, 2012 (''Knight Letter''); Kimberly Unger, Executive Director, The Security Traders Association of New York, Inc., dated June 11, 2012 (''STANY Letter''); Daniel Keegan, Managing Director, Citigroup Global Markets Inc., dated June 13, 2012 (''Citi Letter''); and John C. Nagel, Managing Director and General Counsel, Citadel Securities, dated June 13, 2012 (''Citadel Letter'').

[5] *See* Letter to the Commission from Brant K. Brown, Associate General Counsel, The Financial Industry Regulatory Authority, Inc., dated June 19, 2012 (''FINRA Response Letter'').

II. Description of the Proposal

FINRA's proposal would amend Section 1 of Schedule A to the FINRA By-Laws to adjust the rate of FINRA's TAF for transactions in Covered Securities that are equity securities.[6] The TAF, along with the Personnel Assessment and the Gross Income Assessment fees, is used to fund FINRA's regulatory activities.[7]

The current TAF rate is $0.000095 per share for each sale of a Covered Security that is an equity security, with a maximum charge of $4.75 per trade. This rate, which was implemented by FINRA on March 1, 2012, represented a $0.000005 per share increase over the previously effective rate of $0.000090 per share, while the per-transaction cap for Covered Securities that are equity securities increased by $0.25, from $4.50 to $4.75.[8]

Under the current proposal, FINRA would increase the TAF rate by an additional $0.000024 per share, from $0.000095 per share to $0.000119 per share, while the per-transaction cap for transactions in Covered Securities that are equity securities would increase by $1.20, from $4.75 to $5.95. FINRA intends to make the proposal effective on July 1, 2012.

Additionally, FINRA seeks approval to submit future filings related to the TAF rate under Section 19(b)(3)(A) of the Act[9] and Rule 19b–4(f)(2) thereunder,[10] rather than under Section 19(b)(2) of the Act.[11] When the TAF was first proposed in 2002 to replace the former NASD Regulatory Fee, several commenters at the time expressed concern that the TAF rate could be raised at any time without notice and comment and Commission approval.[12] The Commission approved the TAF in part based on representations by NASD that all future changes to the TAF would

[6] Covered Securities are defined in Section 1 of Schedule A to the FINRA By-Laws as: exchange-registered securities wherever executed (except debt securities that are not TRACE-Eligible Securities); OTC Equity Securities; security futures; TRACE-Eligible Securities (provided that the transaction is a Reportable TRACE Transaction); and all municipal securities subject to Municipal Securities Rulemaking Board reporting requirements. The rules governing the TAF also include a list of exempt transactions. *See* FINRA By-Laws, Schedule A, § 1(b)(2).

[7] *See* FINRA By-Laws, Schedule A, § 1(a).

[8] *See* Securities Exchange Act Release No. 66287 (February 1, 2012), 77 FR 6161 (February 7, 2012); Securities Exchange Act Release No. 66276 (January 30, 2012), 77 FR 5613 (February 3, 2012).

[9] 15 U.S.C. 78s(b)(3)(A).

[10] 17 CFR 240.19b–4(f)(2).

[11] 15 U.S.C. 78s(b)(2).

[12] *See* Securities Exchange Act Release No. 47946 (May 30, 2003), 68 FR 34021 (June 6, 2003).

be filed under Section 19(b)(2) of the Act and thus subject to approval by the Commission.[13]

III. Summary of Comments and FINRA's Response to Comments

a. Summary of Comments

The Commission received four comments on the proposal, all of which objected to both the proposed increase in the TAF and FINRA's intention to file future TAF adjustments under Section 19(b)(3)(A) of the Act.

The commenters shared concern that the proposed increase to the TAF would disproportionately harm FINRA members that provide liquidity in covered equity securities.[14] One of these commenters observed that the proposed new TAF rate would represent a 138% increase over the rate that was first implemented in 2002.[15] This commenter argued that, because the fee is based on share transaction volume, liquidity providers are assessed the greatest amount of fees.[16] Furthermore, this commenter expressed concern that the proposal would result in an inequitable allocation of fees among FINRA members and therefore run afoul of Section 15A(b)(5) of the Act.[17] Specifically, the commenter contended that, because 95% of the TAF is generated by transactions in equity securities, the net result of the TAF is that liquidity providers that deal in covered equity securities end up funding aspects of FINRA's regulatory that do not apply to them.[18]

The commenters also questioned the structure of FINRA's funding. One commenter noted that the revenues FINRA derives from the TAF are subject to the volatility of trading in the equity markets; as a result, according to this commenter, adequate funding for FINRA's regulatory program is dependent on FINRA's transaction volume projections.[19] Additionally, this commenter believed increasing the TAF at a time when transaction volume decreases places an especially difficult burden on trading firms, which operate on thin margins and are themselves dependent on volume.[20] Thus, the commenter suggested that FINRA consider alternatives to the TAF that would be more stable and equitably apportioned among FINRA members.[21] Another commenter also suggested that FINRA consider a funding scheme for its regulatory programs that more fairly allocates the financial burden of regulation across asset classes and regulated members.[22]

