brokers and dealers and among exchange markets, and the practicability of brokers executing investors' orders in the best market.

If CBSX is at quoting at the national best bid or offer (''NBBO'') when a Trade, Flash and Cancel order is submitted to CBSX, CBSX will execute the incoming order automatically against the published quotation. However, if CBSX is not quoting at the NBBO, the Trade, Flash and Cancel designation initiates a process whereby the order would be electronically exposed to CBSX traders for a period of up to three seconds, rather than routed away to other markets, in accordance with Exchange Rule 52.6(a). CBSX traders will not know the identity or the account type of the party that submitted the Trade, Flash and Cancel order.[7] CBSX traders can respond with orders that match or better the NBBO to trade with the Trade, Flash and Cancel order. If no CBSX trader matches or improves on the NBBO by the end of the exposure period, the CBSX system will cancel the Trade, Flash and Cancel order. In no event will an execution result that is inferior to the NBBO.[8] Use of the Trade, Flash and Cancel order is strictly voluntary. The Commission believes that the Trade, Flash and Cancel order type is a potentially useful means for order senders to control where their orders are routed and to seek price improvement. Therefore, the Commission believes that the proposal is consistent with the Act.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act, that the proposed rule change (SR–CBOE–2008–123) be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[9]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9–2774 Filed 2–10–09; 8:45 am]

BILLING CODE 8011–01–P

[7] *See* e-mail from Angelo Evangelou, Assistant General Counsel, CBOE, to Michael Gaw, Assistant Director, and Andrew Madar, Special Counsel, Division of Trading and Markets, Commission, dated February 3, 2009.

[8] The Exchange stated that, ''If a flash responder attempts to trade against the order by matching the flash price (the NBBO price at the time the order was received by the CBSX System), the order will be executed unless the system determines at the point of execution that the flash price is worse than a revised NBBO in which case the order will be cancelled.'' *See* e-mail from Angelo Evangelou, Assistant General Counsel, CBOE, to Michael Gaw, Assistant Director, and Andrew Madar, Special Counsel, Division of Trading and Markets, Commission, dated December 19, 2008.

[9] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–59358; File No. SR–FINRA–2008–051]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Order Approving Proposed Rule Change Relating to Amendments to the Codes of Arbitration Procedure To Require Arbitrators To Provide an Explained Decision Upon the Joint Request of the Parties

February 4, 2009.

I. Introduction

The 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'') on October 14, 2008 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 Rules 12214, 12514 and 12904 of the Code of Arbitration Procedure for Customer Disputes (''Customer Code'') and Rules 13214, 13514 and 13904 of the Code of Arbitration Procedure for Industry Disputes (''Industry Code,'' and together with the Customer Code, the ''Codes'') [3] to require arbitrators to provide an explained decision upon the joint request of the parties. The proposed rule change was published for comment in the **Federal Register** on October 31, 2008.[4] The Commission received five comments in response to the proposed rule change.[5] This order approves the proposed rule change.

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

[2] 17 CFR 240.19b–4.

[3] The former NASD Rule 12000 Series (Customer Code) and 13000 Series (Industry Code) have been adopted as the FINRA 12000 Series (Customer Code) and 13000 Series (Industry Code) in the new consolidated rulebook pursuant to SR–FINRA–2008–021, which was approved by the Commission. *See* Securities Exchange Act Release No. 58643 (September 25, 2008), 73 FR 57174 (October 1, 2008) (SR–FINRA–2008–021) (approval order). The FINRA Rule 12000 Series (Customer Code) and 13000 Series (Industry Code), as set forth in SR–FINRA–2008–021, became effective on December 15, 2008. *See* FINRA Regulatory Notice 08–57 (SEC Approves New Consolidated FINRA Rules) (October 2008).

[4] *See* Securities Exchange Act Release No. 58862 (October 27, 2008), 73 FR 64995 (October 31, 2008), (SR–FINRA–2008–051) (notice).

[5] *See* letter from Kevin Thomas Hoffman, dated November 10, 2008 (''Hoffman letter''); letter from Barbara Black, Director, Corporate Law Center, University of Cincinnati College of Law, Jill I. Gross, Director, Pace Investor Rights Clinic, Pace University School of Law, and Deborah Sommers, Student Intern, submitted November 20, 2008 (''Black and Gross letter''); letter from Barry D. Estell, dated November 20, 2008 (''Estell letter''); letter from Scott R. Shewan, Vice-President, Public Investors Arbitration Bar Association, dated November 21, 2008 (''PIABA letter''); and letter from Theodore M. Davis, submitted November 21, 2008 (''Davis letter'').

