

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-57572; File No. SR-FINRA-2008-010]

### Self-Regulatory Organizations: Financial Industry Regulatory Authority, Inc.; Notice of Filing of Proposed Rule Change Relating to Amendments to the Codes of Arbitration Procedure To Establish New Procedures for Arbitrators To Follow When Considering Requests for Expungement Relief

March 27, 2008.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on March 13, 2008, Financial Industry Regulatory Authority, Inc. ("FINRA") (f/k/a National Association of Securities Dealers, Inc. ("NASD")) filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by FINRA. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

FINRA is proposing Rule 12805 of the Code of Arbitration Procedure for Customer Disputes ("Customer Code") and Rule 13805 of the Code of Arbitration Procedure for Industry Disputes ("Industry Code") to establish new procedures that arbitrators must follow when considering requests for expungement relief under Rule 2130.

Below is the text of the proposed rule change. All the text is new.

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#### 12805. Expungement of Customer Dispute Information Under Rule 2130

In order to grant expungement of customer dispute information under Rule 2130, the panel must:

(a) Hold a recorded hearing session (by telephone or in person) regarding the appropriateness of expungement. This paragraph will apply to cases administered under Rule 12800 even if a customer did not request a hearing on the merits.

(b) In cases involving settlements, review settlement documents and consider the amount of payments made to any party and any other terms and conditions of a settlement.

(c) Indicate in the arbitration award which of the Rule 2130 grounds for expungement serve(s) as the basis for its expungement order and provide a brief written explanation of the reason(s) for its finding that one or more Rule 2130 grounds for expungement applies to the facts of the case.

(d) Assess all forum fees for hearing sessions in which the sole topic is the determination of the appropriateness of expungement against the parties requesting expungement relief. 13805. Expungement of Customer Dispute Information under Rule 2130

In order to grant expungement of customer dispute information under Rule 2130, the panel must:

(a) Hold a recorded hearing session (by telephone or in person) regarding the appropriateness of expungement. This paragraph will apply to cases administered under Rule 13800 even if a claimant did not request a hearing on the merits.

(b) In cases involving settlements, review settlement documents and consider the amount of payments made to any party and any other terms and conditions of a settlement.

(c) Indicate in the arbitration award which of the Rule 2130 grounds for expungement serve(s) as the basis for its expungement order and provide a brief written explanation of the reason(s) for its finding that one or more Rule 2130 grounds for expungement applies to the facts of the case.

(d) Assess all forum fees for hearing sessions in which the sole topic is the determination of the appropriateness of expungement against the parties requesting expungement relief.

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#### 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

FINRA is proposing to amend its Customer Code and Industry Code to

establish new procedures that arbitrators must follow when considering requests for expungement relief under Rule 2130. The procedures are designed to: (1) Make sure that arbitrators have the opportunity to consider the facts that support or weigh against a decision to grant expungement; and (2) ensure that expungement occurs only when the arbitrators find and document one of the narrow grounds specified in Rule 2130.

Proposed Rules 12805 and 13805 would require arbitrators considering an expungement request to hold a recorded hearing session by telephone or in person, provide a brief written explanation of the reasons for ordering expungement, and, in cases involving a settlement, review the settlement documents to examine the amount paid to any party and any other terms and conditions of the settlement that might raise concerns about the associated person's involvement in the alleged misconduct before awarding expungement. The proposed rule change would provide that the panel must assess forum fees for hearing sessions held solely for the purpose of considering expungement against the parties requesting the relief.

The proposed rule change would not affect FINRA's current practice of permitting expungement, without judicial intervention, of information from the Central Registration Depository ("CRD") system as directed by arbitrators in intra-industry arbitration awards that involve associated persons and firms based on the defamatory nature of the information ordered expunged.<sup>3</sup>

###### Background

The CRD system, an online registration and licensing system, contains information regarding broker-dealers and their associated persons. It contains administrative information (e.g., personal, educational, and

<sup>3</sup> In its original filing with the Commission proposing Rule 2130 (see SR-NASD-2002-168), FINRA (then known as NASD) explained in Footnote 2 that "NASD may execute, without a court order, arbitration awards rendered in disputes between registered representatives and firms that contain expungement directives in which the arbitration panel states that expungement relief is being granted because of the defamatory nature of the information. These expungements are not covered by the moratorium and will not be covered by the proposed rules and policies." In Amendment No. 1 to that filing (at page five), FINRA reiterated this point by stating "NASD may execute, without a court order, an arbitration award rendered in a dispute between a member and a current or former associated person that contains an expungement directive in which the arbitration panel states that expungement relief is being granted based on the defamatory nature of the information." See also *NASD Notice to Members 04-16* (March 2004) n. 4.

