SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–61057; File No. SR–FINRA–2009–075]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of Proposed Rule Change To Amend the Postponement Fee and Hearing Session Fee Rules of the Code of Arbitration Procedure for Customer and Industry Disputes

November 24, 2009.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on November 4, 2009, Financial Industry Regulatory Authority, Inc. (''FINRA'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been substantially 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 Dispute Resolution is proposing to amend Rules 12601(b) and 12902(a) of the Code of Arbitration Procedure for Customer Disputes (''Customer Code'') and Rules 13601(b) and 13902(a) of the Code of Arbitration Procedure for Industry Disputes (''Industry Code'') to clarify the applicability of the fee waiver provision of the postponement rule and to codify the hearing session fee for an unspecified damages claim heard by one arbitrator.

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

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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 the rules of the Customer Code and the Industry Code (collectively, the ''Codes'') that address the fee waiver provision of the postponement rule and the hearing session fee for one arbitrator in an unspecified damages claim. First, FINRA is proposing to amend Rules 12601(b)(3) and 13601(b)(3) of the Codes, hereinafter referred to as the fee waiver provision of the postponement rule, to clarify that the late postponement fee will not be waived if parties request a postponement within three business days before the scheduled hearing session. Second, the proposal would amend Rules 12902(a)(1) and 13902(a)(1) of the Codes to codify FINRA's current practice of charging $450 per hearing session for an unspecified damages claim heard by one arbitrator. Each proposal is discussed separately below.[3]

Amendment to Fee Waiver Provision of Postponement Rule

The Codes require arbitration hearings to be postponed if the parties agree.[4] Hearings may also be postponed by the Director of FINRA Dispute Resolution (''Director''), by the panel in its own discretion, or by the panel on a motion of a party.[5] If a hearing is postponed, the arbitration panel will assess a postponement fee against one or more of the parties, which is typically equivalent to the applicable hearing session fee that would have been assessed had the hearing been held.[6]

There are instances, however, in which a postponement fee is not assessed against the parties. Under Rule 12601(b)(3) of the Customer Code, for example, staff will not charge parties a postponement fee if they agree to submit the matter to mediation at FINRA.[7] Thus, if the parties agree to mediation administered through FINRA, the Director will waive the postponement fee. This provision does not apply to late postponement fees.

Nevertheless, FINRA has received complaints from arbitrators that parties are using the fee waiver provision in connection with an agreement to mediate through FINRA to avoid paying a late postponement fee. If parties request and are granted a hearing postponement within three business days of a scheduled hearing session (*i.e.,* a late postponement request), the Director will assess a postponement fee of $100 per arbitrator.[8] Parties who make this late postponement request contend that, if they agree to mediate their dispute through FINRA, they should not be assessed the $100 late postponement fee, because Rule 12601(b)(3) waives the postponement fee if the parties agree to mediate through FINRA.

FINRA did not intend Rule 12601(b)(3) to be applied this way.[9] Parties who make late postponement requests should be charged the $100 late postponement fee, regardless of their intent to mediate through FINRA. FINRA is therefore proposing to amend Rule 12601(b)(3) to state that no postponement fee will be charged if a hearing is postponed because the parties agree to submit the matter to mediation administered through FINRA, except that the parties shall pay the additional fees described in Rule 12601(b)(2) for late postponement requests.[10]

FINRA believes the proposed amendment will ensure that arbitrators continue to receive some compensation in the event a scheduled hearing is postponed because of a late postponement request, and will continue to serve as an incentive to parties to settle their disputes earlier to avoid additional fees.

Amendment to the Hearing Session Fee for One Arbitrator in Unspecified Damages Claim

In FINRA's arbitration forum, if the parties and the arbitrator(s) meet to discuss the issues giving rise to the arbitration dispute, the meeting is called a ''hearing session.''[11] The Customer Code authorizes FINRA to assess hearing session fees against the parties for each hearing session.[12] The total

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] To simplify the explanation, the discussion will focus on the proposed amendments to the Customer Code. However, the explanation and rationale apply to the same rules of the Industry Code, which, in this case, are identical to the rules of the Customer Code.

[4] *See* Rules 12601(a)(1) and 13601(a)(1).

[5] *See* Rules 12601(a)(2) and 13601(a)(2).

[6] *See* Rules 12601(b)(1) and 13601(b)(1).

[7] *See also* Rule 13601(b)(3) of the Industry Code.