II. Description of the Proposed Rule Change

FINRA proposed to amend its Customer Code and Industry Code to require arbitrators to provide an explained decision upon the joint request of the parties. The explained decision would be a fact-based award stating the general reason(s) for the arbitrators' decision; it would not be required to include legal authorities and/or damage calculations. Under the proposed rule change, parties would be required to submit any joint request for an explained decision at least 20 days before the first scheduled hearing date.[6] The chairperson would: (1) Be required to write the explained decision; and (2) receive an additional honorarium of $400 for writing the decision. The panel would allocate the cost of the additional honorarium to the parties as part of the final award.

The arbitrators would not be required to provide an explained decision in cases resolved without a hearing under simplified arbitration Rules 12800 and 13800 or in default cases conducted under Rules 12801 and 13801.

FINRA did not propose to amend Rules 12904(f) and 13904(f), which provide that an award may contain an underlying rationale. This means that arbitrators would continue to be permitted to decide, on their own, to write an explained decision. Thus, as is currently the case, if the panel decides on its own to write an explained decision, FINRA would not pay an additional honorarium to any panel member.

Background

The absence of explanations in awards is a common complaint of non-prevailing parties in the FINRA forum, especially customers and associated persons. In order to address these complaints and increase investor confidence in the fairness of the arbitration process, in March 2005, FINRA filed a proposed rule change with the SEC that would have required arbitrators to provide explained decisions upon the request of customers, or of associated persons in industry controversies. The SEC published the original proposed rule

[6] The term ''hearing'' means the hearing of an arbitration under Rules 12600 and 13600 (*see* Rules 12100(m) and 13100(m)).

change for comment in July 2005.[7] The SEC received almost two hundred comment letters in response to the original proposed rule change, many of which were critical.

While FINRA was considering its next steps, there were several new developments related to explained decisions in other contexts. FINRA filed with the Commission dispositive motions[8] and expungement procedures[9] proposals, both of which require arbitrators to write an explanation for granting relief. In addition, the Securities Industry Conference on Arbitration (SICA) conducted a ''Perceptions of Fairness'' survey of participants in securities arbitration proceedings.[10] The survey results, released in February 2008, indicate that 55.5% of customers who responded to the survey would be ''more satisfied if they had an explanation in the award.'' In light of the comments, and these later developments, FINRA withdrew the original proposed rule change as filed in SR–NASD–2005–032 and filed a new proposed rule change. Key provisions of the proposed rule change are discussed in more detail below, together with related comments from the original proposed rule change.

Parties Must Jointly Request an Explained Decision

The original proposed rule change would have permitted a customer, or an associated person in an intra-industry controversy, to require an explained decision. Many commenters objected to the one-sided nature of that provision. Under the new proposed rule change, all parties to a case would have to agree to an explained decision. Moreover, while the arbitrators will be resolving the entire matter and the explained decision would normally address all the claims asserted by the parties, the parties may request that an explained decision address only certain claims. According to FINRA, requiring the parties' joint agreement to an explained decision is consistent with FINRA's general policy to accommodate a joint request of the parties.

Parties Must Submit Any Request for an Explained Decision 20 Days Before the First Scheduled Hearing Date

The new proposed rule change would provide that parties must submit any joint request for an explained decision no later than 20 days prior to the first scheduled hearing date. This deadline coincides with the time that parties must exchange documents and identify witnesses they intend to present at the hearing. In FINRA's view, this approach would establish a clear deadline, give the parties sufficient time to request an explained decision, and provide notice to the arbitrators that an explained decision will be required before the hearing begins.

The Chairperson Must Write the Explained Decision

The new proposed rule change would require that the chairperson write the explained decision. The original proposed rule change contemplated that any of the arbitrators, or all of them, might draft the decision. Many commenters on the original proposed rule change were concerned that poorly written decisions might harm the public's perception of arbitration, or increase the likelihood of a party successfully vacating an award. To address these concerns, the rule would require that the chairperson write the decision.

