



## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-98047; File No. SR-FINRA-2022-031]

### **Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Order Approving a Proposed Rule Change to Adopt FINRA Rules 6151 (Disclosure of Order Routing Information for NMS Securities) and 6470 (Disclosure of Order Routing Information for OTC Equity Securities)**

August 2, 2023.

#### **I. Introduction**

On November 16, 2022, the Financial Industry Regulatory Authority, Inc. (“FINRA”) filed with the Securities and Exchange Commission (“Commission” or “SEC”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Exchange Act”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to require members to (i) publish order routing reports for orders in OTC Equity Securities,<sup>3</sup> and (ii) submit their order routing reports for both OTC Equity Securities and NMS securities<sup>4</sup> to FINRA for publication on the FINRA website. The proposed rule change was published for comment in the Federal Register on December 6, 2022.<sup>5</sup> On January 18, 2023, pursuant to Section 19(b)(2) of the Exchange Act,<sup>6</sup> the Commission designated

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

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> FINRA Rule 6420(f) defines an “OTC Equity Security” as any equity security that is not an NMS stock, other than a Restricted Equity Security. FINRA Rule 6420(k) defines a “Restricted Equity Security” as any equity security that meets the definition of “restricted security” as contained in Rule 144(a)(3) under the Securities Act of 1933. “NMS stock” means any NMS security other than an option. See 17 CFR 242.600(b)(55).

<sup>4</sup> “NMS securities” include any security or class of securities for which transaction reports are collected, processed, and made available to an effective transaction reporting plan, or an effective national market system plan for reporting transactions in listed options. See 17 CFR 242.600(b)(54).

<sup>5</sup> See Securities Exchange Act Release No. 96415 (November 30, 2022), 87 FR 74672 (“Notice”).

<sup>6</sup> 15 U.S.C. 78s(b)(2).

a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to approve or disapprove the proposed rule change.<sup>7</sup> On March 3, 2023, the Commission instituted proceedings to determine whether to approve or disapprove the proposed rule change.<sup>8</sup> On May 31, 2023, the Commission designated a longer period for Commission action on proceedings to determine whether to approve or disapprove the proposed rule change.<sup>9</sup> The Commission received comment letters on the proposed rule change and responses from FINRA.<sup>10</sup> This order approves the proposed rule change.

## II. Summary of the Proposed Rule Change

As FINRA states in the Notice, Rule 606(a) of Regulation National Market System (“Regulation NMS”) requires broker-dealers to publicly disclose specified information about their order routing practices for NMS securities.<sup>11</sup> In 2018, the Commission amended SEC Rule 606(a) to enhance required disclosures from broker-dealers about their order routing practices for NMS securities, including enhanced disclosures for non-directed orders in NMS stocks that are submitted on a “held” basis in order to better allow “customers—and retail investors in particular—that submit orders to their broker-dealers [to] be better able to assess the quality of order handling services provided by their broker-dealers” and to allow customers to determine “whether their broker-dealers are effectively managing potential conflicts of interest.”<sup>12</sup>

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<sup>7</sup> See Securities Exchange Act Release No. 96699, 88 FR 4260 (January 24, 2023).

<sup>8</sup> See Securities Exchange Act Release No. 97039, 88 FR 14653 (March 9, 2023).

<sup>9</sup> See Securities Exchange Act Release No. 97629, 88 FR 37112 (June 6, 2023).

<sup>10</sup> All comments received by the Commission on the proposed rule change are available at: <https://www.sec.gov/comments/sr-finra-2022-031/srfinra2022031.htm>.

<sup>11</sup> 17 CFR 242.606(a) (“SEC Rule 606(a”). See also Notice, *supra* note 5, at 74672.

<sup>12</sup> See Securities Exchange Act Release No. 84528 (November 2, 2018), 83 FR 58338 (November 19, 2018) (“SEC Rule 606 Adopting Release”). A broker-dealer must attempt to execute a “held” order immediately, while a “not held” order instead provides a broker-dealer with price and time discretion. *Id.* at 58344. See also Notice, *supra* note 5, at 74672 n.5.

As described below and in more detail in the Notice, FINRA proposes to adopt FINRA Rule 6470 (Disclosure of Order Routing Information for OTC Equity Securities), which imposes disclosure requirements for OTC Equity Securities that are generally aligned with the requirements of SEC Rule 606(a) disclosures but with modifications to account for differences between the over-the-counter (“OTC”) markets and the market for NMS securities. In addition, to improve the accessibility of these new disclosures, as well as SEC Rule 606(a) reports, FINRA proposes to adopt FINRA Rule 6470(d) and FINRA Rule 6151 (Disclosure of Order Routing Information for NMS Securities) to require members to send both disclosures to FINRA for centralized publication on the FINRA website.

Proposed FINRA Rule 6470 would require the publication of order routing disclosures for OTC Equity Securities.<sup>13</sup> Specifically, proposed FINRA Rule 6470(a) would require every member to make publicly available for each calendar quarter a report on its routing of non-directed orders in OTC Equity Securities that are submitted on a held basis during that quarter, broken down by calendar month, and keep such report posted on an internet website that is free and readily accessible to the public for a period of three years from the initial date of posting on the internet website (“OTC Equity Security reports”).<sup>14</sup> These reports would be required to be separated into three sections: (i) domestic OTC Equity Securities; (ii) American Depository Receipts and foreign ordinaries that are OTC Equity Securities; and (iii) Canadian-listed

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<sup>13</sup> See Notice, supra note 3, at 74672 n.8.