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

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

employment history) and disclosure information (e.g., criminal matters, regulatory and disciplinary actions, civil judicial actions, and information relating to customer disputes). Members of the securities industry, state and federal regulators, and self-regulatory organizations use the CRD system. Although public investors do not have access to the CRD system, much of the information in that system is available to investors through FINRA BrokerCheck and individual state disclosure programs.<sup>4</sup> FINRA recognizes that accurate and complete reporting in the CRD system is an important aspect of investor protection.

FINRA operates the CRD system pursuant to policies developed jointly with the North American Securities Administrators Association (NASAA). FINRA works with the SEC, NASAA, other members of the regulatory community, and broker-dealer firms to establish policies and procedures reasonably designed to ensure that information submitted to and maintained in the CRD system is accurate and complete. These procedures, among other things, cover expungement of information from the CRD system.

In December 2003, the SEC approved NASD Rule 2130, which contains procedures for expungement of customer dispute information from the CRD System.<sup>5</sup> It requires that FINRA members or associated persons name FINRA as an additional party in any court proceeding in which they seek an order to expunge customer dispute information or request confirmation of an award containing an order of expungement.

Under Rule 2130, FINRA may waive the requirement to be named as a party if it determines that the expungement relief is based on an affirmative judicial or arbitral finding that: (i) The claim, allegation, or information is factually impossible or clearly erroneous; (ii) the registered person was not involved in the alleged investment-related sales practice violation, forgery, theft, misappropriation, or conversion of funds; or (iii) the claim, allegation, or information is false. If expungement relief is based on a judicial or arbitral finding other than as enumerated immediately above, FINRA may also

waive the requirement to be named as a party if it determines that the expungement relief and accompanying findings on which it is based are meritorious and that expungement would not have a material adverse effect on investor protection, the integrity of the CRD system, or regulatory requirements.

Proposed new Rules 12805 and 13805 would set forth procedures that arbitrators must follow before recommending expungement of information related to arbitration cases from an associated person's CRD record. If the arbitrators do not fully adhere to these procedures, FINRA may determine not to waive the obligation under Rule 2130 to be named as a party to an expungement proceeding.

Sometimes, arbitrators will order expungement at the conclusion of an evidentiary hearing on the merits of the case. More often, however, arbitrators will order expungement at the request of a party to facilitate settlement of the dispute. For example, customers may receive monetary compensation as part of a settlement, the terms of which require the customer to consent to (or not oppose) the entry of a stipulated award containing an order of expungement. In such cases, FINRA expected that arbitrators would examine the amount paid to any party and any other terms and conditions of the settlement that might raise concerns about the associated person's behavior before awarding expungement.<sup>6</sup> Contrary to this expectation, however, arbitrators often did not inquire into the terms of settlement agreements.

In order for arbitrators to perform the critical fact finding necessary before granting expungement, the proposed rule change would require arbitrators to hold a recorded hearing session by telephone or in person. The requirement of a hearing session would ensure that arbitrators consider the facts that support or weigh against a decision to grant expungement. In cases involving settlements, the proposal would require arbitrators to review the settlement documents, consider the amount paid to any party, and consider any other terms and conditions of the settlement that might raise concerns about the associated person's involvement in the alleged misconduct before awarding expungement.

The proposed rule change would require arbitrators to indicate which of the Rule 2130 grounds for expungement serve as the basis for their expungement order, and provide a brief written explanation of the reasons for ordering

expungement under Rule 2130. This new requirement would address issues concerning judicial confirmation of awards containing orders of expungement, as demonstrated in a recent state court case<sup>7</sup> in which the court expressed concern that the arbitrators did not describe "a single fact or circumstance"<sup>8</sup> for their conclusion that the claims were factually impossible or clearly erroneous (one of the grounds for expungement enumerated in Rule 2130). As a result, the court ordered the arbitrators to conduct a hearing to clarify the facts and circumstances that led them to order expungement. The proposed requirement of a written explanation would provide regulators with additional insight into why arbitrators awarded expungement based on what might appear to be questionable facts and circumstances (e.g., cases involving payment of significant monetary compensation to the customer).<sup>9</sup>

The proposed rule change also would require the arbitrators to assess all forum fees for hearing sessions in which the sole topic is the determination of the appropriateness of expungement against the parties requesting expungement relief. In cases that settle, industry parties often seek expungement. In such cases, parties generally present arguments solely on the issue of expungement. In these circumstances, FINRA believes the fee for that hearing session should not be assessed against a customer.<sup>10</sup>

In cases administered under Rule 12800 or Rule 13800 (Simplified Arbitration), a hearing on the merits normally is held only at the request of a customer or claimant, respectively. The proposed rule change would clarify that if parties request expungement relief in such cases, a hearing session would be held to determine the appropriateness of the request even if a hearing on the merits was not requested. Any forum fees for hearing sessions associated with a request for expungement would be assessed against the parties making the request.