Under the Codes, arbitrators must meet specific experience and training criteria to serve as chairpersons in arbitrations.[11] Therefore, chairpersons may be more experienced than non-chairpersons and should be better able to produce higher quality explained decisions. Further, assigning this responsibility to the chairperson would eliminate any confusion over who would be responsible for drafting the decision and would streamline the decision writing process. Having one arbitrator draft the decision after all the arbitrators have been consulted would reduce the time required to complete the decision. Once the decision was drafted, the arbitrators still would be required to sign the decision as provided in Rules 12904(a) and 13904(a).[12]

The Explained Decision Must Be Fact-Based

Under the new proposed rule change, the explained decision would be a fact-based award stating the general reason(s) for the arbitrators' decision.[13] The award would not be required to include legal authorities and damage calculations. FINRA believes that requiring only fact-based reasons in explained decisions will reduce the potential for misstatements in an award, thereby decreasing the possibility of a subsequent vacatur, modification or remand of an award and ensuring the continued finality of a FINRA award. FINRA believes the proposed rule change would provide the parties with the information they want while simultaneously maintaining the expediency, flexibility, and finality of arbitration.

Only the Chairperson Will Be Compensated for an Explained Decision

The original proposed rule change did not address who would have been responsible for preparing the explained decision and provided that each arbitrator would be paid an additional $200 honorarium for cases in which an explained decision was required. Under the new proposed rule change, only the chairperson would write the decision,

[7] *See* Securities Exchange Act Release No. 52009 (July 11, 2005); 70 FR 41065 (July 15, 2005) (SR–NASD–2005–032) (notice).

[8] FINRA filed the proposed dispositive motion rule on November 2, 2007 (SR–FINRA–2007–021). The proposal was published for comment on March 20, 2008 (*see* Securities Exchange Act Release No. 57497 (March 14, 2008); 73 FR 15019). The Commission approved the proposal on December 31, 2008 (*see* Securities Exchange Act Release No. 59189 (December 31, 2008); 74 FR 731 (January 7, 2009)).

[9] FINRA filed an expungement procedures proposal on March 13, 2008 (SR–FINRA–2008–010). The proposal was published for comment on April 3, 2008 (*see* Securities Exchange Act Release No. 57572 (March 27, 2008); 73 FR 18308). The Commission approved the proposal on October 30, 2008 (*see* Securities Exchange Act Release No. 58886 (October 30, 2008); 73 FR 66086 (November 6, 2008)).

[10] Jill I. Gross and Barbara Black, Perceptions of Fairness of Securities Arbitration: An Empirical Study, (February 6, 2008). The report can be downloaded at *http://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1477&context=lawfaculty*.

[11] Pursuant to Rules 12400 and 13400, arbitrators are eligible for the chairperson roster if they have completed FINRA chairperson training and:

- Have a law degree and are a member of a bar of at least one jurisdiction and have served as an arbitrator through award on at least two arbitrations administered by a self-regulatory organization in which hearings were held; or
- Have served as an arbitrator through award on at least three arbitrations administered by a self-regulatory organization in which hearings were held.

On June 23, 2008, the SEC approved a proposal to eliminate the Code provision allowing arbitrators to serve as Chairpersons provided they have ''substantially equivalent training or experience'' in lieu of completing FINRA Dispute Resolution's Chairperson training course (*see* Securities Exchange Act Release No. 58004 (June 23, 2008); 73 FR 36579 (June 27, 2008) (SR–FINRA–2008–009) (approval order). This rule became effective on September 22, 2008.

[12] Rules 12904(a) and 13904(a) require all awards to be in writing and signed by a majority of the arbitrators or as required by applicable law.

[13] While Rules 12604 and 13604 provide that the panel decides what evidence to admit and is not required to follow state or federal rules of evidence, FINRA intends that, as with current arbitration awards, explained decisions will have no precedential value in other cases. Thus, arbitrators will not be required to follow any findings or determinations that are set forth in prior explained decisions. In order to ensure that users of the forum are aware of the non-precedential nature of explained awards, FINRA plans to revise the template for all awards to include the following sentence: ''If the arbitrators have provided an explanation of their decision in this award, the explanation is for the information of the parties only and is not precedential in nature.''

and only the chairperson would be paid an additional honorarium. The additional honorarium paid to the chairperson would reflect the increased effort involved in drafting an explained decision. Under the new proposed rule change, the panel may allocate the cost of the honorarium to one party, or may allocate it between or among all parties.[14]

Parties May Not Require Explained Decisions in Some Cases

Under the new proposed rule change, parties would not be able to require explained decisions in two types of arbitration proceedings. The first is simplified arbitrations that are decided solely upon the pleadings and evidence filed by the parties, as described in Rules 12800 and 13800. The second is arbitrations that are conducted under the default procedures provided for in Rules 12801 and 13801. According to FINRA, explained decisions would not be appropriate in either of these situations because of the abbreviated nature of these arbitration proceedings.

