of the Act [12] and Rule 19b–4(f)(6) [13] thereunder.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–NASDAQ–2011–095 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–NASDAQ–2011–095. 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 Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of NASDAQ. 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 publicly available. All submissions should refer to File Number SR–NASDAQ–2011–095 and should be submitted on or before August 19, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[14]

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2011–19191 Filed 7–28–11; 8:45 am]

BILLING CODE 8011–01–P

[12] 15 U.S.C. 78s(b)(3)(A).

[13] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[14] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–64954; File No. SR–FINRA–2010–036]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing Proposed Rule Change and Amendment No. 1 To Amend the Codes of Arbitration Procedure To Permit Arbitrators To Make Mid-Case Referrals

July 25, 2011.

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 July 12, 2010, the Financial Industry Regulatory Authority, Inc. (''FINRA'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by FINRA. On July 7, 2011, FINRA filed Amendment No. 1.[3] The Commission is publishing this notice to solicit comments on the proposed rule change, as modified by Amendment No. 1, from interested persons.

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

[2] 17 CFR 240.19b-4.

[3] Amendment No. 1 to SR–FINRA–2010–036 replaces and supersedes the original rule filing.

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

FINRA is proposing to amend Rule 12104 of the Code of Arbitration Procedure for Customer Disputes (''Customer Code'') and Rule 13104 of the Code of Arbitration Procedure for Industry Disputes (''Industry Code'') to broaden arbitrators' authority to make referrals during an arbitration proceeding.

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.

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

(a) Background

In light of well publicized securities frauds that resulted in harm to investors, FINRA has reviewed the Customer and Industry Codes (together, Codes) and determined that its rules on arbitrator referrals should be amended to permit arbitrators to make referrals during an arbitration proceeding, rather than solely at the conclusion of a matter as is currently the case.

Currently, Rule 12104(b) of the Customer Code and Rule 13104(b) of the Industry Code state, in relevant part, that any arbitrator may refer to FINRA for disciplinary investigation any matter that has come to the arbitrator's attention during and in connection with the arbitration *only* at the conclusion of an arbitration (emphasis added). FINRA is concerned that the current rule's requirement that arbitrators in all instances must wait until a case is concluded before making a referral could hamper FINRA's efforts to uncover fraud as early as possible. FINRA is proposing, therefore, to broaden the arbitrators' authority under the Codes to make referrals, in limited

circumstances, during the hearing phase of an arbitration.

(b) Explanation of the Proposed Rule Changes to the Customer Code [4]

Rule 12104—Effect of Arbitration on FINRA Regulatory Activities

First, FINRA proposes to add the phrase ''Arbitrator Referral During or at Conclusion of Case'' to the title of Rule 12104 so that it reflects accurately the proposed changes. The new title would read: ''Effect of Arbitration on FINRA Regulatory Activities; Arbitrator Referral During or at Conclusion of Case.''

Second, the current rule would be rearranged to reflect the order in which an arbitrator may make a referral in an arbitration case. Subparagraph (a) would remain unchanged. The rule language in current subparagraph (b) of the rule, which addresses arbitrator referrals made only at the conclusion of the case (hereinafter, ''the post-case referral provision''), would be amended and moved to new subparagraph (e). In its place, FINRA would insert new rule language in subparagraph (b) to address arbitrator referrals made during the hearing phase of an arbitration (hereinafter, ''the mid-case referral provision''). New subparagraph (c) would require the Director of Arbitration to disclose the mid-case referral to the parties and permit the parties to request the referring arbitrators' recusal. New subparagraph (d) would provide the President of FINRA Dispute Resolution (President) and the Director with the authority to evaluate the arbitrator referral to determine whether to transmit it to other divisions of FINRA. Finally, new subparagraph (e) would contain the rule language in current subparagraph (b), with some minor amendments, to address post-case referrals.

Rule 12104(b)—Mid-Case Referral Provision

Rule 12104(b) would be amended to state that during the pendency of an arbitration, any arbitrator may refer to the Director any matter or conduct that has come to the arbitrator's attention during the hearing, which the arbitrator has reason to believe poses a serious threat, whether ongoing or imminent, that is likely to harm investors unless immediate action is taken. The proposed rule would also state that arbitrators should not make referrals during the pendency of an arbitration based solely on allegations in the statement of claim, counterclaim, cross claim, or third party claim. Further, the proposed rule would also state that if a case is nearing completion, the arbitrator should wait until the case concludes to make the referral if, in the arbitrator's judgment, investor protection would not be materially compromised by this delay.

