



SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-83866; File No. SR-FINRA-2018-029]

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

August 16, 2018

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 August 10, 2018, 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 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 Carteret (the “FINRA/Nasdaq

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).

TRF Carteret”) and the FINRA/Nasdaq Trade Reporting Facility Chicago (the “FINRA/Nasdaq TRF Chicago”) (collectively, the “FINRA/Nasdaq TRFs”).⁵

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

The FINRA/Nasdaq TRFs are facilities of FINRA that are operated by Nasdaq, Inc. (“Nasdaq”) and utilize Automated Confirmation Transaction Service technology. In connection with the establishment of the FINRA/Nasdaq TRFs, FINRA and Nasdaq entered into a limited liability company agreement (the “LLC Agreement”). Under the LLC Agreement, FINRA, the

⁵ The Commission recently approved a proposed rule change to adopt rules relating to the establishment of the FINRA/Nasdaq TRF Chicago. See Securities Exchange Act Release No. 83559 (June 29, 2018), 83 FR 31589 (July 6, 2018) (Order Approving File No. SR-FINRA-2018-013). Among other things, the proposed rule change amended the Rule 7600A Series to provide that the schedules of credits and fees apply to reporting activity that occurs on either or both of the FINRA/Nasdaq TRFs and that a participant’s eligibility for any volume-based credits or fee caps will be determined based upon its aggregate reporting volume between the two FINRA/Nasdaq TRFs. SR-FINRA-2018-013 will be effective on the date that the FINRA/Nasdaq TRF Chicago commences operation, which FINRA anticipates will be in September 2018.

“SRO Member,” has sole regulatory responsibility for the FINRA/Nasdaq TRFs. Nasdaq, the “Business Member,” is primarily responsible for the management of the FINRA/Nasdaq TRFs’ business affairs, including establishing pricing for use of the FINRA/Nasdaq TRFs, 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 TRFs.

Pursuant to the FINRA Rule 7600A Series, participants in the FINRA/Nasdaq TRFs 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 TRFs (Rule 7610A). These rules are administered by Nasdaq, in its capacity as the Business Member and operator of the FINRA/Nasdaq TRFs on behalf of FINRA,⁶ and Nasdaq collects all fees on behalf of the FINRA/Nasdaq TRFs.

Pursuant to FINRA Rule 7620A, participants in the FINRA/Nasdaq TRFs are subject to four categories of fees, each of which is applicable to transactions on the three Tapes:⁷ (1) Media/Executing Party; (2) Non-Media/Executing Party; (3) Media/Contra Party; and (4) Non-Media/Contra Party.⁸ Rule 7620A provides that for any category of fees, a participant will

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 Market data is transmitted to three tapes based on the listing venue of the security: New York Stock Exchange securities (“Tape A”), NYSE American and regional exchange securities (“Tape B”), and Nasdaq Stock Market securities (“Tape C”).

⁸ Media eligible trade reports are those that are submitted to the FINRA/Nasdaq TRFs for public dissemination by the Securities Information Processors. By contrast, non-media trade reports are not submitted to the FINRA/Nasdaq TRFs for public dissemination, but are submitted for regulatory and/or clearance and settlement purposes.

qualify for a cap on the fees they [sic] would otherwise pay to report trades to a particular Tape during a given month, provided that during the month, the participant separately has a daily average number of Media/Executing Party trades of at least 2,500 in that same Tape.

Additionally, the Rule provides for a special fee cap program – known as the “Media/Contra Cap” – for participants that make markets in an alternative trading system (“ATS”).

Nasdaq, as the Business Member, has determined to make several adjustments to the schedule of fees and caps that applies to participants in the FINRA/Nasdaq TRFs. As discussed below, the overall aims of the proposed adjustments are to: (1) align the activity-based fees and cap levels with the rising costs of operating, maintaining, and improving the FINRA/Nasdaq TRF Carteret and, going forward, the FINRA/Nasdaq TRF Chicago; (2) re-calibrate the fee structure so that it provides for a more equitable allocation of fees among Executing Parties and Contra Parties; (3) ensure that all FINRA/Nasdaq TRF participants, regardless of the level of their reporting or contra activity, bear at least some baseline responsibility for the costs of their participation; and (4) clarify the fee structure. Nasdaq also intends for the proposed adjustments to generate profits for itself as the Business Member. FINRA is proposing to amend Rule 7620A accordingly.

