volume-based tiers for Professional Customers and Broker-Dealers that transact electronically is equitable and not unfairly discriminatory because the change will apply to all participants in those categories equally and such participants are free to change the manner in which they access the Exchange. The proposed change also will reward Professional Customers and Broker-Dealers that bring relatively higher volumes of trading activity to the Exchange. Moreover, as noted previously, these participants have lower aggregate fees when compared to, for example, the ATP fees incurred by a NYSE Amex Market Maker to quote the entire universe of names traded on the Exchange. Further, the establishment of the tiers will enable Professional Customers and Broker-Dealers that transact in sufficient volumes to obtain a lower per contract rate on all of their electronic volumes in a given month. This is equitable and not unfairly discriminatory given that a higher volume of marketable orders, which these volume tiers will encourage, is beneficial to other Exchange participants due to the increased opportunity to trade.

The Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues if they determine that such venues offer more favorable trading conditions and rates.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose 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

No written comments were solicited or received with respect to the proposed rule change.

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

The foregoing rule change is effective upon filing pursuant to Section 19(b)(3)(A) [9] of the Act and subparagraph (f)(2) of Rule 19b–4 [10] thereunder, because it establishes a due, fee, or other charge imposed by NYSE MKT.

At any time within 60 days of the filing of such 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.

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 email to *rule-comments@sec.gov.* Please include File Number SR–NYSEMKT–2012–74 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–NYSEMKT–2012–74. This file number should be included on the subject line if email 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 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the NYSE's principal office and on its Internet Web site at *www.nyse.com.* 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–NYSEMKT–2012–74, and should be submitted on or before January 7, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[11]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–30324 Filed 12–14–12; 8:45 am]

BILLING CODE 8011–01–P

[9] 15 U.S.C. 78s(b)(3)(A).

[10] 17 CFR 240.19b–4(f)(2).

[11] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68404; File No. SR–FINRA–2012–041]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Order Approving Proposed Rule Change To Amend the Customer and Industry Codes of Arbitration Procedure Relating to Subpoenas and to Arbitrator Authority To Direct the Appearance of Associated Person Witnesses and the Production of Documents Without Subpoenas

December 11, 2012.

I. Introduction

On August 24, 2012, the Financial Industry Regulatory Authority, Inc. (''FINRA'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Exchange Act'' or ''Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change amending the Customer and Industry Codes of Arbitration Procedure (collectively, the ''Codes'') (1) to provide that when FINRA member firms and/or employees or associated persons of FINRA members who are parties to an arbitration (collectively, ''Member Parties'') seek the appearance of witnesses by, or the production of documents from, FINRA members (and individuals associated with the member) who are not parties to the arbitration (collectively, ''Non-Party Members''), FINRA arbitrators shall (unless circumstances dictate otherwise) issue orders for the appearance of witnesses or the production of documents, instead of issuing subpoenas; (2) to add procedures for any non-party (Non-Party Member or otherwise) receiving a subpoena to object to the subpoena; (3) to provide that if an arbitrator issues a subpoena to a Non-Party Member at the request of a Member Party, the Member Party making the request is (unless the panel

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

[2] 17 CFR 240.19b–4.

directs otherwise) responsible for paying the reasonable costs of the appearance of witnesses by or the production of documents from the Non-Party Member; (4) to add procedures for any party to an arbitration to file a motion requesting arbitrators issue an order for the appearance of any employee or associated person of a FINRA member (collectively, ''Associated Persons'') or the production of documents from such Associated Persons or members; (5) to add procedures for any party to an arbitration receiving a motion for an order and draft order to object to the order; (6) to add procedures for how the party to the arbitration that requested the order must serve the order (if issued); (7) to add procedures for any Non-Party Member receiving an order to object to the order; and (8) to add procedures for how parties to an arbitration must share documents received in response to an order issued to a Non-Party Member.

The proposed rule change was published for comment in the **Federal Register** on September 13, 2012.[3] The Commission received three comment letters on the proposed rule change from: the Securities Arbitration Clinic at St. John's University School of Law [4]; the Investor Rights Clinic at Pace Law School [5]; and the Public Investors Arbitration Bar Association (''PIABA'').[6] 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, on the Commission's Web site at *http://www.sec.gov,* and at the Commission's Public Reference Room.

This order approves the proposed rule change.

II. Description of the Proposed Rule Change

A. Subpoena Rules

Currently, the Codes authorize arbitrators to issue subpoenas for the production of documents or the appearance of witnesses.[7] Rules 12512 and 13512 of the Codes (the ''Subpoena Rules'') set forth procedures for any party (Member Party or non-member) to an arbitration to make a motion for a subpoena. Specifically, the requesting party must file a written motion with FINRA's Director of Arbitration (''Director'') (with an additional copy for the arbitrator) requesting that an arbitrator issue a subpoena to another party to the arbitration or to a non-party. The motion must include a draft subpoena and the requesting party must serve the motion and draft subpoena on each other party to the arbitration at the same time and in the same manner as on the Director. The requesting party, however, may not serve the motion or draft subpoena on a non-party.[8]