First, FINRA is proposing to permit any arbitrator to make a mid-case referral to the Director but only after the commencement of an evidentiary hearing. The amended proposal would limit mid-case referrals, so that the referrals would be based on evidence presented by the parties during a hearing. FINRA believes this limitation would ensure that arbitrators have reviewed or heard actual evidence that would enable them to make an informed decision before making a mid-case referral.

Second, proposed Rule 12104(b) would state that arbitrators must not make mid-case referrals based only on allegations in the statement of claim, counterclaim, cross claim, or third party claim. Thus, mid-case referrals could not be based solely on the parties' pleadings.[5] Because Dispute Resolution routinely provides copies of arbitration claims and other pleadings to other FINRA divisions for analysis, mid-case referrals based only on the pleadings are not necessary to apprise those divisions of possible wrongdoing.[6] But if, during a hearing, arbitrators learn of information relating to an ongoing or imminent threat, the new rule would give them the discretion to make a mid-case referral to protect other investors. Moreover, by providing that the arbitrators should not make a mid-case referral based solely on the pleadings, the rule would limit unnecessary disruption to an ongoing case.

Third, the proposed rule would require that the arbitrator have reason to believe the serious threat, whether ongoing or imminent, is likely to harm investors unless immediate action is taken before making a mid-case referral. Under the proposed threshold of certainty, the referring arbitrator would not need to conclude that there is fraud, only that there is an indication of an ongoing or imminent threat that requires immediate action. FINRA believes the proposed threshold for making a mid-case referral would reduce the potential for a finding of arbitrator bias and would help a prevailing investor defend against a possible motion to vacate the award.

The Federal Arbitration Act establishes four grounds for vacating an arbitration award, one of which is evident partiality.[7] A party can establish an arbitrator's evident partiality by demonstrating that the arbitrator either failed to disclose relevant facts or displayed actual bias at the arbitration proceeding.[8] Thus, a party may attempt to overturn an award issued through FINRA's dispute resolution forum, based on an arbitrator's mid-case referral, on the ground that such a referral establishes an arbitrator's evident partiality. Generally, case law permits arbitrators to form opinions based on the evidence presented to them after they are appointed, and an award would not be vacated because arbitrators developed their views prior to the conclusion of the proceedings.[9] Accordingly, FINRA believes that the new standards, which would require an arbitrator to base a mid-case referral on evidence learned at a hearing, would reduce the potential for establishing arbitrator bias and would help a prevailing investor defend against a motion to vacate.

Last, proposed Rule 12104(b) also would provide arbitrators with the discretion to delay their referral until the end of a case if, in the arbitrator's judgment, investor protection will not be materially compromised by a short delay in making the mid-case referral. For example, if, during the third of four consecutively scheduled hearing days,[10] where the case is to conclude on the fourth day, the arbitrators learn of an ongoing or imminent threat that meets the criteria of the proposed rule, the arbitrators could defer making the mid-case referral until the conclusion of the case.[11] In deciding whether to delay

[4] As noted, FINRA also is proposing to amend Rule 13104 of the Industry Code to broaden the arbitrators' authority to make referrals in intra-industry cases. The explanations for the proposed changes to Rule 13104 are the same as those for Rule 12104 of the Customer Code.

[5] A pleading is a statement describing a party's causes of action or defenses. Documents that are considered pleadings are: a statement of claim, an answer, a counterclaim, a cross claim, a third party claim, and any replies. Rule 12100(s) of the Customer Code and Rule 13100(s) of the Industry Code.

[6] Dispute Resolution provides copies of all statements of claim, amended initial claims, counterclaims, amended counterclaims, cross claims, amended cross claims, third party claims, amended third party claims, and answers in promissory note cases to the Central Review Group (CRG), which is part of the Office of Fraud Detection and Market Intelligence, to analyze for fraudulent securities activity. If this analysis indicates possible securities violations, CRG may alert Enforcement for further review.

[7] 9 U.S.C. 10(a).

