



SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-84901; File No. SR-FINRA-2018-042]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend FINRA Rules 7610A and 7620A to Modify Certain Fees and Credits Applicable to FINRA/Nasdaq TRF Retail Participants

December 20, 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 December 17, 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.

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).

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

FINRA is proposing to amend FINRA Rules 7610A and 7620A to modify certain fees and credits applicable to Retail Participants that use the FINRA/Nasdaq Trade Reporting Facility Carteret (the "FINRA/Nasdaq TRF Carteret") and/or the FINRA/Nasdaq Trade Reporting Facility Chicago (the "FINRA/Nasdaq TRF Chicago"). Under FINRA rules and as used herein, the term "FINRA/Nasdaq TRF" means the FINRA/Nasdaq TRF Carteret, the FINRA/Nasdaq TRF Chicago, or both, as applicable, depending on the facility or facilities to which the participant elects to report.

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 TRF is a facility of FINRA that is operated by Nasdaq, Inc. ("Nasdaq"). 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 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/Nasdaq TRF participants are charged fees, 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,⁵ and Nasdaq collects all fees on behalf of the FINRA/Nasdaq TRF.

Pursuant to Supplementary Material .01 to FINRA Rule 7620A, a “Retail Participant”⁶ is a participant “for which substantially all of its trade reporting activity on the FINRA/Nasdaq Trade Reporting Facility comprises Retail Orders.”⁷ Under FINRA Rule 7620A, Retail

⁵ 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.

⁶ To qualify as a “Retail Participant” and for special pricing under the Retail Participant fee schedule, a participant must complete and submit to Nasdaq, as the Business Member, an application. The application form requires the participant to attest to its qualifications as a Retail Participant on the FINRA/Nasdaq TRF in which it is a participant and for which it seeks Retail Participant pricing. 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.

⁷ Pursuant to FINRA Rule 7260A.01, a “Retail Order” means “an order that originates from a natural person, provided that, prior to submission, no change is made to the terms

Participants presently are subject to four categories of transaction-based fees, each of which is applicable to transactions on the three Tapes:⁸ (1) Media/Executing Party; (2) Non-Media/Executing Party; (3) Media/Contra Party; and (4) Non-Media/Contra Party.⁹ Rule 7620A provides that for any of these categories of fees, a Retail Participant may qualify for a cap on the fees it would otherwise pay to report trades to a particular Tape during a given month, provided that during the month, the Retail Participant achieves a daily average number of Media/Executing Party trades of at least 2,500 in that same Tape.¹⁰ The uncapped fee rates and cap amounts that apply to Retail Participants are different from those that apply to non-Retail Participants under the Rule.¹¹

of the order with respect to price or side of market and the order does not originate from a trading algorithm or any other computerized methodology.”

⁸ 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”).

⁹ Media eligible trade reports are those that are submitted to the FINRA/Nasdaq TRF for public dissemination by the Securities Information Processors (“SIPs”). 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. 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.

¹⁰ Additionally, the Rule provides for a monthly Participation Fee, from which Retail Participants are exempt. It also provides for two special fee cap programs – known as the “ATS Market Maker Media/Contra Party Cap” and the “ATS Market Maker Combined Media Activity Cap” – for participants that make markets in an alternative trading system (“ATS”).

¹¹ Retail Participants generally do not achieve Executing Party activity sufficient to qualify for cap programs due to the nature and scale of their retail businesses. Retail orders that originate from natural persons or from nonprofessional investors are not produced in the same volumes or notional amounts as are orders that originate from professional executing broker firms. To date, only one Retail Participant has achieved enough Executing Party activity to qualify for a cap.

Under Rule 7610A, FINRA members that report over-the-counter (“OTC”) transactions in NMS stocks to a FINRA/Nasdaq TRF for public dissemination or “media” purposes may receive quarterly transaction credits that equal a percentage of FINRA/Nasdaq TRF revenues that are attributable to the members’ transactions.¹² The percentage of attributable revenue that a FINRA member may receive in the form of a transaction credit varies depending upon the extent of the member’s market share on the FINRA/Nasdaq TRF.¹³ The schedule of transaction credits is as follows. (Presently, it does not distinguish among categories of FINRA/Nasdaq TRF participants.)

Tape A

Percentage Market Share	Percent of attributable revenue shared
Greater than or equal to 2%	98%
Less than 2% but greater than or equal to 1%	95%
Less than 1% but greater than or equal to 0.50%	75%
Less than 0.50% but greater than or equal to 0.10%	20%
Less than 0.10%	0%

¹² Under the Rule, a transaction is attributable to a FINRA member if a trade report submitted to the FINRA/Nasdaq TRF that the FINRA/Nasdaq TRF then submits to either of the SIPs identifies the FINRA member as the Executing Party on the transaction.