Arbitrators May Choose To Write Explained Decisions in Other Circumstances

Under the new proposed rule change, arbitrators would continue to be permitted to decide, on their own or upon the motion of one party, to write an explained decision. Arbitrators would not receive an additional honorarium if the panel issues an explained decision that is not required under the proposed rules. The new proposed rule change would not affect the current rule that permits arbitrators to include a rationale in an award, even if the parties have not requested it, and would not encourage arbitrators to write an explained decision when they are not asked to do so by all the parties.

III. Comment Letters

The SEC received five comment letters.[15] Three commenters essentially supported the proposal[16] and two opposed it.[17] The Commission also received FINRA's response to comments, which is discussed below.[18]

One commenter supported the proposal, but asserted that every panel should provide a brief explanation for each award.[19] Another commenter supported the proposal but expressed concerns that investors' perceptions concerning the unfairness of the arbitration process would increase in circumstances in which an industry party blocks an investor's request for an explained decision.[20] One commenter argued that only the investor should be able to request an explained decision.[21]

FINRA responded to these comments by stating that under FINRA's original proposal (which has since been withdrawn), arbitrators would have been required to provide explained decisions upon the request of customers, or of associated persons in industry disputes.[22] FINRA stated that many commenters on that proposal objected to the one-sided nature of the proposal.[23] In addition, FINRA noted that a number of commenters were concerned that the proposal would lead to an increase in motions to vacate based on the arbitrators' explanations.[24]

FINRA further asserted that one of the benefits of arbitration is that it is final and binding, and courts rarely vacate awards.[25] In light of this, FINRA stated that any risks that may be associated with explained decisions should be borne by the parties only after they have agreed jointly to request an explained decision.[26] For these reasons, FINRA declined to amend the provision that requires joint agreement of the parties.[27]

One commenter stated that the proposal does not provide sufficient guidance to arbitrators.[28] The commenter asserted that the rule is ambiguous concerning the extent of the fact-based detail sufficient to constitute an explanation, and that the proposal is silent on whether the explanation would have to address every legal theory presented.[29]

FINRA responded by stating that the proposed rule specifies that a fact-based decision includes the general reasons for the arbitrators' decision, and that arbitrators do not have to include legal authorities or damage calculations.[30] FINRA stated that the proposal, as filed, gives the arbitrators the flexibility they need to tailor each award to the specific case being decided.[31] FINRA further responded by stating that the proposal requires the chairperson of the panel to write the explained decision.[32] Because chairpersons have completed chairperson training and have served as arbitrators through award on at least two arbitrations,[33] FINRA stated that requiring the chairperson to write the explained decision will ensure that parties are provided with the information called for in the proposed rule change.[34] Therefore, FINRA declined to amend the proposal to add further explanation regarding the content of the fact-based decision.[35]

One commenter argued that requiring a joint request for an explained decision eliminates the need for the proposal.[36] The commenter noted that FINRA already fosters a policy of accommodating parties' joint requests. Another commenter asked whether, under the current Codes, a panel would be required to write a reasoned decision if the parties made a joint request.[37] FINRA responded by stating that the panel currently is not required to accede to a joint request for an explained decision.[38] FINRA explained that under current practice, FINRA would forward the parties' joint request for an explained decision to the arbitrators, but that the arbitrators could decline the parties' request.[39] FINRA further stated that the proposed rule change would make it clear that arbitrators must provide an explained decision upon the joint request of the parties, set a timetable for such requests and provide for compensation for the chairperson's efforts in writing the explained

[14] Under the Customer and Industry Codes, the panel has the authority to assess fees in connection with discovery-related motions, contested subpoena requests, and hearing session fees to one party, or may split the fees between or among all parties.

[15] *See* note 5, *supra.*

[16] *See* Hoffman, Black and Gross, and Davis letters. The Hoffman letter supported the proposal with reservations. The Davis letter supported the proposed rule change with the caveat that the SEC re-visit FINRA's chair eligibility rules. FINRA did not propose to amend the chair eligibility rules in this proposal (*see* Rules 12400(c) and 13400(c)). Therefore, FINRA determined that the chair eligibility issue is outside the scope of the rule proposal and FINRA did not address it in its response to comments.

[17] *See* Estell and PIABA letters. FINRA did not address the concerns raised by the Estell letter, as it viewed those concerns as outside the scope of the rule proposal.