Finally, the commenters objected to FINRA's proposal to file future adjustments to the TAF under Section 19(b)(3)(A) of the Act, as opposed to Section 19(b)(2). According to the commenters, allowing FINRA to do so would limit or eliminate the opportunity for public comment on such future adjustments.[23] One commenter stated that those most affected by adjustments to the TAF rely on the opportunity for public comment as an appropriate check on FINRA's rate-setting.[24] Another commenter contended that transparency is necessary in this context because FINRA has no competitors and the TAF is not subject to competitive forces.[25] Thus, both commenters expressed their belief that a reasonable period for notice and comment is important to allow FINRA members the chance for meaningful input.[26]

b. FINRA's Response to Comments

FINRA responded that the proposed adjustment to the TAF is necessary, reasonable, and equitably allocated among its members, and by explaining its rationale for the TAF structure.

With respect to the commenters' concerns about the TAF's disproportionate impact on covered equity security liquidity providers, FINRA noted that there are three critical factors that it uses to measure regulatory costs for a member firm: the overall size of the firm, the level of a firm's trading activity, and the firm's number of registered representatives. FINRA stated that it has sought to measure these factors and assess fees accordingly by implementing regulatory fees that line up with each factor: the Gross Income Assessment Fee, the TAF, and Personnel Assessment Fee, respectively. According to FINRA, trading in the equity markets drives a significant portion of its regulatory costs, and therefore it is equitable to recover some of those costs from fees generated from equity trading activity.[27] FINRA also noted that the TAF rate for other types of securities, like TRACE-reportable debt securities, is similarly calibrated to be equitably allocated in a way that corresponds to the costs of FINRA's regulatory efforts.[28]

Second, with respect to the structure of FINRA's funding, FINRA noted that the TAF is one of three types of assessments—the other two are the Gross Income Assessment and the Personnel Assessment. According to FINRA, the Gross Income Assessment, which is not dependent on market activity, is the most important component of FINRA's regulatory funding, and in 2011 the TAF represented only 33% of FINRA's total member regulatory fees and assessments.[29]

FINRA stated that it strives to operate on a cash-flow-neutral basis [30] and routinely reexamines its fee structure to consider alternative means to reasonably and equitably allocate fees in a method that is efficient, sustainable, and predictable.[31] FINRA stated that in 2009, for example, it increased the Personnel Assessment fee and revised its calculation of the Gross Income Assessment to achieve a more consistent and predictable funding scheme, while also engaging in cost-control measures.[32] According to FINRA, the currently proposed adjustment—an increase to the TAF—is necessary in light of current market conditions so that FINRA can properly fund its regulatory mission.[33] FINRA represents, however, that if market volume were to increase, it would decrease the TAF rate accordingly.[34]

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[13] *See id.* at 34024.

[14] *See* Knight Letter at 2–3; STANY Letter at 2 (expressing particular concern about FINRA members that make markets in OTC equities securities); Citi and Citadel Letters (joining the Knight and STANY Letters).

[15] *See* Knight Letter at 2.

[16] *See id.*

[17] 15 U.S.C. 78o–3(b)(5).

[18] *See* Knight Letter at 2–3. *See also* STANY Letter at 2 (expressing a similar concern); Citi and Citadel Letters (joining the Knight and STANY Letters).

[19] *See* Knight Letter at 2.

[20] *See id. See also* STANY Letter at 2 (stating that ''[a]t a time when trading desks are seeing a marked decline in revenue due to the decline in volume, we are concerned that an increase in there [sic] per share fees may cause some firms to go out of business and will serve as a further disincentive to other firms to continue making markets or providing liquidity in the markets for OTC equity securities'').

[21] *See* Knight Letter at 3.

[22] *See* STANY Letter at 2.

[23] *See* Knight Letter at 3–4; STANY Letter at 2.

[24] *See* Knight Letter at 3–4.

[25] *See* STANY Letter at 2.

[26] *See also* Citi and Citadel Letters (joining the Knight and STANY Letters).

[27] *See* FINRA Response Letter at 4. FINRA also stated that it is cognizant of the fact that its member firms may be experiencing lower revenues themselves as a result of the decrease in volume, but its statutory obligations continue to exist in difficult financial and market environments and it needs adequate resources to effectively carry out its responsibilities. *See id.* at 3.

[28] FINRA noted that when the TAF was expanded to TRACE-reportable debt securities, it set the rate so that the portion of TAF revenue received on debt transactions reflected FINRA's regulatory efforts in the fixed income market. *See id.* at 4–5.

[29] *See id.* at 2–3.

