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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-76556; File No. SR-FINRA-2015-053]

December 4, 2015

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend Rule 7620A Relating to FINRA/Nasdaq Trade Reporting Facility Fees

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 November 25, 2015, Financial Industry Regulatory Authority, Inc. (“FINRA”) 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 Act³ 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 FINRA Rule 7620A to modify certain fees applicable to members that use the FINRA/Nasdaq Trade Reporting Facility (the “FINRA/Nasdaq TRF”).

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).

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

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

Background

The FINRA/Nasdaq TRF is a facility of FINRA that is operated by Nasdaq, Inc. ("NASDAQ")⁵ and utilizes Automated Confirmation Transaction ("ACT") Service technology. In connection with the establishment of the FINRA/Nasdaq TRF, FINRA and NASDAQ entered into a limited liability company agreement (the "LLC Agreement"). Under the LLC Agreement, FINRA, the "SRO Member," has sole regulatory responsibility for the FINRA/Nasdaq TRF. NASDAQ, the "Business Member," is primarily responsible for the management of the

⁵ As approved by its board of directors and the Commission, effective September 8, 2015, NASDAQ changed its legal name from The NASDAQ OMX Group, Inc. to Nasdaq, Inc. See Nasdaq, Inc. Form 8-K Current Report (filed September 8, 2015) (available at www.sec.gov/Archives/edgar/data/1120193/000119312515314459/d48431d8k.htm).

FINRA and NASDAQ are in the process of amending the LLC Agreement to reflect the name change, and FINRA will file a separate proposed rule change to update the FINRA manual accordingly.

FINRA/Nasdaq TRF's business affairs, including establishing pricing for use of the FINRA/Nasdaq TRF, to the extent those affairs are not inconsistent with the regulatory and oversight functions of FINRA. Additionally, the Business Member is obligated to pay the cost of regulation and is entitled to the profits and losses, if any, derived from the operation of the FINRA/Nasdaq TRF.

Pursuant to the FINRA Rule 7600A Series, FINRA members that are FINRA/Nasdaq TRF participants are charged fees and may qualify for fee caps (Rule 7620A) and also may qualify for revenue sharing payments for trade reporting to the FINRA/Nasdaq TRF (Rule 7610A). These rules are administered by NASDAQ, in its capacity as the Business Member and operator of the FINRA/Nasdaq TRF on behalf of FINRA,⁶ and NASDAQ collects all fees on behalf of the FINRA/Nasdaq TRF.

Pursuant to Rule 7620A, FINRA members are charged fees for "Non-Comparison/Accept (Non-Match/Compare)" trades. Such trades are defined as transactions that are not subject to the ACT Comparison process, and they may be submitted as media or non-media,⁷ clearing or non-clearing, AGU (automated give-up), QSR (Qualified Service Representative), one-sided or internalized crosses.⁸ Under the fee schedule there are four categories of fees, each of which is applicable to transactions of the three Tapes:⁹ (1) Media/Executing Party; (2) Non-

⁶ FINRA's oversight of this function performed by the Business Member is conducted through a recurring assessment and review of TRF operations by an outside independent audit firm.

⁷ Media eligible trade reports are those that are submitted to the FINRA/Nasdaq TRF for public dissemination by the Securities Information Processors. By contrast, non-media trade reports are not submitted to the FINRA/Nasdaq TRF for public dissemination, but are submitted for regulatory and/or clearance and settlement purposes.

⁸ See FINRA Rule 7620A.01.

⁹ Market data is transmitted to three tapes based on the listing venue of the security: New York Stock Exchange securities ("Tape A"), American Stock Exchange and regional

Media/Executing Party; (3) Media/Contra; (4) Non-Media/Contra.¹⁰ Each fee category is subject to a monthly fee cap, which is based on the average daily volume of reports submitted to a particular Tape. To be eligible for a cap in a particular Tape, a member must achieve a minimum average daily volume of 2,500 media reports submitted to that Tape as Executing Party in a given month. Trade reports in which the member appears as the Contra Party do not contribute to the achievement of the cap. However, if a member is eligible for a cap based on media trade reports in which it appears as the Executing Party, then caps also would apply to media reports in which that member appears as the Contra Party, as well as to non-media reports where the member appears as Executing Party or Contra Party. Thus, once a member achieves a cap, the maximum number of billable trade reports applicable to each fee category is 2,500 for Tape A, B or C.