Specifically, the proposed rule change would: (1) raise the threshold daily average number of Media/Executing Party trades that are necessary for a participant to qualify for a fee cap program during a month; (2) lower uncapped monthly charges for reporting Media/Executing Party and Non-Media/Executing Party trades and raise the caps on such fees, if applicable; (3) raise the caps on Media/Contra Party and Non-Media/Contra Party fees, if

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.

applicable; (4) raise the level of the cap that applies to ATS market makers; (5) establish a new fee cap program known as the “ATS Market Maker Combined Activity Cap”; (6) establish a new fixed monthly fee known as the “Participation Fee”; and (7) establish a special pricing tier for participants whose trade reporting activity to the FINRA/Nasdaq TRF consists of substantially all retail orders (“Retail Participants”). The proposed rule change also would re-organize the fee schedule and make other clarifying changes to Rule 7620A. Each of these proposals is described in detail below.

Cap Qualifying Activity

The proposed rule change would raise the level of “Cap Qualifying Activity” – i.e., the daily average number of Media/Executing Party trades that a participant must report to the FINRA/Nasdaq TRFs in a given month to qualify for caps on its trade reporting fees as set forth elsewhere in the fee schedule. Presently, the level of Cap Qualifying Activity is 2,500 for reports in each of Tapes A, B, and C. Nasdaq, as the Business Member, has determined to raise these threshold numbers to 5,000 in each Tape.

The levels of Cap Qualifying Activity have not increased since they were introduced in 2010,⁹ at a time when reporting volume on the FINRA/Nasdaq TRF Carteret was significantly lower than it is now. Indeed, average daily executions on the FINRA/Nasdaq TRF Carteret have increased by approximately 47 percent since 2012 even as cap thresholds have remained static. Meanwhile, the cost of operating the FINRA/Nasdaq TRF Carteret has increased by approximately 16 percent. These costs have increased for various reasons, including but not limited to inflation, investments that Nasdaq has made in upgrading and improving the facility,

⁹ See Securities Exchange Act Release No. 61817 (March 31, 2010), 75 FR 17810 (April 7, 2010) (Notice of Filing and Immediate Effectiveness of File No. SR-FINRA-2010-011).

and also increased operational and maintenance costs that have flowed from rising levels of trade reporting activity. Nasdaq has advised that raising the levels of Cap Qualifying Activity will help to re-align the thresholds with rising volumes and costs.

Media/Executing Party and Non-Media/Executing Party Fees and Caps

The proposed rule change would amend the schedule of fees and associated caps for both Media/Executing Party and Non-Media/Executing Party trade reports. For both types of trade reports, Nasdaq, as the Business Member, has determined to lower the uncapped fee from \$0.018 to \$0.015 per side. Nasdaq also has determined to modify the formulas for calculating the maximum amount of fees that a participant will pay to report these trades if the participant achieves Cap Qualifying Activity. Presently, the formulas for the Media/Executing Party cap and the Non-Media/Executing Party cap are, respectively: $\$0.018 \times (\text{the required average daily number of Media/Executing Party Trades for Tape A, B, or C}) \times (\text{the number of trading days during the month})$; and $\$0.018 \times 2,500 \times (\text{the number of trading days during the month})$. Nasdaq has determined to lower the fee in the cap formulas from \$0.018 to \$0.013 and raise the average daily number of trade reports needed to qualify for the cap from 2,500 to 5,000. Finally, the proposed rule change would simplify the formula for the Media/Executing Party Cap by stating expressly the average daily number of Media/Executing Party trades necessary to qualify for the cap – 5,000 – rather than merely describe that number, as it does now.

Nasdaq has advised that the proposed changes are aimed at rationalizing Media (Non-Media)/Executing Party fee caps with the 47 percent increase in reporting activity to the FINRA/Nasdaq TRFs [sic] and the 16 percent increase in costs associated with the operation of the TRF that have occurred over the past six years. However, Nasdaq also proposes downward adjustments to the uncapped rates for reporting Media/Executing Party trades to dampen the

financial impact of the increase in the cap upon participants that will no longer qualify for it under the proposed rule change.

Media/Contra Party and Non-Media/Contra Party Fees and Caps

The proposed rule change would raise the caps for both Media/Contra Party and Non-Media/Contra Party trades while keeping the uncapped monthly charge of \$0.013 per side the same. For both types of trades, Nasdaq, as the Business Member, has determined to modify the cap formulas so that, instead of being $\$0.013 \times 2,500 \times$ (the number of trading days during the month), the formulas will be $\$0.013 \times 5,000 \times$ (the number of trading days during the month). The rationale for this increase is the same as is described above.