<sup>14</sup> Proposed FINRA Rule 6470 would apply to “every member,” but FINRA notes that the focus of the proposed disclosures is held orders from customers in OTC Equity Securities, and some members may not engage in any activities involving held orders from customers in OTC Equity Securities. See Notice, supra note 5 at 74673 n.9. If a member does not accept any orders in OTC Equity Securities from customers during a given calendar quarter (whether held or not held), such member would not be required to publish a report under Rule 6470 for that quarter. Id. Similarly, a member that accepted only not held orders in OTC Equity Securities from customers—but no held orders in OTC Equity Securities from customers—during a given calendar quarter would not be required to publish a report for that quarter. Id. Further, FINRA states that if a member accepted orders in OTC Equity Securities (whether held, not held, or both) only from other broker-dealers, but not from customers, during a given calendar quarter, such member would not be required to publish a report for that quarter. Id.

securities trading in the United States as OTC Equity Securities.<sup>15</sup> In addition, proposed FINRA Rule 6470(a) would specify that the new OTC Equity Security reports must be made available using the most recent versions of the XML schema and associated PDF renderer as published on the FINRA website,<sup>16</sup> and proposed FINRA Rule 6470(d) would require the reports to be made publicly available within one month after the end of the quarter addressed in the report.<sup>17</sup>

Pursuant to proposed FINRA Rule 6470(a), the new OTC Equity Security reports would be required to include the information specified in paragraphs (a)(1) through (4) of proposed FINRA Rule 6470, specifically:

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- <sup>15</sup> FINRA states that to provide for consistency across member reports, FINRA will publish a list of the OTC Equity Security symbols that fall under each category, and members would be required to publish reports in a manner consistent with such list. See Notice, supra note 5, at 74673. FINRA states that it will provide information in the Regulatory Notice announcing the effective date regarding where members may access the list of OTC Equity Security symbols that FINRA will maintain on its website. Id. at 74674 n.11. FINRA also notes that these categories differ from the NMS securities categories required to be reported for SEC Rule 606(a) reports, which it believes are not relevant to the OTC market. Id.
- <sup>16</sup> FINRA states that it will publish the technical specifications for the XML schema and associated PDF renderer on its website for member use in generating the new reports. See Notice, supra note 5, at 74673 n.12. FINRA expects that, subject to the differences between the SEC Rule 606(a) reports and the OTC Equity Security reports, the XML schema and associated PDF renderer published by FINRA would be substantially similar to those published by the SEC for the SEC Rule 606(a) reports. Id. FINRA believes this requirement would ensure that reports are generated and published in standardized machine-readable and human-readable forms, which would benefit investors by permitting the public to more easily analyze and compare the OTC Equity Security reports across members, as well as to more easily perform combined analysis of both SEC Rule 606(a) and OTC Equity Security reports. Id. at 74763.
- <sup>17</sup> FINRA states that it understands that some introducing firms route all of their orders in OTC Equity Securities to one or more clearing firms for further routing to other venues for execution. See Notice, supra note 5 at 74673 n.10. FINRA states that the Commission has provided guidance that, where an introducing firm routes all of its covered orders to one or more clearing firms for further routing and execution and the clearing firm in fact makes the routing decision, the introducing firm generally may comply with the SEC Rule 606(a) order routing disclosure requirements by: (i) disclosing its relationship with the clearing firm(s) on its website that includes any payment for order flow received by the introducing firm, and (ii) adopting the clearing firm's disclosures by reference, provided that the introducing firm has examined the report and does not have reason to believe it materially misrepresents the order routing practices. Id. FINRA states that it intends to provide parallel guidance with respect to proposed FINRA Rule 6470. Id.

- the percentage of total orders<sup>18</sup> for the section that were not held orders and held orders, and the percentage of held orders for the section that were non-directed orders;<sup>19</sup>
- the identity of the ten venues to which the largest number of total non-directed held orders for the section were routed for execution<sup>20</sup> and of any venue to which five percent or more of non-directed held orders for the section were routed for execution, and the percentage of total non-directed held orders for the section routed to the venue;<sup>21</sup>
- for each identified venue, the net aggregate amount of any payment for order flow received, payment from any profit-sharing relationship received, transaction fees paid,

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<sup>18</sup> FINRA states that “total orders” would include all orders from customers for the section, including both directed and non-directed orders from customers. See Notice, supra note 5, at 74673 n.14.

<sup>19</sup> FINRA states that for purposes of the proposed disclosures, a “non-directed order” would mean any order from a customer other than a directed order. See Notice, supra note 5, at 74673-74 n.15. FINRA further states that consistent with the definition of “directed order” under Regulation NMS, a “directed order” would mean an order from a customer that the customer specifically instructed the member to route to a particular venue for execution. See id.; 17 CFR 242.600(b). FINRA notes that, similar to the definition of “customer” under SEC Rule 600(b)(23) of Regulation NMS, a “customer” is defined under FINRA rules to exclude a broker or dealer. See FINRA Rule 0160(b)(4). Orders from other broker-dealers would therefore be excluded from the proposed disclosures. See Notice, supra note 5, at 74673-74 n.15.