¹³ For purposes of this Rule, the term “market share” means a percentage calculated by dividing the total number of shares represented by trades reported by a FINRA member to the FINRA/Nasdaq TRF for media purposes during a given calendar quarter by the total number of shares represented by all trades reported to the Consolidated Tape Association or the Nasdaq Securities Information Processor, as applicable, during that quarter. Market Share is calculated separately for each tape. See Rule 7620A. The Rule notes, moreover, that if a FINRA member reports trades to both FINRA/Nasdaq TRFs during a given calendar quarter, then “market share” shall be calculated by dividing the total number of shares represented by trades reported by the member to both of the FINRA/Nasdaq TRFs during that calendar quarter by the total number of shares represented by all trades reported to the Consolidated Tape Association or the Nasdaq SIP, as applicable, during that quarter.

Tape B

Percentage Market Share	Percent of attributable revenue shared
Greater than or equal to 2%	98%
Less than 2% but greater than or equal to 1%	90%
Less than 1% but greater than or equal to 0.35%	70%
Less than 0.35% but greater than or equal to 0.10%	10%
Less than 0.10%	0%

Tape C

Percentage Market Share	Percent of attributable revenue shared
Greater than or equal to 2%	98%
Less than 2% but greater than or equal to 1%	95%
Less than 1% but greater than or equal to 0.50%	75%
Less than 0.50% but greater than or equal to 0.10%	20%
Less than 0.10%	0%

The Rule 7600A Series expressly provides that the schedules of credits and fees apply to reporting activity that occurs on either or both of the FINRA/Nasdaq TRFs and 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. Nasdaq, as the Business Member, has determined to make several amendments to the current schedules of fees, caps, and credits. There is substantial competition in the market for OTC trade reporting between the FINRA/Nasdaq TRF and the FINRA/NYSE TRF, as evidenced by a recent shift in market share

between these facilities.¹⁴ The proposed rule change responds to these competitive forces by reducing the fees that most Retail Participants pay to the FINRA/Nasdaq TRF. It also establishes a new transaction credit program that will be more accessible to Retail Participants than is the existing credit program. The proposed rule change also clarifies the fee schedule and corrects a typographical error in the existing fee schedule. Each of these proposed changes is described in detail below.

General Clarification and Reorganization

First, the proposed rule change clarifies Rule 7620A by adding roman numerals to each of the headings in the fee schedule and also letters and numbers to its subheadings. These proposed changes will render the fee schedule easier to read and understand, particularly when there is a need to cross-reference the various fee programs contained therein.

The proposed rule change also moves the example of the operation of the fee schedule, which presently appears immediately under the heading “Non-Comparison/Accept (Non-Match/Compare) Trade Report Fees and Caps on Trade Report Fees” (to be numbered “II”), to the subheading “Cap Qualifying Activity (Requisite Daily Average Media/Executing Party Trade Reporting Activity for a Participant to Qualify for Fee Caps in Paragraphs 1 – 4 Above)” (to be relocated to follow subparagraphs 1 through 4 and numbered “II.A”). Movement of this example is necessary because of other proposed changes to the Rule, to be discussed below, which will render the example applicable only under the fee program set forth in revised subparagraph II.A.

¹⁴ Nasdaq understands, based upon Retail Participant feedback, that recent market share changes are attributable to disparities in pricing between the FINRA/Nasdaq TRF and the FINRA/NYSE TRF. Due to pricing concerns, some Retail Participants have instructed their executing counterparties to shift their trade reporting activity from the FINRA/Nasdaq TRF to the FINRA/NYSE TRF. The proposed rule change seeks to lower Retail Participant pricing on the FINRA/Nasdaq TRF to render the FINRA/Nasdaq TRF a more attractive trade reporting venue for this market segment.

As discussed below, the proposed rule change adds new examples that are tailored for the new Retail Participant fee programs that will be set forth in proposed subparagraphs II.B and II.C.

Additionally, the proposed rule change adds a clarifying sentence beneath proposed paragraph II, which states that a participant's activity that qualifies for more than one special fee program under the Rule will automatically receive the benefit of the lowest applicable fee rate or cap. The purpose of this sentence is to clarify how the fee schedule operates where multiple discounts or caps apply to the same activity on the FINRA/Nasdaq TRF. An example of the application of this principle is included in the Rule text, under proposed subparagraph II.C, and below.

Lastly, the proposed rule change amends the definition of a "Retail Order," in Supplementary Material .01 to Rule 7620A, to clarify that it includes orders "on behalf of accounts that are held in a corporate legal form, such as an Individual Retirement Account, Corporation, or a Limited Liability Corporation that has been established for the benefit of an individual or group of related family members, provided that the order is submitted by an individual." Although the existing definition arguably implies that a Retail Order already includes such orders, prospective Retail Participants have requested the proposed clarification to eliminate any uncertainty in this regard.