Media/Contra Cap

FINRA Rule 7620A provides for a monthly “Media/Contra” fee cap of \$5,000 per Tape (A, B or C) that applies to all trades (i.e., Media/Executing Party, Non-Media/Executing Party, Media/Contra and Non-Media/Contra) under the Rule. Eligibility for this fee cap is based on a FINRA member’s trade reporting of Media/Contra trades to the FINRA/Nasdaq TRFs and its participation as a market maker on an ATS. To qualify as a market maker on an ATS, a FINRA member must maintain a two-sided quote for each security that the FINRA member maintains interest in within each ATS and display a quotation size of at least one normal unit of trading (specific for each security), and it must attest to these qualifications in writing. The FINRA member must also attest that it will continue to meet the ATS-based requirements to be eligible for the fee cap.¹⁰ To qualify for the cap, a FINRA member must have its Media/Contra Party trades equal, or exceed, 35% of its total volume on the FINRA/Nasdaq TRFs. The FINRA

¹⁰ As set forth in the Rule, Nasdaq will periodically audit FINRA members that choose to participate to ensure compliance with the attestation.

member also 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 determined to modify the Media/Contra Party fee cap program by increasing the maximum monthly per Tape charge applicable to qualifying participants. Specifically, the maximum monthly charge will increase from \$5,000 per Tape per month to \$10,000 per Tape per month. Nasdaq, as the Business Member, has determined that the existing cap level, which has not changed since it was introduced in 2015, no longer bears a reasonable relationship to the volume of qualifying participant reporting activity that occurs on the FINRA/Nasdaq TRFs [sic]. The volume of market maker Media/Contra Party reports to the FINRA/Nasdaq TRFs [sic] is growing rapidly. From January 2016 through June 2017, the firms that presently qualify for the cap increased their activity on the FINRA/Nasdaq TRF Carteret by 60%. Their activity presently exceeds the minimum qualifying threshold for the cap by more than fourfold.

In addition, the proposed rule change would change the name of this cap to the “ATS Market Maker Media/Contra Party Cap” to more accurately describe the program, add clarity to the fee schedule and avoid potential confusion with the other Media/Contra cap.

ATS Market Maker Combined Media Activity Cap

Nasdaq, as the Business Member, has determined to establish a new fee cap program, entitled the “ATS Market Maker Combined Media Activity Cap.” The purpose of the proposed cap is to foster new reportable business activities among FINRA members that do not qualify for the existing FINRA/Nasdaq TRFs [sic] fee cap program.

For example, a participant may be a new FINRA member or it may engage in new off-exchange business activities, such as the establishment of a single-dealer platform or an ATS. In the initial stages of these business activities, the participant may not qualify for the existing fee cap programs because the participant may not achieve the requisite daily average number of Media/Executing Party trades during a month or because it may not reliably maintain the requisite volume of Media/Contra Party activity to qualify for the Media/Contra Party cap (which, as noted above, would cap both its Executing Party and Contra Party fees).

The proposed ATS Market Maker Combined Media Activity Cap will provide assistance to such a participant by capping the combined FINRA/Nasdaq TRFs fees (i.e., Media/Executing Party, Media/Contra, Non-Media/Executing Party and Non-Media/Contra) that the participant would otherwise pay while the participant ramps up its new reportable activity to levels that would enable it to qualify for existing fee cap programs with higher qualification thresholds, such as the Media/Executing Party cap and the Media/Contra Party cap.

To qualify for the proposed ATS Market Maker Combined Media Activity Cap, a participant must: (1) qualify as a market maker on an ATS (as defined below); (2) engage in both Executing Party and Contra Party activities; and (3) average at least 2,500 Media/Executing Party trades in a given Tape per day during a month. If the participant meets this threshold, then the participant will pay for that month, on a per Tape basis, the lesser of \$7,500 or the sum of all the participant's combined monthly Executing Party and Contra Party fees for that Tape during the month (as calculated using the regular uncapped Media/Executing Party, Non-Media/Executing Party, Media/Contra Party, and Non-Media/Contra Party rates). If the participant's average daily Media/Executing Party trade reports reach at least 5,000 in a given Tape in a given month, then the participant will no longer qualify for the proposed ATS Market

Maker Combined Media Activity Cap in that Tape in that month and, instead, will qualify for the regular cap programs for that month. If the participant does not reach 2,500 Media/Executing Party trades in a given Tape per day during a month, the firm will be subject to the regular uncapped fee schedule or to other fee caps that may be applicable to it for that month.¹¹

As with the ATS Market Maker Media/Contra Party Cap, a participant qualifies as a market maker on an ATS by maintaining a two-sided quote for each security that the FINRA member maintains interest in within each ATS and by displaying a quotation size of at least one normal unit of trading (specific for each security). Additionally, as with the existing ATS Market Maker Media/Contra Party cap, the participant must attest to its market maker qualifications in writing and must re-certify its qualifications every six months.¹² Nasdaq will periodically audit participants to ensure that their attestations are accurate and that they qualify for the ATS Market Maker Combined Activity Cap.