<sup>20</sup> FINRA states that, consistent with the Commission’s approach to SEC Rule 606(a), a “venue” would be defined broadly to cover any market center or any other person or entity to which a member routes orders for execution. See Notice, supra note 5, at 74674 n.16. Accordingly, for purposes of proposed FINRA Rule 6470, where an alternative trading system (“ATS”) offers both automatic order execution and order delivery functionality, the ATS should be identified as the venue only when the ATS provides order execution. Conversely, for purposes of proposed FINRA Rule 6470, in cases where the ATS instead provides order delivery, the separate market center to which the orders are delivered—e.g., a market maker or other ATS—should be identified as the venue where the order was routed for execution. Id.

<sup>21</sup> Proposed FINRA Rule 6470(b) would provide that a member is not required to identify execution venues that received less than 5% of non-directed held orders for a section of the member’s OTC Equity Security report, provided that the member has identified the top execution venues that in the aggregate received at least 90% of the member’s total non-directed held orders for the section. FINRA states that this provision is consistent with exemptive relief that the Commission has provided with respect to SEC Rule 606(a) reports. See Notice, supra note 5, at 74674 n.17.

and transaction rebates received, both as a total dollar amount and per order, for all non-directed held orders for the section; and

- a discussion of the material aspects of the member's relationship with each identified venue, including, without limitation, a description of any arrangement for payment for order flow and any profit-sharing relationship and a description of any terms of such arrangements, written or oral, that may influence a member's order routing decision including, among other things: (i) incentives for equaling or exceeding an agreed upon order flow volume threshold, such as additional payments or a higher rate of payment; disincentives for failing to meet an agreed upon minimum order flow threshold, such as lower payments or the requirement to pay a fee; (ii) volume-based tiered payment schedules; and (iii) agreements regarding the minimum amount of order flow that the member would send to a venue.<sup>22</sup>

To make both the existing SEC Rule 606(a) reports and the new OTC Equity Security reports more accessible for regulators, investors and others seeking to analyze and compare the data, FINRA is proposing to require that members provide the reports to FINRA for central publication on the FINRA website. Proposed FINRA Rule 6151 would require every member that is required to publish a SEC Rule 606(a) report to provide the report to FINRA, in a manner prescribed by FINRA, within the same time and in the same formats that such report is required

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<sup>22</sup> FINRA states that the types of arrangements referenced above are not an exhaustive list of terms of payment for order flow arrangements or profit-sharing relationships that may influence a broker-dealer's order routing decision that would be required to be disclosed. See Notice, supra note 5, at 74674 n.18. For example, if a broker-dealer receives a discount on executions in other securities or some other advantage in directing order flow in a specific security to a venue, or if a broker-dealer receives equity rights in a venue in exchange for directing order flow there, then all terms of those arrangements would also be required to be disclosed. Id. Similarly, if a broker-dealer receives variable payments or discounts based on order types and the number of orders sent to a venue, such arrangements would be required to be disclosed. Id. However, FINRA notes that these are only examples, and a member would be required to disclose any other material aspects of its relationship with each identified venue regardless of whether a particular example is listed in the proposed rule text or otherwise discussed in this proposed rule change. Id.

to be made publicly available pursuant to SEC Rule 606(a). In combination with proposed FINRA Rule 6470(d), which would require members to provide the OTC Equity Security report to FINRA within one month after the end of the quarter addressed in the report in such a manner as may be prescribed by FINRA, FINRA would be able to publish both SEC Rule 606(a) and OTC Equity Security reports on its public website, free of charge and without usage restrictions.<sup>23</sup>

FINRA states that it undertook an “economic impact assessment” to analyze the potential economic impacts of the proposed rule change, including potential costs, benefits, and distributional and competitive effects, relative to the current baseline.<sup>24</sup> In this analysis, FINRA analyzed the number of firms quoting, executing trades and routing orders in OTC Equity Securities over specific time periods, as well as the number of symbols traded per firm and average dollar volume of trading per symbol and per firm. In addition, FINRA published the proposed rule change in Regulatory Notice 21-35 (October 2021) and received five comments in response.<sup>25</sup> FINRA provided these comments, as well as a summary of these comments and its responses in its filing with the Commission.<sup>26</sup>

### III. Discussion and Commission Findings

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<sup>23</sup> See Notice, supra note 5, at 74674-75. FINRA states that the SEC has provided guidance that introducing firms may comply with SEC Rule 606(a) by incorporating their clearing firm(s)’s reports in specified circumstances, and FINRA intends to provide similar guidance with respect to the OTC Equity Security reports required under proposed FINRA Rule 6470. Id. at 74675 n.25. To facilitate centralized access to the reports, such introducing firms must provide FINRA with a list of their clearing firm(s) and the hyperlink to the webpage where they disclose their clearing firm relationship(s) and adopt the clearing firm(s)’s reports by reference. Id. Each introducing firm relying on this guidance would be required to provide this information to FINRA upon implementation of the proposed rule change and to update FINRA if the information previously provided changes. Id. This information will enable FINRA to provide investors with relevant information for all firms, including introducing firms incorporating clearing firm reports by reference, on FINRA’s website. Id.

<sup>24</sup> See Notice, supra note 5, at 74675-78.