As noted above, the proposed rule change would not affect FINRA's current practice of permitting

<sup>7</sup> *Matter of Sage, Rutty & Co., Inc. v. Salzberg*, Index No. 2007-01942 (N.Y. Sup. Ct. May 30, 2007).

<sup>8</sup> *Id.* at 4.

<sup>9</sup> In such cases, the payment may be based on the behavior of someone other than the associated person who is seeking expungement.

<sup>10</sup> In those situations where the issue of expungement does not constitute the sole topic considered by the arbitrators during a hearing session, the panel will determine the hearing session fee that each party must pay. See Rules 12902(a) and 13902(a).

<sup>4</sup> FINRA BrokerCheck is a free online tool to help investors check the background of current and former FINRA-registered securities firms and brokers.

<sup>5</sup> Securities Exchange Act Release No. 48933 (December 16, 2003), 68 FR 74667 (December 24, 2003). Rule 2130 applies to all cases filed on or after April 12, 2004; see *NASD Notice to Members 04-16* (March 2004).

<sup>6</sup> See *NASD Notice to Members 04-43* (June 2004).

expungement, without judicial intervention, of information from the CRD system as directed by arbitrators in intra-industry arbitration awards that involve associated persons and firms based on the defamatory nature of the information ordered expunged. In allowing expungement relief without judicial intervention under such circumstances, FINRA believes that it is fairly balancing the interests of the brokerage community and others in expunging defamatory statements with FINRA's interests in investor protection and the integrity of the CRD system.

## 2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,<sup>11</sup> which requires, among other things, that FINRA rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. The new procedures would enhance the integrity of the information in the CRD system and would ensure that investor protection is not compromised when arbitrators order expungement of information related to arbitration cases from an associated person's CRD record.

### 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.

### 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

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve such proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be 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](mailto:rule-comments@sec.gov). Please include File Number SR-FINRA-2008-010 on the subject line.

### Paper Comments

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549-1090.

All submissions should refer to File Number SR-FINRA-2008-010. 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 Web site (<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 inspection and copying in the Commission's Public Reference Room on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of FINRA.

All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-FINRA-2008-010 and should be submitted on or before April 24, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>12</sup>

**Florence E. Harmon,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-57575; File No. SR-Phlx-2008-06]

### Self-Regulatory Organizations; Philadelphia Stock Exchange, Inc.; Order Approving Proposed Rule Change, as Modified by Amendment No. 1 Thereto, Relating to U.S. Dollar-Settled FCO Spot Prices

March 28, 2008.

## I. Introduction

On January 28, 2008, the Philadelphia Stock Exchange, Inc. ("Phlx" or "Exchange") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to amend the definition of Spot Price so that the Exchange may use certain bid and ask prices ("Thomson Quotes") provided by Tenfore Systems Limited ("Tenfore") through Thomson Financial LLC ("Thomson") as Spot Prices in determining applicable margin requirements and strike prices for the Exchange's U.S. dollar-settled foreign currency options ("FCOs"). On February 19, 2008, the Exchange filed Amendment No. 1 to the proposed rule change. The proposed rule change, as modified by Amendment No. 1, was published for comment in the **Federal Register** on February 27, 2008.<sup>3</sup> The Commission received no comments on the proposal. This order approves the proposed rule change, as modified by Amendment No. 1.

## II. Description of the Proposal

Phlx proposes to amend the definition of Spot Price to permit the Exchange to use the Thomson Quotes to calculate the Spot Prices in connection with the Exchange's determination of strike prices and margin requirements for its U.S. dollar-settled FCOs.<sup>4</sup> Under Phlx

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

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

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

<sup>3</sup> See Securities Exchange Act Release No. 57361 (February 20, 2008), 73 FR 10503.

<sup>4</sup> The Exchange is also proposing to substitute the term "Spot Prices" for the defined term "Spot Sales Prices" in Rule 1000(b)(16), as a clarification that

<sup>11</sup> 15 U.S.C. 78o-3(b)(6).