[8] *See* Rules 12601(b)(2) and 13601(b)(2).

[9] *See supra* note 6.

[10] The proposal would amend Rule 13601(b)(3) of the Industry Code with the same proposed language.

[11] A hearing session can either be an arbitration hearing or a prehearing conference. Rule 12100(n) of the Customer Code and Rule 13100(n) of the Industry Code.

[12] *See* Rule 12902(a)(1). *See also* Rule 13902(a)(1) of the Industry Code.

amount charged to the parties for each hearing session is based on the amount in dispute.[13] For claims that do not request or specify money damages (*i.e.,* an unspecified damages claim), however, Rule 12902(a)(2) gives the Director the discretion to determine the amount of the hearing session fee, except that the fee cannot exceed $1,200.[14]

Currently, under the Customer Code, the hearing session fee charged for each hearing session in an unspecified damages claim heard by three arbitrators is $1,000.[15] However, for an unspecified damages claim heard by one arbitrator, the rules list the hearing session fee as not applicable (''N/A'').[16] Thus, FINRA is proposing to amend Rule 12902(a)(1) to change the current amount for an unspecified damages claim heard by one arbitrator from ''N/A'' to $450.[17]

FINRA's current practice is to charge parties $450 per hearing session for an unspecified damages claim heard by one arbitrator, even though the Code gives the Director the discretion to determine the amount of the hearing session fee for an unspecified damages claim. The Director charges this amount currently because it is the same amount assessed for hearing sessions heard by one arbitrator in which parties request damages ranging from $10,000.01 to over $500,000, and thus provides case administration with a uniform fee structure that is easy to apply. So, for example, under current practice and the proposed rule, if the parties agree to a single arbitrator in a case involving unspecified damages,[18] the Director would assess the $450 hearing session fee.[19] FINRA believes the proposal would benefit parties by notifying them of the potential costs at the outset of an unspecified damages case heard by one arbitrator, thereby providing more transparency in FINRA's fee structure. The proposal would also ensure consistent assessment of fees in its arbitration forum and would enhance the efficiency of the forum by making the rules easier to apply and understand.

Moreover, FINRA believes that codifying its current practice of charging $450 per hearing session for an unspecified damages claim heard by one arbitrator would not represent an increase in customer fees, because the proposed single arbitrator fee is the same as the current fee for any specific claim over $10,000. Further, FINRA notes that, even though the proposal would codify a fee for an unspecified damages claim heard by one arbitrator, the Code would continue to authorize the Director to determine whether the hearing session fee for an unspecified damages claim should be more or less than the amount specified in the fee schedule of the rule.[20] Thus, the proposal would not change FINRA's practice of reducing or waiving its fees in documented cases of financial hardship.

2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,[21] 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. FINRA believes the proposed rule change will preserve fairness in the arbitration process by ensuring that arbitrators receive some compensation in the event that a scheduled hearing session is postponed as a result of a late postponement request, and will enhance the efficiency of the forum by making the rules easier to apply and understand.

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, as amended.

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.* Please include File Number SR–FINRA–2009–075 on the subject line.

Paper Comments

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

All submissions should refer to File Number SR–FINRA–2009–075. 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. 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 the File Number SR–FINRA–2009–075 and

[13] *Id.*

[14] *See also* Rule 13902(a)(2) of the Industry Code.

[15] For hearing sessions involving three arbitrators in which parties request damages ranging from $25,000.01 to over $500,000, the amount for each hearing session can range from $600 to $1200. *See supra* note 11.

[16] *Id.*

[17] The proposal would amend Rule 13902(a)(1) of the Industry Code with the same proposed language.

[18] *See* Rule 12401(c) of the Customer Code and Rule 13401(c) of the Industry Code.

[19] The proposed hearing session fee would also apply, for example, if the chairperson conducts a prehearing conference in a claim for unspecified damages.

[20] *See* Rules 12902(a)(2) and 13902(a)(2).

[21] 15 U.S.C. 78*o*–3(b)(6).

should be submitted on or before December 22, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[22]

Elizabeth M. Murphy,

Secretary.

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[22] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–61052; File No. SR–FINRA–2009–066]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Order Granting Approval of Proposed Rule Change To Adopt FINRA Rule 2251 (Forwarding of Proxy and Other Issuer-Related Materials) in the Consolidated FINRA Rulebook

November 23, 2009.