<sup>25</sup> Comments received by FINRA are available on FINRA’s website at <https://www.finra.org/rules-guidance/notices/21-35#comments>.

<sup>26</sup> See Notice, supra note 5, at 74678-80.

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to a national securities association.<sup>27</sup> In particular, the Commission finds that the proposed rule change is consistent with Section 15A(b)(6) of the Exchange Act,<sup>28</sup> which requires, among other things, that the association's rules be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest, and that the rules are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Commission received two comment letters that were broadly supportive of the proposed rule change and greater transparency regarding the routing of orders in OTC Equity Securities in general.<sup>29</sup> Another commenter submitted three comment letters, and was supportive of some aspects of the proposal, but expressed concerns about and opposed other aspects of the proposal, as discussed below.<sup>30</sup>

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<sup>27</sup> In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>28</sup> 15 U.S.C. 78o-3(b)(6).

<sup>29</sup> See letters to Vanessa Countryman, Secretary, Commission, from G.P., dated November 30, 2022; and from Daniel Lambden, dated December 5, 2022.

<sup>30</sup> See letters to Vanessa Countryman, Secretary, Commission, from Howard Meyerson, Managing Director, Financial Information Forum, dated December 20, 2022 ("FIF Letter"), dated February 3, 2023 ("FIF Letter II"), and dated April 13, 2023 ("FIF Letter III"). The commenter is supportive of some aspects of the proposal, including: FINRA's proposal to maintain the same quarterly reporting timeframe for OTC Equity Security reports as applies for SEC Rule 606(a) reporting; FINRA's chosen OTC Equity Security reporting categories; FINRA's assertion that it will publish and maintain a file of which symbols are included in each OTC Equity Security category and make this file accessible to all industry members without charge; FINRA's approach of not requiring the OTC Equity Security reports to be broken out by order type; FINRA's proposal to require reporting of payments per executed order rather than per share; FINRA's decision to limit the OTC Equity Security reports to non-directed held orders; and proposed FINRA Rule 6470(b) which would provide a limited exception to venue reporting requirements in proposed FINRA Rule 6470(a)(2). See FIF Letter at 7-9. The commenter and FINRA both state that the proposal to require reporting of payments per executed order rather

A. Disclosure in the Routing Firm Scenario

Among other things, proposed FINRA Rule 6470(a) requires a member to disclose the identity of the ten venues to which the largest number of total non-directed held orders for the section were routed for execution and of any venue to which five percent or more of non-directed held orders for the section were routed for execution.<sup>31</sup> The commenter states that it opposes this aspect of the proposal because the proposed FINRA rule, like SEC Rule 606(a), would require a reporting firm that receives and routes customer orders to a second firm (“routing firm”) that does not execute customer orders but routes those orders to other venues for execution (“routing firm scenario”), to disclose the venue to which the routing firm routes the customer orders for execution.<sup>32</sup> The commenter states that this requires the reporting firm to report the net fees paid and rebates received between the routing firm and the execution venue in the OTC Equity Security report tables (i.e., the disclosures required by proposed FINRA Rule 6470(a)(3)) and material aspects disclosures (i.e., the disclosures required by proposed FINRA Rule 6470(a)(4)).<sup>33</sup> The commenter states that the proposed FINRA rule, like SEC Rule 606(a), does

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than per share is consistent with current industry practice for OTC Equity Securities. See id.; Notice, supra note 5, at 74674.

<sup>31</sup> See proposed FINRA Rule 6470(a)(2).

<sup>32</sup> See FIF Letter at 2. The commenter describes what it believes is a “highly problematic ‘look-through’ approach” used by the Commission in its application of SEC Rule 606(a) and its predecessor rule, Rule 11Ac1-6, to the routing firm scenario. See id. at 2; and FIF Letter III at 4-5. The commenter states that this “look-through” approach was not included in the text of Rule 606(a) nor discussed in the 2018 amendments to Rule 606(a) reporting. The Commission highlights that the requirement in SEC Rule 606(a) to report the venues to which orders were routed “for execution” has been in place since Rule 11Ac1-6 was originally adopted in 2000. In the Rule 11Ac1-6 adopting release, the Commission stated that “[t]he term ‘venue’ is intended to be interpreted broadly to cover ‘market centers’ within the meaning of Rule 11Ac1-5(a)(14), as well as any other person or entity to which a broker routes non-directed orders for execution. Consequently, the term excludes an entity that is used merely as a vehicle to route an order to a venue selected by the broker-dealer.” (emphasis in the original). See Securities Exchange Act Release No. 43590 (November 17, 2000), 65 FR 75414, 75427 n.63 (December 1, 2000).