Special Pricing Programs for Retail Participants

The proposed rule change will replace the existing pricing programs for Retail Participants with two new programs that are intended to substantially decrease the fees that many Retail Participants pay to the FINRA/Nasdaq TRF. The first new program is the Retail

Participant Contra Party Fee Discount and Cap Program and the second one is the Retail Participant Combined Cap Program. These new pricing programs are described below.¹⁵

Retail Participant Contra Party Fee Discount and Cap Program

The first proposed pricing program, which is set forth in a new subparagraph II.B, will focus on a Retail Participant's Contra Party activity on the FINRA/Nasdaq TRF. Most of the activity in which Retail Participants engage on the FINRA/Nasdaq TRF is Contra Party activity, and this new program is intended to reduce substantially the fees that Retail Participants, and their clients, pay for engaging in such activity.

Presently, a Retail Participant that engages in Contra Party activity on the FINRA/Nasdaq TRF pays the following fees. The monthly charge for a Retail Participant that engages in Media/Contra Party (Non-Media/Contra Party) activity is \$0.013 multiplied by the number of Media/Contra Party (Non-Media/Contra Party) trades that the participant reports to the FINRA/Nasdaq TRF during the month. Retail Participants 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. If capped, Media/Contra Party (Non-Media/Contra Party) fees for a Retail Participant equal \$0.013 multiplied by 2,500 multiplied by the number of trading days during that month.

¹⁵ The proposed rule change would specify that if a participant in the FINRA/Nasdaq TRF is approved as a Retail Participant on or before the twenty-second day of a month, such approval will be deemed effective, for purposes of Rule 7620A, as of the first day of that month, whereas an approval that occurs after the twenty-second day of the month will be deemed effective the first day of the next month. If a participant in the FINRA/Nasdaq TRF notifies Nasdaq, Inc. that it no longer qualifies as a Retail Participant during a given month, such notification shall be deemed effective, for purposes of Rule 7620A, as of the first day of the next month.

The proposed rule change will largely replace this pricing scheme with a new one that will make it easier for Retail Participants to qualify for discounts or caps on their Contra Party activity. Specifically, a Retail Participant will be entitled to receive special tiered pricing on its Contra Party activity even when it has no corresponding Media/Executing Party Activity. Under the proposed program, a Retail Participant will qualify for discounted or capped fees to the extent that it achieves, during a given month, a qualifying volume of average daily Contra Party activity (Media, Non-Media, or both) in a particular Tape. Within each Tape, a qualifying Retail Participant will receive a volume-based discount on its monthly uncapped Contra Party activity charges relative to the standard rate.¹⁶ For both Media/Contra Party and Non-Media/Contra Party activity, the standard uncapped rate is the number of Media/Contra Party (Non-Media/Contra Party) reports during the month multiplied by \$0.013, whereas the discounted rates under the new program will be the number of Media/Contra Party (Non-Media/Contra Party) reports multiplied by the following:

Tier	Daily Average Number of Executions During the Month Needed to Qualify for Tier	Discounted Rate (Relative to Standard Rate) to be Used to Calculate Monthly Charge, If Uncapped
Tape A		
1	50,000-100,000	\$0.0120
2	100,001-200,000	\$0.0072
3	200,001-300,000	\$0.0052

¹⁶ The structure of the proposed tiers differs within each Tape. The tiers are structured to enable Retail Participants to qualify for special pricing on Contra Party activity beginning at lower volumes on Tape B, where the FINRA/Nasdaq TRF has less such activity, and at higher volumes on Tapes A and C, where the FINRA/Nasdaq TRF has more such activity.

4	>300,000	\$0.0050
Tape B		
1	15,000-30,000	\$0.0120
2	30,001-60,000	\$0.0072
3	60,001-100,000	\$0.0052
4	>100,000	\$0.0050
Tape C		
1	50,000-100,000	\$0.0120
2	100,001-200,000	\$0.0072
3	200,001-300,000	\$0.0052
4	>300,000	\$0.0050

In addition, monthly fees for a Retail Participant's qualifying Contra Party activity for each Tape will be capped at a maximum monthly amount if the Retail Participant qualifies for Tier 4 pricing, as follows:

Tier	Daily Average Number of Executions During the Month Needed to Qualify for Tier	Maximum Monthly Charge, If Capped
Tape A		
1	50,000-100,000	n/a
2	100,001-200,000	n/a
3	200,001-300,000	n/a
4	>300,000	\$32,000
Tape B		
1	15,000-30,000	n/a
2	30,001-60,000	n/a
3	60,001-100,000	n/a

4	>100,000	\$11,000
Tape C		
1	50,000-100,000	n/a
2	100,001-200,000	n/a
3	200,001-300,000	n/a
4	>300,000	\$32,000

These caps will replace the existing cap formulas that apply to Retail Participants for their Media/Contra Party and Non-Media Contra Party reporting activity (proposed subparagraphs II.3 and II.4).