On October 2, 2009, Financial Industry Regulatory Authority, Inc. (''FINRA'') (f/k/a National Association of Securities Dealers, Inc. (''NASD'')) filed with the Securities and Exchange Commission (''Commission'') a proposed rule change pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] to adopt without material change NASD Rule 2260 (Forwarding of Proxy and Other Materials) and NASD IM–2260 (Approved Rates of Reimbursement) in the consolidated FINRA rulebook.[3] The proposed rule change would combine NASD Rule 2260 and NASD IM–2260 into a single rule that would be renumbered as FINRA Rule 2251 in the consolidated FINRA rulebook. Notice of the proposal was published for comment in the **Federal Register** on October 22, 2009.[4] The Commission received no comments on the proposed rule change. This order approves the proposed rule change.

I. Description of the Proposal

NASD Rule 2260 sets forth certain requirements with respect to the transmission of proxy materials and other communications to beneficial owners of securities and the limited circumstances in which members are permitted to vote proxies without instructions from those beneficial owners. NASD IM–2260 regulates the reimbursement that members are entitled to receive in connection with forwarding proxy materials and other communications.

FINRA proposes to combine the two rules, without material change, into a single rule that would be renumbered as FINRA Rule 2251 in the consolidated FINRA rulebook.[5] FINRA proposed making clarifying changes and other changes primarily to reflect the new formatting and terminology conventions of the consolidated FINRA rulebook.[6] In addition, the proposed rule change would add language where appropriate to remind members that they are obligated to comply both with the FINRA rule and applicable Commission rules and/or guidance. With respect to NASD Rule 2260(c)(2)'s provisions allowing a member to give a proxy to vote any stock pursuant to the rules of ''any national securities exchange to which the member is also responsible,'' proposed FINRA Rule 2251 would clarify that a ''member may give a proxy to vote any stock pursuant to the rules of any national securities exchange of which it is a member. * * *''

FINRA stated that it will announce the implementation date of the proposed rule change in a *Regulatory Notice* to be published no later than 90 days following Commission approval.

II. Discussion and Commission's Findings

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities association.[7] In particular, the Commission finds that the proposed rule change is consistent with the provisions of section 15A(b)(6) of the Act,[8] 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 Commission believes that the proposed rule change will continue to provide FINRA members with guidance on the forwarding of proxy and other issuer-related materials, as well as applicable rates of reimbursement. The Commission notes that the consolidation of these rules does not result in any substantive changes to the existing requirements.

III. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[9] that the proposed rule change (SR–FINRA–2009–066) be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[10]

Elizabeth M. Murphy,

Secretary.

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BILLING CODE 8011–01–P

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The current FINRA rulebook consists of: (1) FINRA Rules; (2) NASD Rules; and (3) rules incorporated from NYSE (''Incorporated NYSE Rules'') (together, the NASD Rules and Incorporated NYSE Rules are referred to as the ''Transitional Rulebook''). While the NASD Rules generally apply to all FINRA members, the Incorporated NYSE Rules apply only to those members of FINRA that are also members of the NYSE (''Dual Members''). The FINRA Rules apply to all FINRA members, unless such rules have a more limited application by their terms. For more information about the rulebook consolidation process, *see Information Notice,* March 12, 2008 (Rulebook Consolidation Process).

[4] *See* Securities Exchange Act Release No. 60824 (Oct. 14, 2009), 74 FR 54610.

[5] NASD IM–2260 would be redesignated as Supplementary Material within proposed FINRA Rule 2251.

[6] For example, the language in NASD Rule 2260(a) stating that a member ''has an inherent duty'' to forward materials would be revised to state that a member ''shall'' forward such materials. Further, the proposed rule change would move the footnoted provisions defining the terms ''ERISA'' and ''State'' to the rule text, and the footnoted provision regarding verification of investment advisers would be redesignated as Supplementary Material. The proposed rule change would also add internal cross-references within the rule.

[7] In approving this rule proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[8] 15 U.S.C. 78*o*–3(b)(6).

[9] 15 U.S.C. 78s(b)(2).

[10] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–61061; File No. SR–NYSEArca–2009–44]

Self-Regulatory Organizations; NYSE Arca, Inc.; Order Granting Partial Approval of a Proposed Rule Change, as Modified by Amendment No. 4 Thereto, Expanding the Penny Pilot Program

November 24, 2009.

I. Introduction

On May 15, 2009, NYSE Arca, Inc. (''NYSE Arca'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend its options trading rule to extend through December 31, 2010