<sup>33</sup> See FIF Letter at 2. See also proposed FINRA Rule 6470(a)(3) and (4).

not require the reporting of the net fees paid or rebates received between the reporting firm and the routing firm in the OTC Equity Security report tables.<sup>34</sup>

The commenter states that this approach obscures relevant information from retail customers because, to understand the financial inducements faced by a reporting firm, the relevant information is the payment between the reporting firm and the routing firm. The commenter also states that this results in reported data that is not comparable across broker-dealers.<sup>35</sup> In addition, the commenter states that the approach results in reporting of arrangements that are not relevant to investors and results in relevant and important information being excluded from the reports.<sup>36</sup> The commenter also states that this approach requires firms to report on financial arrangements to which they might not be a party, that the rules do not impose any obligation on the routing firm to provide data to the reporting firm, and a reporting firm cannot effectively validate the data received from routing firms, particularly in situations where a foreign routing firm routes to a foreign execution venue.<sup>37</sup> The commenter further states that the rule filing does not explicitly discuss the costs for this reporting.<sup>38</sup> The commenter also suggests that if FINRA adopts this reporting, then proposed FINRA Rule 6470 should be revised to address the routing firm scenario, because the proposed rule does not accurately describe what firms are required to report.<sup>39</sup>

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<sup>34</sup> See FIF Letter at 2. See also proposed FINRA Rule 6470(a)(3).

<sup>35</sup> See *id.* at 3-4.

<sup>36</sup> See FIF Letter III at 3-5. In FIF Letter III, the commenter sets forth a scenario of order routing reporting under SEC Rule 606(a) that inaccurately reflects the requirements of such rule. In the scenario, FIF incorrectly assumes reporting is based on the number of orders routed by the reporting broker-dealer instead of the number of orders received by the reporting broker-dealer from the customer as required by SEC Rule 606(a). See *id.* at 4-5; see also letter to Vanessa Countryman, Secretary, Commission, from Robert McNamee, Vice President & Associate General Counsel, FINRA, dated June 23, 2023 (“FINRA Letter II”) at 3 n.12.

<sup>37</sup> See FIF Letter at 5.

<sup>38</sup> See *id.* at 5.

<sup>39</sup> See *id.* at 6; FIF Letter III at 6.

FINRA believes that the proposal is clear concerning the execution venue reporting requirement.<sup>40</sup> FINRA states that, as is the case with SEC Rule 606(a), the plain language of proposed Rule 6470(a)(2) requires disclosure of venues to which orders “were routed for execution.”<sup>41</sup> FINRA highlights that, consistent with SEC Rule 606(a), the purpose of its proposed disclosures is to provide information about members’ order routing practices and potential conflicts of interest related to execution venues and, therefore, FINRA believes that the same types of venues should be covered by its new OTC Equity Security reports as are covered by SEC Rule 606(a) reports.<sup>42</sup> FINRA also states that members already have experience with SEC Rule 606(a) and may be able to utilize existing systems and arrangements with routing firms to provide the disclosures, and that aligning the scope of the SEC Rule 606(a) and OTC Equity Security reports may also reduce potential investor confusion that could arise with similar reports that do not provide information about the same types of venues.<sup>43</sup>

FINRA states that it is appropriate to require reporting firms to provide information on the routing firm’s arrangements with execution venues because reporting firms are responsible for their order handling choices, and FINRA believes that it is reasonable to require reporting firms to obtain and disclose the required information from broker-dealers they choose to use as their routing firms, including where a routing firm or an execution venue is located abroad.<sup>44</sup> In

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<sup>40</sup> See letter to Vanessa Countryman, Secretary, Commission, from Robert McNamee, Associate General Counsel, FINRA, dated March 29, 2023 (“FINRA Letter”) at 5 and FINRA Letter II at 2-4.

<sup>41</sup> See FINRA Letter at 5. FINRA also states that, if a member routes to another broker-dealer that does not itself execute orders, that receiving broker-dealer would not be an execution venue under the text of the proposed rule. See id. Additionally, FINRA has undertaken an economic impact assessment that analyzed, among other things, the potential costs and benefits of the proposal as described in the filing, which clearly contemplates disclosure of execution venues rather than routing brokers. See id. FINRA’s assessment of costs is based on its experience with order routing reporting and adequately describes the costs of producing the report.

<sup>42</sup> See FINRA Letter at 4.

<sup>43</sup> See id.

<sup>44</sup> See id.

addition, FINRA states that “requiring disclosure of execution venues would make the reports more easily comparable across reporting firms, as the reports would all include information about the financial inducements that may influence a member’s decision to route to destinations where the order may be executed by the recipient venue.”<sup>45</sup>

Proposed FINRA Rule 6470, like SEC Rule 606(a), requires the routing report to cover venues to which orders are “routed for execution.”<sup>46</sup> If a routing firm does not execute orders, then it cannot be the venue to which orders were “routed for execution,” and thus the obligation of the reporting firm is to report the relevant information for the execution venues to which the routing firm routes orders to for execution.<sup>47</sup> In response to comments challenging reporting based on the venue to which orders are routed for execution, specifically that the proposed rule is not clear and does not result in comparable data, the Commission agrees with FINRA that requiring the OTC Equity Security report to cover venues to which orders are “routed for execution” would ensure that the reports include information about the financial inducements that may influence a member’s decision to route to destinations where the order may be executed by the recipient venue (whether routing orders itself or through an agent routing firm).<sup>48</sup> It is reasonable and appropriate that the scope of disclosures required by proposed FINRA Rule 6470(a) aligns with the scope of the requirements of SEC Rule 606(a) by requiring the reports to

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<sup>45</sup> See id. While the financial inducements between a reporting firm and a routing firm are not disclosed pursuant to proposed FINRA Rule 6470(a)(3), FINRA states that, consistent with SEC Rule 606(a), such information may be disclosed in the report’s discussion of the material aspects of the member’s relationship with an execution venue pursuant to proposed FINRA Rule 6470(a)(4). See id. at 4-5 n.14; see also FINRA Letter II at 4.