[8] *See Timothy L. Woods* v. *Saturn Distribution Corporation,* 78 F.3d 424, 427 (9th Cir. 1996).

[9] *Ballantine Books Inc.* v. *Capital Distributing Company,* 302 F.2d 17, 21 (2nd Cir. 1962).

[10] The average arbitration hearing takes slightly under 5 days.

[11] If the referring arbitrator delays making the referral until the conclusion of the case, the referral would then take place under the current rule, which provides for referrals at the conclusion of a case.

making a mid-case referral, however, arbitrators should weigh the potential harm a mid-case referral could have on the individual claimant against the possible harm to the markets and other investors that a brief delay, one day in the example above, could cause.

FINRA contemplates that the mid-case referral rule would typically be used in those circumstances where a hearing is scheduled for many days, or even weeks, and, in particular, where the hearing days are not scheduled consecutively. In the example above, if four hearing days were scheduled, but there was a significant time gap between scheduled hearing dates, then a delay in making a mid-case referral would not likely be appropriate. The proposed rule would encourage arbitrators to determine, based on their judgment and the facts and circumstances of the case, whether a mid-case or post-case referral is more appropriate.

FINRA believes that the criteria in proposed Rule 12104(b) would limit the use of the mid-case referral rule to only rare circumstances. While FINRA has lowered the threshold of certainty that arbitrators must have to make a mid-case referral, the referral must be based on evidence presented at a hearing, not information provided in the pleadings. Further, the evidence must support the arbitrators' belief that the threat is either ongoing or imminent, and likely to harm investors unless immediate action is taken. Although the proposed rule provides arbitrators with discretion to determine whether a delay in making a mid-case referral is appropriate, the arbitrators must determine as an initial matter whether the threat, as supported by the evidence, meets the criteria of the proposed rule. For these reasons, FINRA believes that arbitrators would rarely invoke the mid-case referral rule.

Rule 12104(c)—Arbitrator Disclosure and Arbitrator Recusal

If any arbitrator makes a mid-case referral under proposed Rule 12104(c), the Director will disclose to the parties the arbitrator's act of making such referral. The proposed rule also states that a party may request that referring arbitrators recuse themselves, as provided in the Codes. Under the proposal, if an arbitrator makes a mid-case referral, the arbitrator will notify the Director, who, in turn, will notify the parties.

Currently, under the Codes, any party may ask arbitrators to recuse themselves from the panel for good cause.[12] The arbitrators, who are the subject of the request, decide such requests.[13] FINRA believes that, in any case, a party should have the right to challenge an arbitrator's appearance on a panel. However, FINRA also believes that the arbitrator who is the subject of the challenge is best suited to assess the merits of a party's challenge and respond appropriately.

Thus, FINRA is proposing to change the requirement that the referring arbitrators withdraw from the panel upon a party's request, as provided in the original proposal. Rather, under the amended proposal, parties may make a recusal request of the referring arbitrators in the event of a mid-case referral. However, the referring arbitrators should honor such a request only if they conclude that they cannot serve impartially as a result of the act of making such a referral.

In cases with one arbitrator, if, after the arbitrator makes a mid-case referral, the parties submit a recusal request and the arbitrator honors it, the Director will appoint a replacement arbitrator as provided for in the Codes.[14] The arbitration case will begin anew with the replacement arbitrator. The parties may stipulate to facts, prior witness testimony, documents and other evidence provided during the initial case to educate the replacement arbitrator and expedite the subsequent case.[15] If the parties cannot agree or are unable to provide suggestions on how to educate the replacement arbitrator, the arbitrator will determine the best approach to commence the subsequent case including, but not limited to, reviewing transcripts from the initial case, listening to tapes from the initial case, or recalling witnesses. If the replacement arbitrator holds hearings in the subsequent case, the arbitrator will have the discretion in the award to determine which party or parties will pay the additional costs and expenses.[16] Further, in the award, the arbitrator will have discretion to order a party to reimburse another party for all or part of any filing fee paid.[17]