Participation Fee

Nasdaq, as the Business Member, has determined to assess a new fixed monthly Participation Fee of \$350 that will apply to each participant in the FINRA/Nasdaq TRFs.¹³ The

¹¹ If a participant qualifies for the ATS Market Maker Combined Media Activity Cap in month 1 and then graduates out of the Combined Cap program in month 2 due to the fact that the participant's average daily Media/Executing Party trade reports in a given Tape in month 2 exceed 5,000, the participant will once again qualify for the ATS Market Maker Combined Media Activity Cap in month 3 if its average daily Media/Executing Party trade reports during month 3 fall back below 5,000.

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

¹³ The Participation Fee will be assessed on each registered participant, irrespective of whether the participant is identified (as Executing Party or Contra Party) in any trade report submitted to the FINRA/Nasdaq TRF in a given month. Participants that use multiple Market Participant Identifiers or "MPIDs" for purposes of reporting to the FINRA/Nasdaq TRF in accordance with Rule 6160 will not be assessed a Participation Fee for each separate MPID.

Participation Fee will help defray certain shared and common costs associated with the operation of the FINRA/Nasdaq TRFs, including overhead costs and the costs of developing, maintaining, and upgrading shared technology.¹⁴ Nasdaq believes that all users of the FINRA/Nasdaq TRFs – both large and small – should bear at least some responsibility for the upkeep of the FINRA/Nasdaq TRFs.¹⁵ The Participation Fee represents a baseline share of this responsibility. Responsibility for costs in excess of the proposed Participation Fee will continue to be recovered from participants through trade reporting fees in proportion to the volume of their activities on the FINRA/Nasdaq TRFs. The Participation Fee is distinct from the fee that Nasdaq separately charges under its rules to port into the FINRA/Nasdaq TRFs.

Retail Participant Pricing Program

Nasdaq, as the Business Member, has determined to establish a new pricing program for participants that qualify as “Retail Participants” due to the fact that substantially all of their trade reporting activity to the FINRA/Nasdaq TRFs constitutes “Retail Orders.”¹⁶ For purposes of this pricing program, a “Retail Order” is an order that originates from a natural person, provided that, prior to submission, no change is made to the terms of the order with respect to price or side of

¹⁴ Because the Participation Fee covers costs that are common to and allocated specifically to either FINRA/Nasdaq TRF, a participant will pay only a single Participation Fee even if it participates in both the FINRA/Nasdaq TRF Carteret and FINRA/Nasdaq TRF Chicago.

¹⁵ As discussed below, Retail Participants will be exempt from paying the Participation Fee.

¹⁶ In defining a “Retail Participant,” the proposal derives from a similar concept set forth in Nasdaq’s Designated Retail Order pricing program and its corresponding Designated Retail Order Attestation Form. See Securities Exchange Act Release No. 75375 (July 7, 2015), 80 FR 40098 (July 13, 2015) (Notice of Filing and Immediate Effectiveness of File No. SR-NASDAQ-2015-066). The Nasdaq Designated Retail Order Attestation Form provides that to qualify for the Designated Retail Order pricing program, an applicant must attest that “substantially all orders submitted to the Exchange by the Applicant would meet the qualifications for such orders under the Retail Order rule.” See <https://nasdaqtrader.com/content/ProductsServices/Trading/AttestationForm.pdf>. FINRA will refine the definition of a Retail Participant if it proves to be unworkable in practice.

market and the order does not originate from a trading algorithm or any other computerized methodology.¹⁷

The purpose of this retail pricing program is to help Retail Participants to control their costs associated with reporting trades to the FINRA/Nasdaq TRFs and, in doing so, to limit or reduce any such costs that Retail Participants pass on to their retail customers. Such retail customers generally include individuals who trade less frequently and have fewer trades reported to the FINRA/Nasdaq TRFs than do other categories of customers; therefore, it is fair and reasonable to charge Retail Participants and their customers less than these other categories of participants and customers.¹⁸