<sup>46</sup> 17 CFR 242.606(a)(2); proposed FINRA Rule 6470(a)(2).

<sup>47</sup> See supra notes 20-21 and accompanying text.

<sup>48</sup> The Commission disagrees with commenter concerns that this approach obscures relevant information from retail customers, because, to the extent that a reporting firm receives financial inducements from a routing firm when routing orders to an execution venue, such financial inducements may be reported pursuant to FINRA Rule 6470(a) as material aspects of the routing firm’s relationship with the execution venue. See Notice, supra note 5, at 74674 n.18.

include information for venues to which orders are “routed for execution,” which would ensure consistency across such reports. In addition, proposed FINRA Rule 6470 clearly and adequately addresses the application of the rule to the routing firm scenario raised by the commenter. The Commission also agrees with FINRA that requiring disclosure of execution venues would make the reports more easily comparable across reporting firms, as the reports would all include information about the financial inducements that may influence a member’s decision to route to destinations where the order may be executed by the recipient venue. In response to comments raising cost concerns, FINRA has undertaken an economic impact assessment that analyzed, among other things, the potential costs and benefits of the proposal that was based on its experience with order routing reporting.

B. OTC Equities with a Limited Number of Available Execution Venues

The commenter states that there are a significant number of OTC stocks that have a limited number of available execution venues (in many cases, only one or two market centers), and states that there is a potential risk that investors viewing the report for these stocks would see a high percentage of order flow being routed to one or two venues without appropriate context of the limited choices available to the reporting firm and that some firms with lower trading volume in OTC Equity Securities could have routing relationships with a limited number of market makers.<sup>49</sup> The commenter suggests that FINRA should identify this as a factor for investors to consider when reviewing a member’s OTC Equity Security report.<sup>50</sup> FINRA responds that, while the OTC Equity Securities market differs from the NMS securities market in the number of available execution venues, it intends to, as appropriate, provide members, investors, and others with information and otherwise engage in investor education efforts about the purpose, content, and potential limitation of the reports.<sup>51</sup> In addition, FINRA states that members could also

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<sup>49</sup> See FIF Letter at 8.

<sup>50</sup> See id.

<sup>51</sup> See FINRA Letter at 6.

provide additional explanatory context regarding their OTC Equity Security reports, provided that such information is accurate, not misleading, and otherwise complies with other applicable SEC and FINRA requirements.<sup>52</sup>

The Commission believes that the proposed OTC Equity Security reports are appropriately designed to provide valuable information to customers and others regarding a FINRA member's order routing practices in OTC Equity Securities, which may elicit questions regarding such practices, including when a high percentage of order flow is being routed to a small number of venues. Among other things, the proposed OTC Equity Security reports should help facilitate and inform customer dialogues with their broker-dealers about the broker-dealers' order routing practices in OTC Equity Securities. For example, if a customer has questions about the number of execution venues or frequency of use of an execution venue, the customer should discuss those questions with their reporting broker. In those conversations, or through other means, the reporting broker could also provide additional explanatory context regarding their OTC Equity Security reports, provided that such information is accurate, not misleading, and otherwise complies with other applicable SEC and FINRA requirements.<sup>53</sup>

### C. Use of Consolidated Audit Trail ("CAT") Data

The commenter also states that FINRA should consider whether certain categories of data that firms are required to report in the OTC Equity Security reports could be obtained by FINRA from the CAT.<sup>54</sup> In the filing, FINRA states that it is not proposing to use CAT data because of restrictions on the use of CAT data, and because FINRA believes the most efficient and

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<sup>52</sup> See id.

<sup>53</sup> See id. In addition, as described above, FINRA has stated that as appropriate, it intends to provide members, investors, and others with information and otherwise engage in investor education efforts about the purpose, content, and potential limitation of the reports. See id.

<sup>54</sup> FIF Letter at 6. The CAT is operated pursuant a national market system plan approved by the Commission pursuant to Section 11A of the Exchange Act and the rules and regulations thereunder. See Securities Exchange Act Release No. 79318 (November 15, 2016), 81 FR 84696 (November 23, 2016).

comprehensive means of providing the data included in the OTC Equity Security order routing disclosures is for members to generate the reports directly.<sup>55</sup> FINRA also states that not all of the data required in the reports is also reported to CAT.<sup>56</sup> The Commission agrees with FINRA that the most efficient and comprehensive means of obtaining the data included in the OTC Equity Security report is from members directly. The CAT does not contain all of the data required on the OTC Equity Security reports, while FINRA members with reporting obligations under the new rule will have the means of collecting and reporting the required data.

#### D. Implementation and Comment Period

The commenter also raises concerns about implementation of the proposal, stating that it is important to ensure that industry members will have sufficient time to properly implement the planned reporting changes.<sup>57</sup> The commenter also states that the rule filing does not provide clear guidance on reporting scenarios relating to trading on OTC Link ATS and raises several hypothetical situations where it believes OTC Link ATS should be reported as the execution venue, as opposed to where the execution actually took place.<sup>58</sup> In the proposal, FINRA states that it intends to engage with members and other interested parties prior to implementation of the proposed rule change, including specifically to discuss order routing disclosures in scenarios involving OTC Link ATS, as well as provide guidance as appropriate on other interpretative questions.<sup>59</sup> FINRA also provided responses to the specific scenarios the commenter provided

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<sup>55</sup> See Notice, supra note 5, at 74678-79.