[30] *See id.* at 3.

[31] *See id.* at 6.

[32] *See id.*

[33] *See id.* at 3.

[34] *See id.* at 3, 7–8.

Finally, with respect to filing future amendments to the TAF under Section 19(b)(3)(A), FINRA stated that Section 19(b)(3)(A) and Rule 19b–4(f)(2) thereunder specifically contemplate such types of fee filings. Furthermore, FINRA noted that filing adjustments to the TAF under Section 19(b)(3)(A) would allow it to adjust rates in response to market volatility—both up and down—more efficiently, and would not run afoul of the rulemaking system's set of checks and balances established in the Act and the SEC's rules thereunder.

IV. Discussion and Commission's Findings

After carefully considering the proposed rule change, the comments submitted, and FINRA's response to the comments, 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.[35] In particular, the Commission finds that the proposal is consistent with Section 15A(b)(5) of the Act,[36] which requires, among other things, that FINRA rules provide for the equitable allocation of reasonable dues, fees, and other charges among members and issuers and other persons using any facility or system that FINRA operates or controls. The Commission believes that the proposal is reasonably designed to secure adequate funding to support FINRA's regulatory duties.

FINRA has represented that its proposed increases to the TAF rate and per-transaction cap are necessary to adequately fund FINRA's member regulatory obligations, and that the proposed increase to the TAF, like prior adjustments, seeks to remain revenue neutral to FINRA. Although commenters argue that the proposal would disproportionately harm firms that provide liquidity in covered equity securities and that the TAF is subject to volatility in the equity markets, the Commission agrees with FINRA that adjusting the TAF rate and the per-transaction cap as proposed is warranted. FINRA represented that trading in equity markets drives a significant portion of its regulatory costs, and therefore it is equitable to recover some of those costs from fees generated from equity trading activity. Moreover, as the Commission stated in 2009,

> Adequate regulatory funding is critical to FINRA's ability to meet [its] statutory requirements. While some member firms understandably question whether it is reasonable for FINRA to increase regulatory fees at a time when the securities industry has faced declining revenues as a result of the economic downturn, it is incumbent on FINRA to continue to support a robust regulatory program irrespective of market events.[37]

Furthermore, the Commission notes that the TAF constitutes only a portion of the fees that FINRA charges members to support its regulatory function. FINRA also charges a Gross Income Assessment Fee and a Personnel Assessment Fee, which are not directly correlated to equity trading volumes.

Finally, the Commission finds that FINRA may, consistent with the Act, submit future filings to adjust the TAF rate and the per-transaction fee cap for immediate effectiveness under Section 19(b)(3)(A) of the Act. Section 19(b)(3)(A)(ii) allows an SRO to file an immediately effective proposed rule change if such filing is designated as ''establishing or changing a due, fee, or other charge imposed by the self-regulatory organization.'' [38] Proposed adjustments to the TAF rate and per-transaction fee cap clearly fall within the scope of this provision.

The Commission notes that commenter concerns regarding the opportunity to comment on proposed TAF adjustments are mitigated by the fact that such filings would still be subject to comment and Commission review even when filed under Section 19(b)(3)(A). The Commission summarily may temporarily suspend such a proposed rule change within 60 days of filing ''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].'' [39]

For the reasons stated above, the Commission finds that the proposed rule change is consistent with the Act and the rules and regulations thereunder.

V. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[40] that the proposed rule change (SR–FINRA–2012–023) be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[41]

Kevin M. O'Neill,

Deputy Secretary.

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[35] In approving the proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[36] 15 U.S.C. 78o–3(b)(5).

[37] Securities Exchange Act Release No. 61042 (November 20, 2009), 74 FR 62616, 62818 (November 30, 2009).

[38] 15 U.S.C. 78s(b)(3)(A)(ii).

[39] 15 U.S.C. 78s(b)(3)(C).

[40] 15 U.S.C. 78s(b)(2).

[41] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–67239; File No. SR–FINRA–2012–028]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Adjust Fees for Review of Advertising Material Filed With FINRA

June 22, 2012.

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 June 8, 2012, 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 prepared by FINRA. FINRA has designated the proposed rule change as ''establishing or changing a due, fee or other charge'' under Section 19(b)(3)(A)(ii) of the Act[3] and Rule 19b–4(f)(2) thereunder,[4] which renders the proposal effective upon receipt of this filing by 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 the Substance of the Proposed Rule Change

FINRA is proposing to amend Section 13 of Schedule A to the FINRA By-Laws (''Section 13'') governing the review charges for advertisements, sales literature, and other such material filed with or submitted to FINRA's Advertising Regulation Department (the ''Department'').

The text of the proposed rule change is available on FINRA's Web site at *http://www.finra.org*, at the principal office of FINRA and at the Commission's Public Reference Room.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(ii).

[4] 17 CFR 240.19b–4(f)(2).