In a case involving three arbitrators, if any arbitrator honors a request for recusal, the Director will appoint a replacement arbitrator as provided for in the Codes, unless the parties agree in writing to proceed with only the remaining arbitrators.[18] If a replacement arbitrator is appointed in these cases, the parties may stipulate to facts, prior witness testimony, documents and other evidence provided during the initial case to educate the new arbitrator.[19] If the parties cannot agree or are unable to provide suggestions on how to educate the new arbitrator to proceed in the case, the panel, including the replacement arbitrator, will determine the best approach to educate the new arbitrator to proceed in the case including, but not limited to, reviewing transcripts from the initial case, listening to tapes from the initial case, or recalling witnesses. If the panel holds hearings after FINRA appoints a replacement arbitrator, the panel will have the discretion in the award to determine which party or parties will pay the additional costs and expenses.[20] Further, in the award, the panel will have discretion to order a party to reimburse another party for all or part of any filing fee paid.[21]

Rule 12104(d)—President's and Director's Authority

Proposed Rule 12104(d) would authorize the President or the Director to evaluate the arbitrator referral to determine whether it should be transmitted to other FINRA divisions, and limit this authority to the President or the Director.[22]

FINRA believes the proposed rule provides an added layer of protection for the investor by providing only the President or Director with the authority to determine whether to forward the mid-case referral to other FINRA divisions. This requirement would insulate the referring arbitrator from reaching the ultimate conclusion that there was the likelihood of imminent investor harm before making a mid-case referral, since that determination would reside with the President or the Director.

Rule 12104(e)—Post-Case Referral Provision

The rule language in current subparagraph (b) of the Rule 12104,

[12] Rule 12406 of the Customer Code and Rule 13409 of the Industry Code.

[13] *Id.*

[14] *See* Rule 12402(g) of the Customer Code and Rule 13411 of the Industry Code.

[15] *See* Rule 12105(a) of the Customer Code and Rule 13105(a) of the Industry Code.

[16] *See* Rule 12902(c) of the Customer Code and Rule 13902(c) of the Industry Code.

[17] *See* Rule 12900(d) of the Customer Code and Rule 13900(d) of the Industry Code.

[18] *See* Rules 12403(c)(6) and 12403(d)(6)–(8) of the Customer Code and Rule 13411 of the Industry Code.

[19] *Supra* note 15.

[20] *See* Rule 12902(c) of the Customer Code and Rule 13902(c) of the Industry Code.

[21] *See* Rule 12900(d) of the Customer Code and Rule 13900(d) of the Industry Code.

[22] The process for handling mid-case referrals would be similar to the Director's authority to remove an arbitrator after the first hearing or initial pre-hearing conference. Thus, the mechanism for such a review currently exists in the forum. *See* Rule 12408 of the Customer Code and Rule 13412 of the Industry Code.

which addresses arbitrator referrals made only at the conclusion of the case, would be amended and moved to new subparagraph (e).

The current rule states that ''only at the conclusion of an arbitration, any arbitrator may refer to FINRA for disciplinary investigation any matter that has come to the arbitrator's attention during and in connection with the arbitration, either from the record of the proceeding or from material or communications related to the arbitration, which the arbitrator has reason to believe may constitute a violation of NASD or FINRA rules, the federal securities laws, or other applicable rules or laws.''

The proposal would continue to permit arbitrators to make post-case referrals. However, FINRA would remove the term ''disciplinary'' to ensure that the scope of potential referrals is not limited to disciplinary findings, and would add the phrase ''or conduct,'' so that the subject-matter of Rule 12104 is consistent throughout the rule. The rule also would be amended to replace the reference to violations of ''NASD or FINRA rules'' with ''the rules of'' FINRA because the current FINRA rulebook consists of FINRA Rules, NASD Rules, and incorporated NYSE Rules.

Dispute Resolution would continue the current practice of forwarding all post-case arbitrator referrals to FINRA's regulatory divisions for review.

Conclusion

FINRA believes the proposal would strengthen its regulatory structure and provide an additional layer of protection to investors and the markets from fraudulent securities market schemes. In addition, FINRA believes the proposed rule change would provide it with a vital tool for detecting and addressing serious ongoing or imminent threats to the securities markets as early as possible.

2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,[23] 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 is consistent with FINRA's statutory obligations under the Act to protect investors and the public interest because the proposal could help FINRA detect serious ongoing or imminent threats to the securities markets at an earlier stage, which could minimize the financial losses of investors as well as the effects these threats could have on the securities markets. Thus, the proposed rule change would strengthen FINRA's ability to carry out its regulatory mission and provide another layer of protection to investors and the markets against fraud.