A Retail Participant will be subject to the following fee schedule when it reports trades to the FINRA/Nasdaq TRF. For Media/Executing Party (Non-Media/Executing Party) fees, the monthly charge for a Retail Participant will be \$0.018 multiplied by the number of Media/Executing Party (Non-Media/Executing Party) trades that the Retail Participant reports to the FINRA/Nasdaq TRFs during that month. Such fees will be capped for a given month once the Retail Participant reports to the FINRA/Nasdaq TRFs, on average, at least 2,500 Media/Executing Party trades per day in Tapes A, B, or C during that month. If capped for trades in a particular Tape, Media/Executing Party (Non-Media/Executing Party) fees for a Retail participant will equal \$0.018 multiplied by 2,500 multiplied by the number of trading days

¹⁷ The definition of a “Retail Order” derives from the definition of a “Designated Retail Order” in Nasdaq Rule 7018.

¹⁸ In other contexts, the Commission has approved pricing programs aimed at benefitting retail investors. See, e.g., Securities Exchange Act Release No. 68937 (February 15, 2013), 78 FR 12397 (February 22, 2013) (Order Approving File No. SR-NASDAQ-2012-129 (Nasdaq retail price improvement pilot program); and Securities Exchange Act Release No. 67347 (July 3, 2012), 77 FR 40673 (July 10, 2012) (Order Approving File Nos. SR-NYSE-2011-55 and SR-NYSEAmex-2011-84) (NYSE and NYSE Amex retail liquidity pilot programs).

during that month. Additionally, Retail Participants will be exempt from paying the \$350 per month Participant Fee.

The foregoing preserves for Retail Participants the existing Media/Executing Party (Non-Media/Executing Party) fee schedules, cap thresholds, and cap formulas. It excludes Retail Participants from the adjustments that Nasdaq, as the Business Member, is otherwise proposing to make to the fee schedules and caps and the addition of the Participant Fee. In other words, the average daily trade threshold for Retail Participants to qualify for the Media/Executing Party (Non-Media/Executing Party) cap will remain at 2,500 Media/Executing Party trade reports and will not rise to 5,000, as it will for other participants. However, Retail Participants also will not be subject to proposed decreases in the \$0.018 per trade report fee that other participants will experience.

As to Media/Contra Party (Non-Media/Contra Party) fees, the monthly charge for a Retail Participant will be the same as that which applies to all other participants: \$0.013 multiplied by the number of Media/Contra Party (Non-Media/Contra Party) trades that the participant reports to the FINRA/Nasdaq TRFs during the month. However, the threshold for Retail Participants to qualify for a cap on Media/Contra Party (Non-Media Contra Party) fees will differ from that which will apply to other participants. Retail Participants will continue to qualify for a cap (on a per Tape basis) on Media/Contra Party (Non-Media/Contra Party) fees during a given month if they report to the FINRA/Nasdaq TRFs, on average, at least 2,500 Media/Executing Party trades per day in Tapes A, B, or C, whereas the cap threshold for other participants will rise to an average of 5,000 Media/Executing Party trades per day. If capped, Media/Contra Party (Non-Media/Contra Party) fees for a Retail Participant will equal \$0.013 multiplied by 2,500 multiplied by the number of trading days during that month. Other

participants will pay a maximum charge of \$0.13 multiplied by 5,000 multiplied by the number of trading days during the month.

To qualify as a Retail Participant and receive pricing under the Retail Participant fee schedule, a participant must complete and submit to Nasdaq, as the Business Member, an application. The application form will require the participant to attest to its qualifications as a Retail Participant on the FINRA/Nasdaq TRFs in which it is a participant and for which it seeks Retail Participant pricing.¹⁹ The participant must also attest to its reasonable expectation that it will maintain its qualifications for a one year period following the date of attestation. Once a participant has been designated as a Retail Participant, it must complete and submit a written attestation to Nasdaq on an annual basis to retain its status as such. A Retail Participant must inform Nasdaq promptly if at any time it ceases to qualify or it reasonably expects that it will cease to qualify as a Retail Participant.²⁰

General Reorganization and Clarification

Finally, the proposed rule change would clarify and simplify Rule 7620A. Presently, the Rule is complex and potentially confusing as to the requirements for and interaction among the various cap programs. The proposed rule change would add prefatory language to the Rule to explain more clearly how the fees and cap programs work. As discussed above, the proposed rule change would add a title to the schedule of the daily average Media/Executing Party trade reporting activity needed to qualify for a cap – “Cap Qualifying Activity.” In addition, the amended Rule would be reorganized so that its provisions are listed in a more logical order and would segregate Comparison/Accept fees from the other “Standard Fees” (renamed as “Other

¹⁹ Thus, a participant in both FINRA/Nasdaq TRFs that seeks Retail Participant pricing on both TRFs must attest to their qualifications as such on both TRFs.