Under the current fee cap, a FINRA member that does not conduct a business whereby it is the Executing Party does not have the opportunity to receive a fee cap. Currently, FINRA members are charged Media/Contra fees of \$0.013 multiplied by the number of Media/Contra Reports during the month. Similarly, FINRA members are charged Non-Media/Contra fees of \$0.013 multiplied by the number of Non-Media/Contra Reports during the month. If a FINRA member is eligible under the existing cap, the maximum monthly charge is \$0.013 multiplied by 2,500 (for Tape A, B or C) multiplied by number of trading days in a month. Without the

exchange securities (“Tape B”), and Nasdaq Stock Market securities (“Tape C”). Tape A and Tape B are generally referred to as the Consolidated Tape.

¹⁰ Pursuant to the rule’s Supplementary Material, the “Executing Party (EP)” is defined as the member with the trade reporting obligation under FINRA rules, and the “Contra (CP)” is defined as the member on the contra side of a trade report. These positions formerly were identified in FINRA rules as the “Market Maker” or “MM” side and the “Order Entry” or “OE” side, respectively. See FINRA Rule 7620A.01.

proposed fee cap, a FINRA member that does not conduct a business whereby it is the Executing Party may significantly exceed the cap limit.

Consequently, NASDAQ, as the Business Member, has determined to provide an alternative monthly fee cap of \$5,000 per Tape (A, B or C) applied to trades in each fee category. Eligibility for the new fee cap is based on a FINRA member's trade reporting of Media/Contra trades to the TRF and its participation on an alternative trading system registered pursuant to Regulation ATS¹¹ (an "ATS") as a market maker. Specifically, the FINRA member must make markets on an ATS by maintaining a two-sided quote. FINRA members must complete and provide a form to NASDAQ, in which the FINRA member attests that it maintains two-sided quotes for each security that the FINRA member maintains interest in within each ATS and that it displays a quotation size of at least one normal unit of trading (specific for each security).¹² The FINRA member must also attest that it will continue to meet the ATS-based requirements to be eligible for the fee cap.¹³ In addition, to qualify a FINRA member must have its Contra/Media trades equal, or exceed, 55% of its total FINRA/Nasdaq TRF volume. Lastly, the FINRA member must be contra to a minimum of 1 million trades in Tape A, 500,000 trades in Tape C, and 250,000 trades in Tape B to qualify for the fee cap in the securities of the Tapes, respectively. NASDAQ, as the Business Member, has set the required level of trades reported for each of the Tapes based on the differing levels of overall trades reported to the FINRA/Nasdaq TRF as Contra Party.

¹¹ 17 CFR 242.300-303.

¹² The form of attestation that firms will be required to submit to NASDAQ under the proposed rule change is attached to this filing as Exhibit 3.

¹³ NASDAQ will audit FINRA members that choose to participate to ensure compliance with the attestation.

Although the proposed fee cap is a “flat” cap set at \$5,000 and the existing fee cap is based on a calculation, they are comparable in terms of the limitation of total fees paid. For example, a member that qualifies under the existing fee cap would pay no more than \$3,565 per month in the securities of a single Tape for trade reports (depending on the total number of days in the month).¹⁴ A member qualifying under the proposed Media/Contra-based fee cap would pay no more than \$5,000 per month in the securities of a single Tape.¹⁵

NASDAQ, as the Business Member, has designed the proposed fee cap to make pricing more competitive to attract and retain participants on the FINRA/Nasdaq TRF. NASDAQ also has determined to introduce the proposed fee cap in recognition of a new kind of trading behavior that has emerged in the marketplace. Specifically, some firms that act as market makers route orders to an ATS for execution within the ATS. Such market makers may have trade volume reported to the FINRA/Nasdaq TRF; however, these executions would not qualify the market maker for a fee cap under the existing rules because the ATS is the Executing Party on the trades. Accordingly, FINRA, as the SRO Member, is proposing to amend Rule 7620A to reflect the proposed new Media/Contra fee cap.

FINRA has filed the proposed rule change for immediate effectiveness. The effective date will be the date of filing.

¹⁴ This upper limit is calculated based on $\$0.018 \times 23 \text{ trading days} \times 2,500 = \underline{\$1,035}$ plus $\$0.018 \times 23 \text{ trading days} \times 2,500 = \underline{\$1,035}$ plus $\$0.013 \times 23 \text{ trading days} \times 2,500 = \underline{\$747.50}$ plus $\$0.013 \times 23 \text{ trading days} \times 2,500 = \underline{\$747.50}$. Adding these totals for each category (i.e., Media/Executing Party, Non-Media Executing Party, Media/Contra, and Non-Media/Contra) results in fee a cap of \$3,565.

¹⁵ A FINRA member that qualifies for the lower cap would, by default, never reach the proposed cap.