Example 1

An example of the application of the proposed program is as follows. If in a given month with 20 trading days, a Retail Participant achieves an average daily execution volume on the FINRA/Nasdaq TRF of 150,000 Media/Contra Party trades in Tape A, 20,000 Media/Contra Party Trades in Tape B, and 400,000 Media/Contra Party Trades in Tape C, then the Retail Participant would be entitled to receive the special Media/Contra Party pricing set forth in proposed subparagraph 3 with respect to its activity in Tape A (Tier 2), Tape B (Tier 1) and Tape C (Tier 4). As to Tape A, the Retail Participant would pay the uncapped discounted monthly charges applicable to Tier 2 $((\$0.0072) \times (\text{the number of Media/Contra Party trades in Tape A during the month } (150,000)) \times (20 \text{ trading days}) = \$21,600$. As to Tape B, the Retail Participant would pay the uncapped discounted monthly charges applicable to Tier 1, which would be $\$4,800 ((\$0.12) \times (\text{the number of Media/Contra Party trades in Tape B during the month } (20,000)) \times (20 \text{ trading days}))$. As to Tape C, the Retail Participant would pay the lesser of the uncapped discounted monthly charges applicable to Tier 4 $((\$0.005) \times (\text{the number of Media/Contra Party trades in Tape C during the month } (400,000)) \times (20 \text{ trading days}) = \$40,000$

or the Tier 4 cap (\$32,000), which would be \$32,000. Assuming that these Media/Contra Party transactions comprised all of the Retail Participant's activity on the FINRA/Nasdaq TRF, then the Retail Participant's total fees would be \$58,400.

By comparison, under the existing program, the Retail Participant would not receive the benefit of any cap on its Contra Party activity unless it also achieves at least 2,500 average daily Executing Party reports in each Tape during the month. If the Retail Participant does not achieve a cap on its Contra Party activity – as has been the case generally,¹⁷ then under the existing program, the Retail Participant would pay the standard rate. At the standard rate, the same Contra Party activity would cost the Retail Participant \$39,000 in Tape A ($\$0.013 \times 150,000$ average daily executions $\times$ 20 trading days), \$5,200 in Tape B ($\$0.013 \times 20,000$ average daily executions $\times$ 20 trading days), and \$104,000 in Tape C ($\$0.013 \times 400,000$ average daily executions $\times$ 20 trading days), or a total of \$148,200. Thus, under the existing fee schedule, the Retail Participant in this example would pay roughly 2.45 times more for its Contra Party activity on the FINRA/Nasdaq TRF than it would under the proposed rule change.

Retail Participant Combined Cap Program

The second proposed pricing program, which is set forth in a new subparagraph II.C, is a Retail Participant Combined Cap Program, which will apply to Retail Participants that engage in Media/Executing Party activity in addition to Contra Party activity on the FINRA/Nasdaq TRF.

Presently, a Retail Participant may qualify for a cap on its Media (Non-Media)/Executing Party activity separate and apart from the cap on its Contra Party activity. For Media/Executing Party (Non-Media/Executing Party) fees, the monthly charge for a Retail Participant is \$0.018 multiplied by the number of Media/Executing Party (Non-Media/Executing Party) trades that the

¹⁷ To date, only one Retail Participant has achieved the requisite Executing Party activity to also qualify it for a Contra Party cap.

Retail Participant reports to the FINRA/Nasdaq TRF during that month. Such fees are capped once the Retail Participant reports to the FINRA/Nasdaq TRF, 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 equal \$0.018 multiplied by 2,500 multiplied by the number of trading days during that month.

The proposed rule change would eliminate this cap program because it is ill-suited for Retail Participants. The existing Retail Participant Executing Party pricing programs were adapted from programs that were based on Executing Party activity among non-Retail Participants, i.e., participants whose activity on the FINRA/Nasdaq TRF consists of Executing Party activity, primarily, and Contra Party activity, secondarily. However, Retail Participants' typical activity on the FINRA/Nasdaq TRF is the opposite of non-Retail Participants – it is almost exclusively limited to Contra Party activity. As such, the existing programs – which require a Retail Participant to engage in a threshold level of Media/Executing Party activity to qualify for a cap on either its Executing Party or its Contra Party activity – are ineffective. Indeed, only one Retail Participant to date has achieved enough Media/Executing Party activity to qualify for a cap.