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

On July 12, 2010, FINRA filed a proposal to amend Rules 12104 and 13104 of the Codes to permit arbitrators to make referrals during an arbitration case. The SEC published the proposal in the **Federal Register** on September 23, 2010.[24]

The original proposal would have provided arbitrators with express authority to alert the Director during the prehearing, discovery, or hearing phase of a case when they learned of what they believed to be fraudulent activity that required immediate action. The original proposal also would have required the Director to disclose the mid-case referral to the parties, and would have required the entire panel to withdraw upon a party's request that a referring arbitrator withdraw (hereinafter, ''new panel request''). The proposed disclosure and new panel request requirements reflected FINRA's concern about the perception of possible arbitrator bias against the party that is the subject of the referral, and about the ramifications such perception might have on any award rendered by the panel in place at the time of the referral. Therefore, FINRA included these requirements to minimize the chances of a court vacating an award on the grounds of arbitrator bias, which could further delay resolution of an investor's dispute.

The SEC received eleven comments, all of which opposed the proposal.[25] The commenters raised the following issues.

First, the commenters contend that the new panel request provision benefits the industry party, which would be the only party to be the subject of the referral, and which might routinely invoke the rule to remove unsympathetic arbitrators.[26] They also believe that the provision would help the industry parties conceal their alleged malfeasance, by allowing them, through a request for a new panel, to re-start the arbitration, hence, further delaying the outcome of the case.[27]

Second, several commenters raised the possibility that, under the original proposal, the initial panel's withdrawal could lead to a number of subsequent panel withdrawals involving the same parties, which would jeopardize further an investor's chances to recover lost assets.[28] They questioned how FINRA would administer a case if, after the initial panel's withdrawal, the second panel learned the same information and made the same referral.[29] They also expressed concern that the proposal does not limit the number of times the same parties would be subject to a panel withdrawal. If multiple withdrawals occurred, these commenters believe this result would further delay the resolution of an investor's case and would significantly increase their costs.[30]

Third, several commenters also argue that the costs that an investor would incur as a result of a new panel request are not mitigated adequately under the original proposal.[31] The commenters

[23] 15 U.S.C. 78*o*–3(b)(6).

[24] *See* Securities Exchange Act Rel. No. 62930 (Sept. 17, 2010), 75 FR 58007 (Sept. 23, 2010) (SR–FINRA–2010–036).

[25] The SEC received comments on Notice of Filing of Proposed Rule Change to Amend the Codes of Arbitration Procedure to Permit Arbitrators to Make Mid-case Referrals from Barry D. Estell, Attorney at Law, Oct. 11, 2010 (''Estell Comment''); Richard A. Stephens, *Esq.,* Attorney and FINRA Chairman, Oct. 11, 2010 (''Stephens Comment''); Theodore M. Davis, Esq., Law Office of Theodore M. Davis, Oct. 11, 2010 (''Davis Comment''); Richard M. Layne, Law Office of Richard M. Layne, Oct. 11, 2010 (''Layne Comment''); Scott R. Shewan, President, Public Investors Arbitration Bar Association (''PIABA Comment''); Leonard Steiner, Steiner & Libo P.C., Oct. 11, 2010 (''Steiner Comment''); Dale Ledbetter, Ledbetter & Associates, P.A., Oct. 13, 2010 (''Ledbetter Comment''); William A. Jacobson, *Esq.,* Associate Clinical Professor and Director, and Meghan Tente, Cornell Securities Law Clinic, Oct. 14, 2010 (''Cornell Comment''); Rob Bleecher, Esquire, Pecht Associates, P.C., Oct. 14, 2010 (''Bleecher Comment''); Joelle B. Franc and Gary J. Pieples, Syracuse Securities and Consumer Law Clinic, Syracuse University College of Law, Oct. 19, 2010 (''Syracuse Comment''); and Richard P. Ryder, Esquire, Securities Arbitration Commentator, Inc., Jan. 16, 2011 (''Ryder Comment'').

[26] *Id.*

[27] Estell Comment, Layne Comment, PIABA Comment, Bleecher Comment, and Stephens Comment.