²⁰ The form of application and attestation that firms will be required to submit to Nasdaq under the proposed rule change is attached to this filing at Exhibit 3.

Fees”). Lastly, as discussed above, the proposed rule change would rename the special Media/Contra cap program that applies only to ATS market makers so that it is more clearly differentiated from the regular Media/Contra Party cap.

FINRA has filed the proposed rule changes for immediate effectiveness. The operative date will be September 1, 2018.

2. Statutory Basis

FINRA believes that the proposed rule changes [sic] are consistent with the provisions of Section 15A(b)(5) of the Act,²¹ 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 proposed rule change is reasonable to: (1) raise from 2,500 to 5,000 the Cap Qualifying Activity that a participant needs to achieve to qualify for a Media (Non-Media)/Executing Party cap or a Media (Non-Media)/Contra Party cap under Rule 7620A; (2) raise the overall²² maximum charges under each of these cap programs; and (3) raise the maximum monthly charge under the ATS Market Maker Media/Contra Cap from \$5,000 to \$10,000 per Tape. These caps and cap formulas have not keep [sic] pace with the rapid growth of trade reporting volume on the FINRA/Nasdaq TRF Carteret since they were introduced or with the corresponding increase in costs associated with operating, maintaining, and upgrading the FINRA/Nasdaq TRF Carteret. Nasdaq, as the Business Member, advises FINRA that a recalibration of Rule 7620A will help Nasdaq to continue to accommodate the costs associated

²¹ 15 U.S.C. 78o-3(b)(5).

²² Overall, the proposed rule change will increase the maximum charges under the Media (Non-Media)/Executing Party fee caps even though the per trade portions of the fee cap formulas will decrease from \$0.018 to \$0.013.

with rising trade reporting volumes while also making substantial enhancements to the technology, functionality, and performance of the Facilities [sic].

These proposed increases are also reasonable because they will also help to allocate responsibility for the upkeep of the FINRA/Nasdaq TRFs more equitably among Executing Parties and Contra Parties. Over time, the fee burden associated with the FINRA/Nasdaq TRF Carteret has shifted disproportionately to Contra Parties; the proposed re-allocation will help ensure that Executing Parties pay their fair share of fees.

Nasdaq advises that it expects to earn a profit from the proposed changes, but it believes that such profit represents a reasonable return on its work in support of and investments in the FINRA/Nasdaq TRFs, and that the extent of such profit will be subject to and constrained by competitive pressures. As the Commission has recognized, “[i]f competitive forces are operative, the self-interest of the exchanges themselves will work powerfully to constrain unreasonable or unfair behavior,”²³ and “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.”²⁴ In this instance, the proposed fee increases will be subject to significant competition from the FINRA/NYSE TRF, which has proven itself able to increase its market share relative to the FINRA/Nasdaq TRF Carteret as a result of pricing and other competitive adjustments. As the Commission has held in the past, the presence of competition provides a substantial basis for a finding that the proposal will be an equitable allocation of reasonable dues, fees and other charges.²⁵

²³ See Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770 at 74781 (December 9, 2008) (Order Setting Aside Action by Delegated Authority and Approving File No. SR-NYSEArca-2006-21).

²⁴ Id. at 74781-82.

²⁵ Id.

Finally, and except as described below, these proposals to adjust fee levels and fee caps are equitable and not unfairly discriminatory because they will apply to all similarly situated participants.

The establishment of a special schedule of fees and fee caps for “Retail Participants,” for whom the existing system of trade reporting fees, cap thresholds, and cap formulas will continue to apply, is reasonable, equitable, and not unfairly discriminatory. Although the proposed rule change would make a distinction in pricing in favor of Retail Participants and retail investors, the Act only prohibits unfair discrimination. In this instance, FINRA believes that the establishment of a distinct category of Retail Participant pricing is fair because customers of Retail Participants generally include individuals who trade less frequently and report fewer trades to the FINRA/Nasdaq TRFs than do other categories of customers. FINRA believes that such customers, and the participants that serve them, should not bear primary financial responsibility for helping the FINRA/Nasdaq TRFs to recover rising costs and to account for increasing reporting activity. Moreover, maintaining the existing fee schedule for Retail Participants will help the FINRA/Nasdaq TRFs to maintain its [sic] competitive standing for Retail Participants and their retail trade reporting activity. FINRA believes that the proposed qualifications for Retail Participants are reasonably tailored to ensure that they include only those that exclusively or almost exclusively handle retail trading activity. Finally, FINRA notes that the Commission has, in other contexts, approved programs like this one that are intended to specifically benefit retail firms.²⁶