The proposed rule change would replace the existing Executing Party programs with a new Combined Activity Cap that is tailored specifically to the behavior of Retail Participants. That is, for Retail Participants that engage primarily in Contra Party activity on the FINRA/Nasdaq TRF, the proposed program would not disqualify them from any special pricing – as does the existing program – if they fail to engage in Executing Party activity. For Retail

Participants that do engage in Executing Party activity, the proposed program would cap their combined Executing Party and Contra Party activity for the month.

Specifically, the proposed rule change would establish a new three-tiered combined fee cap. Tier 1 would cap at \$50,000 a Retail Participant's fees for its total Executing Party and Contra Party activity during a month. To qualify for the Tier 1 cap, a Retail Participant would need to achieve between 1,000 and 2,000 average daily Media/Executing Party trades across all three Tapes during the immediately preceding three month period.¹⁸ (This qualifying level of Media/Executing Party activity is notably less than the existing threshold requirement of 2,500 average daily Media/Executing Party trades.) Tier 2 would cap a Retail Participant's total monthly fees at \$25,000. To qualify for the Tier 2 cap, a Retail Participant would need to achieve between 2,001 and 4,000 average daily Media/Executing Party trades across all three Tapes during the immediately preceding three month period. Finally, Tier 3 of the new program would cap a Retail participant's total monthly fees at \$15,000. To qualify for the Tier 3 cap, a Retail Participant would need to achieve more than 4,000 average daily Media/Executing Party trades across all three Tapes during the immediately preceding three month period.

Example 2

The following is an example of the application of the Retail Participant Combined Activity Cap. Assume that a Retail Participant has the same level of Contra Party activity during

¹⁸ Unlike the existing program, which measures a Retail Participant's average daily executions during the prior month, the proposed program will measure activity over the course of the immediately preceding prior three months. Thus, to qualify for the proposed program, Retail Participants will be required to sustain their daily average activity level for a longer period of time than they do presently. This longer qualification period is intended to ensure that the program applies to Retail Participants that are maintaining or increasing Executing party activity, rather than those that have only episodic activity. This time period also aligns with the schedules for dividend reinvestment programs, which often are the basis for Executing Party activity.

a month as described in Example 1 above. Assume also that, in addition to this Contra Party activity, the Retail Participant also achieves, during the immediately preceding three month period, an average of 1,500 Media/Executing Party trade reports per day in Tape A, 500 Media/Executing Party trade reports per day in Tape B, and 100 Media/Executing Party trade reports per day in Tape C. In this scenario, the Retail Participant's aggregate 2,100 average daily Media/Executing Party trades across all three Tapes would qualify it for the Tier 2 Retail Participant Combined Activity Cap of \$25,000. The capped fee would cover all of the Retail Participant's Executing Party and Contra Party activity for the month. Thus, the Retail Participant would pay the \$25,000 combined cap in lieu of paying \$58,400 for its Contra Party activity under the proposed Retail Participant Contra Party Fee Discount and Cap Program (as described in Example 1). This is because the Retail Participant would receive the benefit of the lowest applicable fee for its activity on the FINRA/Nasdaq TRF.

Retail Participant Securities Transaction Credit

The proposed rule change would amend Rule 7610A to establish a new category of transaction credits tailored to Retail Participants. Much like the existing fee program discussed above, the existing transaction credit program set forth in Rule 7610A was not designed with Retail Participants in mind because participants are entitled to credits only to the extent that they engage in substantial amounts of Media/Executing Party activity. For example, those participants with less than 0.10% market share on the FINRA/Nasdaq TRF presently receive no credits for any revenue that is attributable to their Media/Executing Party activity in any Tape.

The proposed rule change would make the transaction credit program available to Retail Participants that achieve even low levels of Media/Executing Party activity during a given quarter. Under the proposed rule change, Retail Participants that achieve less than 0.10 percent

market share on the FINRA/Nasdaq TRFs on any of the three Tapes would be entitled to receive credits equal to 75 percent of the revenue that is attributable to their Media/Executing Party activity in Tape A and Tape C and credits equal to 70 percent of attributable revenue in Tape B. Retail Participants that achieve a market share of between 0.10 percent and less than 0.50 percent in Tape A or Tape C would receive credits equal to 75 percent of attributable revenue in that Tape (versus 20 percent of attributable revenue for other participants). Retail Participants that achieve a market share of between 0.10 percent and less than 0.35 percent in Tape B would receive credits equal to 70 percent of attributable revenue in that Tape (versus 10 percent of attributable revenue for other participants). For higher market shares, Retail Participants in all Tapes would receive the same percentage shares of attributable revenue as would other participants.¹⁹

The proposal to tailor the transaction credit program to Retail Participants would provide another mechanism – in addition to lower fees and fee caps – to lower the overall costs to Retail Participants of participating in the FINRA/Nasdaq TRF, particularly for Retail Participants with a greater scope and volume of activity.