<sup>56</sup> See FINRA Letter at 3.

<sup>57</sup> FIF Letter at 9-10. The commenter specifically requests that any implementation timetable should run from the date that FINRA publishes technical specifications, schemas, interpretive FAQs and other applicable documentation. Id. at 9.

<sup>58</sup> FIF Letter at 6 and FIF Letter II at 2-4.

<sup>59</sup> See Notice, supra note 5, at 74680. See also FINRA Letter at 7-8, stating that FINRA recognizes that members will require sufficient time to implement the new disclosure requirements, intends to provide an appropriate amount of time for implementation of the proposal, will work with the industry to publish technical specifications appropriately in advance of the implementation date, and will also publish interpretive guidance to the extent needed—including on routing scenarios unique to certain platforms in the OTC

demonstrating why the execution venue and not OTC Link ATS should be reported under the proposed rules.<sup>60</sup> FINRA reiterates that, for purposes of the proposed disclosures for OTC Equity Securities, a “venue” would be defined broadly to cover any market center or any other person or entity to which a member routes for execution, and consequently would exclude an entity that is used merely as a vehicle to route an order to a venue selected by the broker-dealer.<sup>61</sup> Thus, FINRA states that, for purposes of proposed Rule 6470, where an alternative trading system (“ATS”) offers both automatic order execution and order delivery functionality, the ATS should be identified as the venue only when the ATS provides order execution.<sup>62</sup> FINRA believes identification of the ATS in these circumstances is appropriate because the ATS is the venue where the order was routed “for execution,” consistent with SEC Rule 606(a).<sup>63</sup> FINRA also believes that, for purposes of proposed Rule 6470, in cases where the ATS instead provides order delivery, the separate market center to which the orders are delivered—e.g., a market maker or other ATS—should be identified as the venue where the order was routed for execution.<sup>64</sup>

The Commission believes that FINRA’s statements with respect to implementation are reasonable and appropriate. As stated above, FINRA recognizes that members will require sufficient time to implement the new disclosure requirements, intends to provide an appropriate amount of time for implementation of the proposal, will work with the industry to publish technical specifications appropriately in advance of the implementation date, and will also publish interpretive guidance to the extent needed—including on routing scenarios unique to certain platforms in the OTC Equity Security market—with sufficient time allowed for

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Equity Security market—with sufficient time allowed for implementation.

<sup>60</sup> See FINRA Letter II at 6-8.

<sup>61</sup> See *id.* at 6.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

implementation. In addition, FINRA has stated that it will announce the effective date of the proposed rule change in a Regulatory Notice and the effective date will be no later than 365 days following publication of the Regulatory Notice.<sup>65</sup> Also, some broker-dealers will have familiarity and the ability to more easily produce OTC Equity Security reports due to experience in producing SEC Rule 606(a) reports for NMS securities, making the implementation reasonable and appropriate.

Moreover, the commenter expresses concern that there was not sufficient time to comment on this proposal.<sup>66</sup> The Commission, however, published the proposal for comment; designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings; instituted proceedings; and extended its time to act on the proposal,<sup>67</sup> during which time the commenter submitted three comment letters. Accordingly, there has been sufficient opportunity for comment on the proposal.

E. Centralized Hosting of Order Routing Disclosures

The commenter states that its members support centralized publication of SEC Rule 606(a) reports and the OTC Equity Security reports by FINRA, but states that if FINRA will publish these reports that firms should no longer be required to separately publish these reports on their own websites, and instead firms should be required to provide a link from its public website to the applicable section of the FINRA website.<sup>68</sup> The commenter also suggests that FINRA create a database with structured firm routing report data that can be accessed through automated queries.<sup>69</sup> FINRA confirms that a member would satisfy the proposed requirement to publish the new OTC Equity Security reports on the member's website by including a link from

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<sup>65</sup> See Notice, supra note 5, at 74675.

<sup>66</sup> See FIF Letter at 10.

<sup>67</sup> See supra notes 7-9 and accompanying text.

<sup>68</sup> FIF Letter at 7.

<sup>69</sup> Id.

its own website to the FINRA webpage hosting centralized publication of OTC Equity Security reports.<sup>70</sup> With respect to the commenter's recommendation that FINRA create a structured database that users may query, FINRA states that it is not contemplating such a database currently but will continue to consider ways to facilitate investor access to, and the usefulness of, the OTC Equity Security reports.<sup>71</sup> In addition, FINRA states in the proposal that it intends to engage in investor education efforts regarding the purpose, content, and potential limitations of the disclosures.<sup>72</sup>

SEC Rule 606(a) reports are required to be made publicly available within one month after the end of the quarter addressed in the report pursuant to Commission rule and such requirement is not affected by this proposal.<sup>73</sup> With respect to OTC Equity Security reports required by proposed FINRA Rule 6470, it is reasonable for the OTC Equity Security reports to be required to be disclosed publicly in a similar manner to SEC Rule 606(a) reports. These proposed changes are reasonably designed to make order routing disclosures more accessible to investors and other relevant stakeholders. Consolidating order routing reports onto a single website could assist market participants, investors and the public to more easily compare order routing disclosures and practices across different firms and observe changes in routing behaviors over time.<sup>74</sup>

#### F. Symbol Categorization File

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<sup>70</sup> See FINRA Letter at 2.