The proposal to establish a new ATS Market Maker Combined Media Activity Cap is reasonable as a means of fostering the establishment and growth among FINRA members of new

²⁶ See n.18, supra.

businesses that involve reportable activity, such as single-dealer platforms and ATSS. In the early stages of these businesses, participants may not yet qualify for the existing fee cap programs because they may not yet conduct enough business as Executing Parties to qualify for the Media/Executing Party cap or otherwise meet the qualifications for the Media/Contra Party cap. The proposed cap will help these participants to establish and grow their businesses by limiting the fees that they will otherwise incur as they grow.

Furthermore, the proposed ATS Market Maker Combined Media Activity Cap is available to all FINRA members that use the FINRA/Nasdaq TRFs and meet the threshold requirements to qualify for the terms of the fee cap. While only some participants 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 is targeted to benefit those participants that have a small but growing volume of Executing Party activity on the FINRA/Nasdaq TRFs. Nasdaq advises FINRA that it is not unfairly discriminatory to limit participation to market makers with a daily average number of Media/Executing Party trades of less than 5,000 because participants with at least 5,000 Media/Executing Party trades will be eligible to graduate to the Media/Executing Party Cap.

The proposed establishment of a fixed monthly Participation Fee is a reasonable means of ensuring that all participants in the FINRA/Nasdaq TRFs (other than Retail Participants, as discussed above) bear a share of financial responsibility for funding their use of the Facility, even if the extent of their use is minimal. Indeed, the FINRA/Nasdaq TRFs incur (or, in the case of the FINRA/Nasdaq TRF Chicago, will incur) costs associated with the mere addition and maintenance of participants' accounts that are independent of the participants' usage of those

accounts to report trades. FINRA believes that it is equitable and non-discriminatory to assess a Participation Fee to help the FINRA/Nasdaq TRFs to recover these costs from all participants.

Finally, FINRA believes that it is reasonable to reorganize and clarify Rule 7620A so that it is easier to comprehend and presented in a more logical order. The proposal to reorganize and restate the Rule is also equitable and not unfairly discriminatory in that the proposal will apply to all similarly situated participants in the FINRA/Nasdaq TRFs.

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

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

Regulatory Need

Nasdaq, as the Business Member and operator of the FINRA/Nasdaq TRFs, collects all fees on behalf of the FINRA/Nasdaq TRFs. As discussed above, Nasdaq has observed an increase in off exchange volumes and the associated cost of operating and improving the FINRA/Nasdaq TRFs, and thus determined to make several adjustments to the schedule of fees and caps to align those with the costs.

Economic Baseline

As discussed above, pursuant to FINRA Rule 7620A, participants in the FINRA/Nasdaq TRFs [sic] are currently subject to four categories of fees, each of which is applicable to transactions on the three Tapes: (1) Media/Executing Party; (2) Non-Media/Executing Party; (3) Media/Contra Party; (4) and Non-Media/Contra Party. The Rule also provides fee caps for participants for a particular Tape during a given month, separately for Media/Executing Party trades and Media/Contra Party trades.

Economic Impact

The proposed rule change entails several changes to the fee and cap structure. The potential marginal impact of each proposed change is discussed below.

Nasdaq has determined to raise the threshold for the “Cap Qualifying Activity” – i.e., the daily average number of Media/Executing Party trades that a participant must report to the FINRA/Nasdaq TRFs in a given month to qualify for caps on its trade reporting fees, from 2,500 reports in each of Tapes A, B, and C to 5,000 reports. Such increase in the cap qualifying activity will increase reporting fees for participants who currently meet the threshold for the cap. Assuming that the participants do not alter the number of reports, some participants may have activity below the threshold and may no longer be eligible for the fee caps. Such participants would potentially experience a larger impact from the proposed increase.

Under the proposed calculation for the Media/Executing Party and Non-Media/Executing fee, the cap would effectively increase by approximately 44%, from \$990 ($\$0.018 \times 2,500 \times 22$) to \$1,430 ($\$0.013 \times 5,000 \times 22$), assuming 22 trading days in a month. Based on the reporting activity from the fourth quarter of 2017 and assuming that reporting activity would remain similar, under the proposed increase in fees and the cap, 27 participants would potentially be impacted from such increase in the cap and thus would pay more in reporting fees under the proposed change. Similarly, under the proposed calculation for the Media/Contra Party and Non-Media/Contra Party fee, the cap would increase 100%, from \$715 ($\$0.013 \times 2,500 \times 22$) to \$1,430 ($\$0.013 \times 5,000 \times 22$), again assuming 22 trading days in a month.