Clarification to ATS Market Maker Media/Contra Party Cap

Lastly, the proposed rule change would amend the ATS Market Maker Media/Contra Party Cap, which currently is set forth in subparagraph 5 and would be renumbered as subparagraph D, to correct a typographical error and also clarify the provision. This cap

¹⁹ The proposed rule change would specify that if a participant in the FINRA/Nasdaq TRF is approved as a Retail Participant after the first day of a calendar quarter, such approval will be deemed effective, for purposes of Rule 7610A, as of the first day of the next calendar quarter. Likewise, if a participant in the FINRA/Nasdaq TRF notifies Nasdaq, Inc. that it no longer qualifies as a Retail Participant after the first day of a calendar quarter, such notification shall be deemed effective, for purposes of Rule 7610A, as of the first day of the next calendar quarter.

program provides for participants making markets in alternative trading systems registered pursuant to Regulation ATS to qualify for a fee cap on all their trades in a month if they meet three criteria. Presently in the Rule, the second criterion is that the “Participant must be contra to a minimum of 1,000,000 trades in Tape A, 500,000 trades in Tape C or 250,000 trades in Tape B.” Prior to the reorganization of the fee schedule, effective September 1, 2018, this provision stated that to qualify for the program, “Participant must be contra to a minimum of 1,000,000 trades in Tape A, 500,000 trades in Tape C and 250,000 trades in Tape B.” (Emphasis added.)²⁰ Upon reorganizing the fee schedule, the “and” in this provision was inadvertently changed to “or.” The proposed rule change corrects that unintended error.

Additionally, the proposed rule change further amends this criterion due to concern that it could be misinterpreted (as corrected above) to mean that qualification for the cap requires a participant to meet minimum Contra Party trade reporting volumes in all three Tapes. In fact, the criterion is intended to mean that to qualify for the cap with respect to trade reports in a particular Tape, a participant must meet the minimum trade volume threshold for that Tape. The proposed revised and corrected text is as follows:

Participant must be contra to a minimum number of trades during the month in a particular Tape to qualify for a cap on trades in that Tape. The minimum number of monthly trades for each Tape are as follows: 1,000,000 trades in Tape A, 500,000 trades in Tape C and 250,000 trades in Tape B.

FINRA has filed the proposed rule change for immediate effectiveness. The operative date will be January 1, 2019.

2. Statutory Basis

²⁰ See Securities Exchange Act Release No. 83866 (Aug. 16, 2018), 83 FR 42545 (Aug. 22, 2018) (Notice of Filing and Immediate Effectiveness of File No. SR-FINRA-2018-029).

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.

First, FINRA believes that the proposed elimination of the existing Retail Participant pricing programs under Rule 7620A and adoption of new programs that are better aligned with and tailored to the behavioral profile of Retail Participants is an equitable allocation of reasonable fees. The existing pricing programs for Retail Participants were established by carving Retail Participants out from the general pricing programs applicable to all participants. The existing pricing programs were not designed with Retail Participants in mind, but instead are geared toward participants that engage in Executing Party activity primarily, and Contra Party activity secondarily. The behavioral profile of Retail Participants is the opposite of non-Retail Participants, such as ATS market makers and wholesalers. Retail Participants engage primarily, if not exclusively, in Contra Party activity on the FINRA/Nasdaq TRF. However, the only aspect of the Retail Participant programs that distinguishes them from their non-Retail Participant counterparts is the fact that their pricing is frozen at pre-September 2018 levels. Because the Retail Participant programs were designed for non-Retail Participants, the existing Retail Participant programs have proven to be ineffective in accomplishing their objectives of lowering fees for Retail Participants and their retail customers. That is, the existing programs require Retail Participants to achieve at least 2,500 average daily Media/Executing Party trades to qualify for caps on either their Executing Party or their Contra Party activity fees, but Retail Participants generally do not generate enough Executing Party activity to trigger the caps. To

²¹ 15 U.S.C. 78o-3(b)(5).

date, only one Retail Participant has qualified for a cap. Moreover, the ineffectiveness of the existing Retail Participant programs in lowering fees has led certain Retail Participants to direct their executing counterparties to stop reporting their trades to the FINRA/Nasdaq TRF and to report them instead to the FINRA/NYSE TRF, which does not charge Contra Parties that are not also reporting parties.