<sup>71</sup> Id.

<sup>72</sup> See Notice, supra note 5, at 74675 n.23.

<sup>73</sup> 17 CFR 242.606(a).

<sup>74</sup> At the time it adopted amendments to SEC Rule 606 in 2018, the Commission declined to require a centralized repository for SEC Rule 606(a) reports, although it stated that a centralized repository could help facilitate the goal of enabling customers to more readily and meaningfully assess broker-dealers' order handling practices. See SEC Rule 606 Adopting Release, supra note 12, at 58377-78 for the Commission's rationale for not adopting that requirement. Here, FINRA has determined that it is appropriate to centralize its members' SEC Rule 606(a) and OTC Equity Security reports to make the reports more accessible for regulators, investors, and others seeking to analyze and compare the data.

The commenter supports FINRA's proposal to publish and maintain a file of which symbols are included in each OTC Equity Security category without charge, but recommends making this file available prior to the first day of each quarter for use in the upcoming quarter.<sup>75</sup> The commenter states that requiring daily updates to the list would significantly increase the reporting burden without material impact on aggregating data for the quarter.<sup>76</sup> Consistent with the commenter's request, FINRA confirms that it will make the symbol categorization file available prior to the first day of each calendar quarter for use during the entirety of the following quarter.<sup>77</sup> The Commission believes that publishing and maintaining a symbol categorization file, which will be available prior to the first day of each quarter, is appropriate and would ease members' reporting burden.

G. Categorization of Held and Not Held Orders

The commenter supports FINRA's proposal to limit the OTC Equity Security disclosures to non-directed held orders, but requests guidance on the proposed requirement to report the percentage of not held and held orders as a percentage of all orders.<sup>78</sup> FINRA responds that it believes that all orders are either held or not held because a firm either has price and time discretion to execute the order, or it does not.<sup>79</sup> The Commission agrees with FINRA, and has

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<sup>75</sup> FIF Letter at 7.

<sup>76</sup> See id.

<sup>77</sup> FINRA Letter at 2.

<sup>78</sup> See FIF Letter at 8.

<sup>79</sup> See FINRA Letter at 6, also stating that consistent with SEC guidance regarding the categorization of held and not held orders for purposes of SEC Rule 606(a), orders should be categorized as held or not held for purposes of the OTC Equity Security disclosures based on whether the customer reasonably expects the firm to attempt to execute its order immediately or instead reasonably expects the firm to use its price and time discretion to execute the order. FINRA Letter at 6 n.19, citing SEC Division of Trading and Markets, Responses to Frequently Asked Questions Concerning Rule 606 of Regulation NMS, Questions 15.01 through 15.04. The Commission notes that these FAQs represent the views of the staff of the Division of Trading and Markets. They are not a rule, regulation, or statement of Commission. The Commission has neither approved nor disapproved their content. These FAQs, like all staff statements, have no legal force or effect: they do not alter or amend applicable law, and they create no new or additional obligations for any person.

discussed the difference between held and not held orders and their separate reporting requirements under Rule 606 of Regulation NMS.<sup>80</sup>

Overall, the proposed requirements relating to the disclosure of order routing information for OTC Equity Securities are reasonably designed to assist customers in evaluating the quality of the order routing services of their broker-dealers and how well their broker-dealers manage potential conflicts of interest with execution venues. Customers would be better able to assess indirect and previously unobservable costs of trading OTC Equity Securities, including, among other things, payment for order flow and transaction fees paid less rebates, which should allow customers to assess the performance of its broker-dealer(s) and be better informed in making choices among firms. The similarities in reporting requirements between proposed FINRA Rule 6470(a) and SEC Rule 606(a) should reduce the burden of reporting for broker-dealers that already produce SEC Rule 606(a) reports, and the proposed differences in reporting requirements for OTC Equity Securities under proposed FINRA Rule 6470(a) and SEC Rule 606(a) reports for NMS securities are reasonable and appropriate due to differences in the nature of OTC Equity Securities and the markets in which they trade.<sup>81</sup>

For the foregoing reasons, the Commission finds that the proposed rule change is consistent with Section 15A(b)(6)<sup>82</sup> of the Exchange Act and the rules and regulations thereunder applicable to a national securities association.

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<sup>80</sup> See SEC Rule 606 Adopting Release, supra note 12, at 58340-41 and 58372.

<sup>81</sup> See Notice, supra note 5, at 74674 (describing the differences in reporting requirements for OTC Equity Securities under proposed FINRA Rule 6470(a) and SEC Rule 606(a) reports for NMS securities).

<sup>82</sup> 15 U.S.C. 78o-3(b)(6).

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Exchange Act,<sup>83</sup> that the proposed rule change (SR-FINRA-2022-031) be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>84</sup>

**Sherry R. Haywood,**

*Assistant Secretary.*

[FR Doc. 2023-16886 Filed: 8/7/2023 8:45 am; Publication Date: 8/8/2023]

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<sup>83</sup> 15 U.S.C. 78s(b)(2).

<sup>84</sup> 17 CFR 200.30-3(a)(12).