[18] Letter from Margo A. Hassan, FINRA, dated December 15, 2008 (''FINRA Letter'').

[19] *See* Hoffman letter.

[20] *See* Black and Gross letter.

[21] *See* PIABA letter.

[22] *See* FINRA letter. *See also* note 7, *supra.*

[23] *See* FINRA letter.

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *See* Black and Gross letter.

[29] *Id.*

[30] *See* FINRA letter.

[31] *Id.*

[32] *Id.*

[33] Rules 12400 and 13400 state that an arbitrator is eligible to serve as chairperson if the arbitrator has completed chairperson training and: 1) has a law degree and is a member of a bar of at least one jurisdiction and has served as an arbitrator through award on at least two arbitrations in which hearings were held; or 2) has served as an arbitrator through award on at least three arbitrations in which hearings were held.

[34] *See* FINRA letter.

[35] *Id.*

[36] *See* PIABA letter.

[37] *See* Davis letter.

[38] *See* FINRA letter.

[39] *Id.*

decision.[40] Finally, FINRA noted that the proposed rule change also specifies that arbitrators would not be required to provide an explained decision in cases resolved under the simplified or default arbitration rules.[41]

FINRA concluded by stating that the proposal will increase investor confidence in the fairness of the arbitration process, and should be approved.[42]

IV. Discussion and Findings

After careful review of the proposed rule change, the comments, and FINRA's response to the comments, the Commission finds that the proposed rule change is consistent with the requirements of the Act, and the rules and regulations thereunder that are applicable to a national securities association.[43] In particular, the Commission believes the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,[44] 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 proposed rule change should address complaints that FINRA has received from non-prevailing parties regarding the absence of explanations in arbitration awards, by providing a framework through which parties could jointly require arbitrators to write an explained decision.

In general, the Commission believes that FINRA has responded to the comments adequately and appropriately, and has explained how the proposed rule change is consistent with the requirements of the Act, and the rules and regulations thereunder that are applicable to a national securities association.

The Commission's oversight of the securities arbitration process is directed at ensuring that it is fair and efficient. The Commission shares the concerns expressed by a commenter that the proposal may not increase investors' perceptions of fairness in circumstances in which an industry party does not agree to an investor's request for an explained decision. Nevertheless, the Commission believes that the even-handed approach of providing parties a means of jointly requesting a decision represents a reasonable compromise between the status quo, whereby the Codes offer parties no formal means of requesting an explained decision, and the original proposal, whereby claimants alone would have the right to request an explained decision. Further, the Commission believes that the procedures set forth in FINRA's proposed rule (including, procedures related to: Deadlines for submitting a request; designating the chairperson as the writer of explained decisions; compensation for writing explained decisions; substance of the explained decision; and eligibility of cases for explained decisions) will contribute to the efficiency of the securities arbitration process by setting forth clear guidelines for parties and arbitrators in instances where parties have jointly requested an explained decision.

At the same time, the Commission is concerned that it may be difficult for parties to mutually agree to request an explained decision, because the decision of whether to request an explained decision (or whether to refuse to request an explained decision) may ultimately be a strategic decision. In order to gauge the effectiveness of the proposal, the Commission has requested that FINRA gather statistics for a period of one year from the effective date of this proposal, on the number of joint requests for explained decisions made in arbitration. Further, the Commission has asked FINRA to report on any anecdotal evidence it receives during this one-year period that may shed light on how often parties are unable to agree to request an explained decision.

V. Conclusions

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[45] that the proposed rule change (SR–FINRA–2008–051) be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[46]

Florence E. Harmon,

Deputy Secretary.

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[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] In approving this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 17c(f).

[44] 15 U.S.C. 78o–3(b)(6).

[45] 15 U.S.C. 78s(b)(2).

[46] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–59362; File No. SR–Phlx–2009–10]

Self-Regulatory Organizations; NASDAQ OMX PHLX, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Relating to Sponsored Access

February 5, 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 January 29, 2009, NASDAQ OMX PHLX, Inc. (''Phlx'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. 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

The Exchange proposes to adopt a sponsored access rule for a pilot period ending on July 29, 2009. The text of the proposed rule change is available on the Exchange's Website at *http://www.nasdaqtrader.com/micro.aspx?id=PHLXRulefilings,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization 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 those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to attract additional business by adopting a sponsored access rule

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

[2] 17 CFR 240.19b–4.