The two proposed Retail Participant fee programs address the ineffectiveness of the existing programs by aligning fees, discounts, and caps with the activities in which Retail Participants engage on the FINRA/Nasdaq TRF. First and foremost in this regard, the proposed rule change introduces a tiered system of caps – as well as discounts, when caps are not economical to the Retail Participant – that become more favorable as the level of the Retail Participant's Contra Party activity increases. The proposed rule change also eliminates the requirement that a Retail Participant must engage in a threshold level of Media/Executing Party activity to qualify for discounts or caps on their Contra Party activity.

Moreover, the proposed rule change introduces a Retail Participant Combined Activity Cap that would provide Retail Participants with a cap on their combined monthly activity on the FINRA/Nasdaq TRF to the extent that they have Media/Executing Party activity. This Combined Activity Cap in many cases would be more favorable than the Contra Activity cap for Retail Participants that also have Executing Party activity.

For similar reasons, FINRA believes that the proposed rule change to establish a new securities transaction credit program under Rule 7610A that is tailored to Retail Participants is an equitable allocation of reasonable fees. The existing securities transaction program is generally inaccessible to Retail Participants, insofar as they generally engage in low levels of Media/Executing Party activity. The proposed rule change would enable Retail Participants with

even low levels of Media/Executing Party activity to receive credits for engaging in such activity. It also would increase the percentage of revenue sharing that occurs at these low levels of activity relative to the percentage that other types of participants receive with the same market shares. As such, the proposed rule change would provide another mechanism to lower the overall costs to Retail Participants of participating in the FINRA/Nasdaq TRF.

The proposed new programs to benefit Retail Participants specifically are not unfairly discriminatory. Effective September 1, 2018, a distinct category of Retail Participant pricing for the FINRA/Nasdaq TRF was established in recognition of the fact that customers of Retail Participants generally include individual investors who trade less frequently than do other categories of customers. Accordingly, Retail Participants often report fewer trades to the FINRA/Nasdaq TRF than other participants. As such, the fees that Retail Participants (and their customers) pay should be better tailored to their activity on the FINRA/Nasdaq TRF.²² However, the existing programs have not achieved their objective of reducing costs for Retail Participants.

Because the existing programs have not succeeded in reducing costs to Retail Participants relative to the FINRA/NYSE TRF (which also competes for Contra Party business and does not charge Contra Parties that are not also reporting parties), several Retail Participants have requested that their executing counterparties report their trades to the FINRA/NYSE TRF rather than the FINRA/Nasdaq TRF. The proposed rule change is designed to further reduce the costs to Retail Participants on the FINRA/Nasdaq TRF in an effort to stem, if not reverse, this loss of retail business to the FINRA/NYSE TRF.

²² See Securities Exchange Act Release No. 83866 (Aug. 16, 2018), 83 FR 42545 (Aug. 22, 2018) (Notice of Filing and Immediate Effectiveness of File No. SR-FINRA-2018-029).

The proposed changes also are not unfairly discriminatory in that they will be available to all FINRA members that use the FINRA/Nasdaq TRF and meet the threshold requirements to qualify for the terms of the programs. The programs themselves are designed to be accessible to most, if not all, existing Retail Participants, including those with both low and high levels of activity on the FINRA/Nasdaq TRF.

Additionally, the proposed rule change would reorganize and clarify Rule 7620A so that it is easier to comprehend and presented in a more logical order. The reorganization will also ensure that examples of the application of the Rule are placed in the paragraphs where they will be applicable going forward.

The proposed rule change also would amend the definition of a “Retail Order” in Supplementary Material .01 to Rule 7620A to clarify that this term includes orders that originate from accounts that exist in corporate form for the benefit of individuals, provided that individuals submit the orders. Although it is reasonable to interpret the existing definition of a Retail Order to include an order that originates from an individual retirement account or another corporate account that exists for the benefit of an individual, the proposed rule change will eliminate any uncertainty in this regard. Moreover, the proposed rule change will aid prospective Retail Participants in understanding their obligations as such. The proposed clarifying language derives from the definition of a “Designated Retail Order” in Nasdaq Rule 7018 [sic], which is reasonable because the concepts are similar. This proposed change is equitable and not unfairly discriminatory because it merely makes a non-substantive technical clarification to the meaning of “Retail Order.”

Finally, the proposed rule change would correct an unintended typographical error that occurred when Rule 7620A was reorganized effective September 1, 2018. FINRA, Nasdaq, and

all FINRA/Nasdaq TRF participants have an interest in FINRA maintaining rules for its trade reporting facilities that are accurate and free of errors. Likewise, FINRA believes that clarifying the ATS Market Maker Media/Contra Party Cap will avoid confusion as to the number of Contra Party trades in a particular Tape that are required to qualify for the cap for that Tape.

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.