[28] Estell Comment, Layne Comment, PIABA Comment, and Bleecher Comment.

[29] *Id.*

[30] *Id.*

[31] Estell Comment, Layne Comment, PIABA Comment, Bleecher Comment, and Syracuse Comment.

contend that the original proposal underestimates the costs that investors would incur if the panel withdraws mid-case.[32] In support of their contention, they cite examples of some of the additional costs investors would incur (*e.g.,* paying expenses for experts to testify at a second hearing, or paying to transcribe the record of the prior hearings) if a party requests a new panel.[33] They believe the additional costs in time and money would be substantial and would not be covered by waiving the fees for any hearing sessions conducted prior to the referral.[34]

Fourth, several commenters contend that the new panel request provision would create a disincentive for arbitrators to make a mid-case referral, because to do so would result in their likely removal from the case.[35]

Finally, several commenters noted that it would be unlikely that arbitrators would learn of a serious, ongoing, or imminent threat during the discovery phase of a case because the type of evidence needed to support a mid-case referral is not typically provided during discovery.[36] According to these commenters, arbitrators generally do not receive information or evidence during the discovery phase of a case.[37] Therefore, the rules would impact only arbitrations in which hearings have begun.[38]

Several commenters supported FINRA's efforts to enhance enforcement to thwart ongoing frauds and thus supported the concept of FINRA amending its rules to broaden arbitrators' authority to make mid-case referrals.[39] In their comments, they indicated or implied that if the proposal did not contain the new panel request provision, they could support the proposal.[40] These commenters questioned FINRA's concern that arbitrators may be perceived as biased once an arbitrator makes a mid-case referral, and that this bias could be grounds to vacate an award rendered by the panel in place at the time of the referral. Several [41] commenters cited relevant case law, which supports the view that arbitrators are permitted to form opinions based on the evidence presented to them after they are appointed, and an award would not be vacated because arbitrators developed their views prior to the conclusion of the proceedings.[42]

FINRA agrees that the new panel request provision may have the unintended consequences of providing parties who would be the subject of the referral with a tool to delay the outcome of an arbitration, increase significantly claimants' costs, and create a disincentive for arbitrators to make mid-case referrals. As these potential effects were not FINRA's intent, FINRA is proposing to replace the original proposal in its entirety with the amended proposal, which would remove the new panel request provision and establish new referral criteria to reduce the potential for a finding of arbitrator bias should an arbitrator make a mid-case referral.

The amended proposal would retain the requirement that the Director notify parties of a mid-case referral, but would eliminate the new panel request. By removing the new panel request mechanism, the amended proposal could reduce the possibility that an entire panel would be removed from an arbitration case before it has concluded. Thus, it is less likely that the case would have to start over again if an arbitrator makes a mid-case referral.[43] Therefore, the customer would be less likely to experience procedural disadvantages, significant delays, and increased costs of starting the arbitration anew.

In place of the new panel request, FINRA would permit the parties to request that the referring arbitrators recuse themselves. As the Codes currently provide, any party may ask arbitrators to recuse themselves from the panel for good cause, and the arbitrators, who are the subject of the request, decide such requests. [44] FINRA believes this element of the amended proposal would provide those parties, who believe the referring arbitrators are biased by making a mid-case referral, with the opportunity to challenge the arbitrators' neutrality. However, unlike the original proposal, the arbitrators would not be required to withdraw from the case.[45]

Even though case law supports the view that arbitrators are permitted to form opinions based on the evidence presented to them after they are appointed, FINRA is proposing new criteria in its amended proposal to minimize the potential for a finding of arbitrator bias in the event of a mid-case referral. First, FINRA would lower the proposed threshold of certainty to require that the arbitrators believe that there is an indication of an ongoing or imminent threat that requires immediate action, rather than conclude that there is a fraud, as the original proposal would have required.

Second, the proposed rules would limit a mid-case referral to information learned during a hearing. FINRA agrees with the commenters that a mid-case referral should be based on information learned during a hearing, so that the referral would be based on evidence presented by the parties. As case law suggests, arbitrators are permitted, indeed even expected, to form opinions based on the evidence presented to them after they are appointed, and such an expression of those views would not be considered proof of bias.[46]

Third, the amended proposal would provide only the President or Director with the authority to determine whether to forward a mid-case referral to other FINRA divisions. This requirement would insulate the referring arbitrator from having to conclude definitively that there was ongoing or imminent investor harm before making a mid-case referral.