An analysis of the participants show [sic] that the firms impacted by the cap qualifier for Media/Executing Party and Non-Media/Executing activity are the same firms who would potentially incur the 100% increase on the Contra Party fees. Under the combined capped

activity, the cost increase would be 68%, on average, for the participants who report both Executing Party and Contra Party trades. The proposed increase in the maximum monthly “Media/Contra” fee from \$5,000 per Tape per month to \$10,000 per Tape per month would potentially impact a few number [sic] of qualifying participants, but could provide savings in the future if they qualify for the ATS Market Maker Combined Media Activity Cap discussed above.

The ATS Market Maker Combined Media Activity Cap would initially benefit only a small number of ATSs due to their reporting activity. The reporting fees would potentially decrease by 25%, from \$30,000 to \$22,500 under the ATS Market Maker Combined Media Activity Cap. However, the fees could potentially decrease by approximately 43% if reporting activity increases.

The proposed participant fee would be assessed on all participants equally and would raise the overall reporting fees by \$350 per month regardless of the reporting activity. Retail Participants would be exempt from paying this fee.

The proposed rule change establishes a “Retail Participant Pricing Program” for participants whose trade reporting activity to the FINRA/Nasdaq TRFs constitutes “Retail Orders.” Under the proposed program, reporting activity to be eligible for the cap would be lower compared to that for non-retail participants. Retail Participants would potentially benefit from the proposed program, and incur relatively lower costs, consistent with relatively fewer trades that are considered retail.

FINRA analyzed data provided by Nasdaq that contain fees incurred by 545 participants in the final quarter of 2017, and projected fees that were estimated under the proposed fee and cap schedule assuming that the reporting behavior would be the same under the current and the proposed schedule. On a net basis, i.e., after incorporating the proposed changes in the fees and

caps and the Participation Fee, 17 participants would experience a reduction in the total fees incurred, with an average estimate of \$722. Another 13 participants would be expected to see no change in the fees incurred, and these participants appear to be those that would be eligible for the Retail Participant Program. The remaining 515 participants would incur an estimated fee increase of \$598 per month. However, for 489 participants out of the 515, the increase is solely due to the proposed Participation Fee of \$350.

The potential net impact of the proposed rule change depends on whether participants alter their reporting activity across TRFs to be eligible for the fee caps. To the extent that the proposed increases impose a burden on participants, they may choose to shift their reporting to other TRFs. The net impact would also depend on whether the proposed fee caps create an optimal reporting strategy to be eligible for a specific cap to maximize the overall savings for all trade types reported to the FINRA/Nasdaq TRFs.

Investors may also potentially incur costs to the extent that participants choose to pass some or all of the fee increase to their customers.

Finally, FINRA notes that the proposed fee and fee cap changes occur within the context of a competitive environment in which the various trade reporting facilities vie for market share. If any existing or prospective participant in either FINRA/Nasdaq TRF determines that the new fees or fee cap thresholds are too high or are unfavorable relative to fees and fee cap programs applicable to the FINRA/NYSE TRF, such participants may choose to report to the FINRA/NYSE TRF in lieu of the FINRA/Nasdaq TRFs, in which case the FINRA/Nasdaq TRFs will lose market share. Likewise, the FINRA/NYSE TRF is free to adjust its fees and fee cap programs, or to modify its functionality, in response to the changes proposed herein to render them more attractive relative to the FINRA/Nasdaq TRFs. FINRA notes, however, that in

certain instances, differences in the relative functionalities among the FINRA/Nasdaq and FINRA/NYSE TRFs may impact participants' decisions to report to the FINRA/NYSE TRF, even if the participants find the FINRA/NYSE TRF fees and fee cap programs to be preferable.

Alternatives Considered

No other alternatives were considered for the proposed rule change.

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

No written comments were either solicited or 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 Act²⁷ and paragraph (f)(2) of Rule 19b-4 thereunder.²⁸ At any time within 60 days of the filing 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

²⁷ 15 U.S.C. 78s(b)(3)(A).

²⁸ 17 CFR 240.19b-4(f)(2).

- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-FINRA-2018-029 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-2018-029. 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 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 the filing also will be available for inspection and copying at the principal office of FINRA. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make

available publicly. All submissions should refer to File Number SR-FINRA-2018-029, 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.²⁹

Eduardo A. Aleman,

Assistant Secretary.

²⁹ 17 CFR 200.30-3(a)(12).