Regulatory Need

Nasdaq, as the Business Member and operator of the FINRA/Nasdaq TRF, collects all fees on behalf of the FINRA/Nasdaq TRF. As discussed above, Nasdaq has observed an increase in competition in the market for OTC trade reporting, and in response to competitive forces, determined to reduce fees for most Retail Participants that report trades to the FINRA/Nasdaq TRFs and establish a new transaction credit program that will be more accessible to such participants.

Economic Baseline

As discussed above, pursuant to FINRA Rule 7620A, Retail Participants in the FINRA/Nasdaq TRF 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 Retail Participants for a particular Tape during a given month, provided that during the month, the Retail Participant achieves a daily average number of Media/Executing Party trades of at least 2,500 in the same Tape.

There are currently fifteen participants who are either approved or being considered for the Retail Participant program, that cumulatively represent approximately 25% of total reporting activity in the FINRA/Nasdaq TRF over the past 12 months. However, due to the nature and scale of retail businesses, to date, only one Retail Participant had sufficient reporting activity to qualify for a cap.

Also, pursuant to Rule 7610A, FINRA members that report OTC transactions in NMS stocks to a FINRA/Nasdaq TRF for public dissemination or “media” purposes may receive quarterly transaction credits that equal a percentage of FINRA/Nasdaq TRF revenues that are attributable to the members’ transactions. However, the current rule does not distinguish among categories of FINRA/Nasdaq TRF participants. Due to Retail Participants’ relatively smaller reporting activity compared to that of non-Retail Participants, Retail Participants have not received transactions credits in the past.

Economic Impacts

The proposed rule change replaces the existing retail Participant Pricing Program with two new programs, “Retail Participant Contra Party Fee Discount and Cap Program” and “Retail Participant Combined Cap Program,” which are designed to reduce the fees that most Retail Participants pay to the FINRA/Nasdaq TRF.

As mentioned above, there are fifteen current and prospective Retail Participants that could potentially benefit from the reduced fees under the proposed Retail Participant programs. While Example 1 above illustrates the potential reduction in fees for a given volume in all Tapes, the potential reduction in fees in each Tape ranges from a few hundred dollars to approximately \$50,000. The reduction in fees could be larger if the Participant qualifies for both the reduced fees and the combined cap. Currently, only one Retail Participant would have the sufficient

activity to qualify for the Retail Participant Combined Cap Program based on its historical activity. Going forward, however, as a result of the proposal, additional Retail Participants may increase their Executing Party activity on the FINRA/Nasdaq TRF and potentially become eligible for transaction credits or the Retail Participant Combined Cap Program.

FINRA analyzed data provided by Nasdaq that contain monthly fees incurred by fifteen current and prospective Retail Participants that reported OTC trades to FINRA/Nasdaq TRF over a one year period from July 2017 through June 2018. The data included the estimated reduction in fees that would have occurred under the proposed fee and cap schedule assuming that the reporting behavior would be the same under the current and the proposed schedule. The analysis demonstrated that there would be no reduction in fees for ten of the fifteen current and prospective Retail Participants, since their level of reporting activity would not qualify them for the discounts (although such Retail Participants would, at a minimum, be exempt from the \$350 per month Participant Fee). The remaining five participants would observe average monthly reduction in fees that range from \$390 to \$111,856.

The proposed rule change also opens up the transaction credit program to Retail Participants that achieve even low levels of Executing Party activity during a given quarter. In the four quarters between July 2017 and June 2018, four Retail Participants would have sufficient market share to qualify for transaction credits. The quarterly credits would range from \$55 to \$11,007 across all Tapes, with a median credit of \$4,749.

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 reduction in fees provide [sic] net benefits, they may choose to shift their reporting from FINRA/NYSE TRF to FINRA/Nasdaq TRF. 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.

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. The FINRA/NYSE TRF is free to adjust its fees and fee cap programs in response to the changes proposed herein to render them more attractive relative to the FINRA/Nasdaq TRF. If any existing or prospective participant in FINRA/Nasdaq TRF determines that the new fees or fee cap thresholds are less attractive 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 TRF, in which case the FINRA/Nasdaq TRFs would lose market share. However, the impact of differences in fees and fee cap programs across the TRFs on a participant's decision to prefer one TRF over the other may be limited by the set of functionalities each TRF provides.

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

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 Act²³ and paragraph (f)(2) of Rule 19b-4 thereunder.²⁴ At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule

²³ 15 U.S.C. 78s(b)(3)(A).

²⁴ 17 CFR 240.19b-4(f)(2).

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-2018-042 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-2018-042. 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-2018-042, 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.²⁵

Brent J. Fields,

Secretary.

²⁵ 17 CFR 200.30-3(a)(12).

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