Last, the amended proposal would add new language urging arbitrators to weigh the need to make a referral immediately, rather than waiting until the case is over, when an arbitration case is close to completion. FINRA believes providing arbitrators with express discretion to consider the timing of the mid-case referral and the stage of the arbitration proceeding would minimize the impact of the proposal on those customers whose hearings are almost completed.

FINRA believes these modifications would address concerns raised by comments filed with the SEC in response to the original proposal and minimize the potential burdens on investor-claimants, while still achieving its regulatory goals.

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[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] Ledbetter Comment, Stephens Comment and Ryder Comment.

[36] Estell Comment, Layne Comment, PIABA Comment, and Bleecher Comment.

[37] *Id.*

[38] *Id.*

[39] Stephens Comment, Steiner Comment, Ledbetter Comment, and Cornell Comment.

[40] *Id.*

[41] Stephens Comment, Ledbetter Comment, and Davis Comment. The Davis Comment opposes the proposal.

[42] *See, e.g., Spector* v. *Torenberg,* 852 F. Supp. 201, 209 (S.D.N.Y. 1994) (citing *Ballantine Books Inc.,* 302 F.2d at 21).

[43] Accordingly, the fee waiver provisions that would have compensated a claimant for hearings conducted prior to the referral in the original proposal are no longer warranted, and have not been included in the amended proposal.

[44] *Supra* note 12.

[45] An arbitrator is not precluded from developing views regarding the merits of a dispute early in the proceedings, and an award will not be vacated because he expresses those views. *Ballantine Books Inc.,* 302 F.2d at 21.

[46] *Health Services Management Corp.* v. *Hughes,* 975 F.2d 1253, 1267 (7th Cir. 1992).

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 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 or disapprove 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–2010–036 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–2010–036. 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 Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 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–2010–036 and should be submitted on or before August 19, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[47]

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2011–19193 Filed 7–28–11; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–64956; File No. SR–NASDAQ–2011–073]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Designation of a Longer Period for Commission Action on Proposed Rule Change To Adopt Additional Listing Requirements for Reverse Mergers

July 25, 2011.

On May 26, 2011, The NASDAQ Stock Market LLC (''Nasdaq'') 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 adopt additional listing requirements for reverse mergers. The proposed rule change was published for comment in the **Federal Register** on June 14, 2011.[3] The Commission received no comments on the proposal.

Section 19(b)(2) of the Act[4] provides that within 45 days of the publication of notice of the filing of a proposed rule change, or within such longer period up to 90 days as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or as to which the self-regulatory organization consents, the Commission shall either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether the proposed rule change should be disapproved. The 45th day for this filing is July 29, 2011.

The Commission is extending the 45-day time period for Commission action on the proposed rule change. The Commission finds that it is appropriate to designate a longer period to take action on the proposed rule change so that it has sufficient time to consider the Exchange's proposal, which would establish additional listing requirements for reverse merger companies, whereby an operating company becomes public by combining with a public shell.

Accordingly, pursuant to Section 19(b)(2) of the Act,[5] the Commission designates September 12, 2011 as the date by which the Commission should either approve or disapprove, or institute proceedings to determine whether to disapprove, the proposed rule change (File Number SR–NASDAQ–2011–073).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[6]

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2011–19231 Filed 7–28–11; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–64957; File No. SR–BATS–2011–023]

Self-Regulatory Organizations; BATS Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend BATS Rules in Connection With the Elimination of a Directed Order Program for BATS Options

July 25, 2011.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on July 22, 2011, BATS Exchange, Inc. (the ''Exchange'' or ''BATS'') 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 Exchange has designated this proposal as a ''non-controversial'' proposed rule change pursuant to Section 19(b)(3)(A) of the Act[3] and Rule 19b–4(f)(6)(iii)

[47] 17 CFR 200.30–3(a)(12).

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

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 64633 (June 8, 2011), 76 FR 34781.

[4] 15 U.S.C. 78s(b)(2).

[5] 15 U.S.C. 78s(b)(2).

[6] 17 CFR 200.30–3(a)(31).

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

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A).