2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(5) of the Act,¹⁶ 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. FINRA members that do not conduct a significant business as an Executing Party (and thus never reach the 2,500 daily average number of Media/Executing Party trades in any of the Tapes) cannot qualify for a fee cap under current rules, and as such, some of these members may pay higher trade reporting fees than members that conduct a significant business as an Executing Party and thus currently qualify for a cap on their trade reporting fees. Furthermore, FINRA members that would pay higher trade reporting fees under the current fee schedule may elect to report their trades to a competing TRF (or, in this instance, a market maker may elect to route its orders to an ATS that reports to a competing TRF). Consequently, NASDAQ, as the Business Member, has advised FINRA that providing an opportunity for certain Contra Parties to qualify for the new fee cap, based on certain levels of market participation and types of activities (i.e. market making), is a more equitable allocation of fees. NASDAQ, as the Business Member, has advised FINRA that because the fee cap levels were chosen relative to the current fee caps for Executing Parties, the proposed rule change may bring the fees paid by Contra Parties that would qualify for the proposed cap more in line with the fees paid by Executing Parties that currently qualify for the existing cap.¹⁷ Accordingly, the proposed fee cap more equitably allocates the fees assessed to members for their use of the FINRA/Nasdaq TRF.

¹⁶ 15 U.S.C. 78o-3(b)(5).

¹⁷ As noted above, a member that qualifies under the existing fee cap would pay no more than \$3,565 per month in the securities of a single Tape, while a member that qualifies

The proposed fee cap is available to all FINRA members that use the FINRA/Nasdaq TRF and meet the threshold requirements to qualify for the terms of the fee cap. While only some Contra Parties will qualify for the proposed cap and thus see a reduction in their FINRA/Nasdaq TRF trade reporting fees, NASDAQ, as the Business Member, has advised FINRA that the proposed cap is not unfairly discriminatory because the proposed fee cap will most benefit those Contra Parties that have significant volume on the FINRA/Nasdaq TRF. These Contra Parties currently may pay larger trade reporting fees than firms with comparable Executing Party volume that qualify for the current fee cap.¹⁸ As noted above, FINRA members that are not subject to capped fees can choose to report trades to a competing TRF (or, in this instance, a market maker may elect to route its orders to an ATS that reports to a competing TRF). NASDAQ has advised FINRA that following implementation, NASDAQ will monitor the fees paid by Contra Parties and will consider whether any adjustments to the proposed fee cap or qualifying thresholds would be appropriate.

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. The fee proposal would not impose new fees or fee rate increases on any member firm, and will reduce the fees paid by some members. NASDAQ has advised FINRA that the estimated fee savings to member firms based on this proposal would be in the range of \$0-\$20,000 per month

under the proposed Contra fee cap would pay no more than \$5,000 per month in the securities of a single Tape.

¹⁸ As noted above, NASDAQ has advised FINRA that the proposed fee cap is in recognition of a new type of trading behavior whereby a market maker's executions occur within an ATS, and as such, the market maker is not the Executing Party on the trades based on current trade reporting rules. Such behavior has emerged since the current fee cap, based on a firm's volume as Executing Party, was originally adopted.

per firm based on overall market and participant activity and number of trading days in the month. NASDAQ, as the Business Member, has further advised FINRA that, based on current trading practices, NASDAQ estimates that approximately two to five member firms would have been able to take advantage of the fee reductions associated with this proposal, had they been in place.

FINRA notes that its members have trade reporting alternatives other than the FINRA/Nasdaq TRF, so to the extent the proposed changes are viewed as burdensome among market participants, those participants may choose not to avail themselves of the fee cap and maintain the status quo with respect to fees or adjust their trading practices. This would permit members to mitigate any direct or indirect costs imposed by this proposal. Moreover, the proposal may promote competition among FINRA members by reducing the fee burden on certain FINRA members who are unable to qualify for the existing fee cap, and FINRA members can choose their trading partners, which determination may in part be based on the fees of the particular TRF applicable to Contra Parties. Lastly, FINRA does not believe that the proposed fee cap burdens competition among reporting facilities because each is free to adjust their respective fees to remain competitive with the FINRA/Nasdaq TRF, to the extent the proposed fee cap makes the FINRA/Nasdaq TRF a more attractive facility on which to report trades.

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.

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

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act¹⁹ and paragraph (f)(2) of Rule 19b-4 thereunder.²⁰ At any time within 60 days of the filing

¹⁹ 15 U.S.C. 78s(b)(3)(A).

of the proposed rule change, the Commission summarily may temporarily suspend such rule change 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. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

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. 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-2015-053 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-2015-053. 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 website (<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

²⁰ 17 CFR 240.19b-4(f)(2).

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 website viewing and printing 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 such filing also will be available for inspection and copying at the principal office of FINRA. 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-2015-053, and should be submitted on or before [INSERT DATE 21 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

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

Robert W. Errett,
Deputy Secretary.

²¹ 17 CFR 200.30-3(a)(12).

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