The Subpoena Rules also detail how a party to an arbitration receiving a motion and draft subpoena may object to the scope or propriety of the subpoena; how the requesting party may reply to another party's objection; and how the arbitrator rules on the issuance and scope of the subpoena.[9] If the arbitrator issues a subpoena, however, the party that requested the subpoena must serve the subpoena at the same time and in the same manner on all other parties to the arbitration and, if applicable, on any non-party receiving the subpoena.[10] Finally, the Subpoena Rules describe how parties to an arbitration must share any documents they receive in response to a subpoena service on a non-party.[11]

The Subpoena Rules do not currently address, however, who bears the costs of production under a subpoena issued to either a party to an arbitration or a non-party. In the Notice, FINRA states that in practice arbitrators resolve disputes between parties to an arbitration, as well as between parties and non-parties, relating to costs associated with complying with a subpoena. In addition, the Subpoena Rules do not currently provide a means for non-parties to object to subpoenas served upon them. FINRA states that in practice, however, FINRA permits non-parties to file objections to subpoenas. And, according to FINRA, in practice the objections may include a request for the arbitrators to determine who pays the costs of production.

FINRA filed this proposed rule change, in part, to codify these existing practices. FINRA proposes new Rules 12512(e) and 13512(e) to the Codes to provide a mechanism for non-parties to object to a subpoena that an arbitrator issues to them. Under the new provisions, if a non-party receiving a subpoena objects to the scope or propriety of the subpoena, the non-party may, within ten (10) calendar days of service of the subpoena, file written objections with the Director. The Director shall forward a copy of the written objections to the arbitrator and all the parties to the arbitration (including the requesting party). The party that requested the subpoena may respond to the objections within ten (10) calendar days of receipt of the objections. After considering all objections, the arbitrator responsible for issuing the subpoena shall rule promptly on the objections. FINRA stated in its Notice that the proposed amendments would codify FINRA's current practice relating to objections.

In addition, the proposed rule change would add new Rules 12512(g) and 13512(g) to the Codes to address costs when a Member Party requests a subpoena directed to a Non-Party Member. Specifically, if the arbitrators issue a subpoena to a Non-Party Member, the Member Party that requested the subpoena shall pay the reasonable appearance and/or production costs related to the Non-Party Member's compliance with subpoena, unless the panel directs otherwise. If a dispute arises regarding who should pay the appearance and/or production costs and whether a stated amount is reasonable, the proposed rule change would allow arbitrators to determine the reasonable costs and to assess responsibility for paying them. FINRA believes that the amendments would codify the current practice relating to how FINRA handles such disputes. FINRA also believes that the responsibility of a party to an arbitration to reimburse a non-party for its appearance and/or production costs should be the same regardless of whether the non-party is responding to a subpoena or an order requested by the party; to this end, new Rules 12512(g) and 13512(g) would also eliminate the current disparity between how the Subpoena Rules and the Order Rules (defined below), which expressly address who bears the costs of production relating to compliance with an order, treat such costs.[12]

B. Order Rules

Rules 12513 and 13513 of the Codes (the ''Order Rules'') also currently

[3] *See* Exchange Act Release No. 67803 (Sept. 7, 2012), 77 FR 56694 (Sept. 13, 2012), (''Notice''). The comment period closed on October 4, 2012.

[4] *See* Letter from Shane Malone and others, Securities Arbitration Clinic, St. John's University School of Law, dated September 25, 2012 (the ''St. John's Letter'').

[5] *See* Letter from Jill I. Gross and others, Investor Rights Clinic, Pace Law School, dated October 4, 2012 (the ''Pace Letter'').

[6] *See* Letter from Ryan K. Bakhtiari, PIABA, dated October 4, 2012 (the ''PIABA Letter''). *See also infra* note 21.

[7] *See* FINRA Rules 12512(a) and 13512(a).

[8] *See* FINRA Rules 12512(b) and 13512(b).

[9] *See* FINRA Rules 12512(c) and 13512(c).

[10] *See* FINRA Rules 12512(d) and 13512(d).

[11] *See* FINRA Rules 12512(e) and 13512(e).

[12] *See* FINRA Rules 12513(b) and 13513(b) (stating that unless the panel directs otherwise, the party to the arbitration requesting the order for the appearance of witnesses by or the production of documents from non-parties under this rule shall (unless the panel directs otherwise) pay the reasonable costs related to the appearance of witnesses or the production of documents done in response to such order).

authorize arbitrators to order the appearance of any Associated Persons or the production of documents in the possession or control of an Associated Person or a FINRA member (including both parties to an arbitration and non-parties) without using the subpoena process.[13] In fact, as stated in the Notice, FINRA believes that parties to an arbitration would be better served by requesting an arbitrator order instead of a subpoena because orders offer a more efficient mechanism for obtaining the appearance of witnesses and production of documents from FINRA members and/or their Associated Persons (including both parties to an arbitration and non-parties). For instance, FINRA states in the Notice that while the Codes provide an enforcement mechanism for both subpoenas and arbitrator orders,[14] typically, once an arbitrator issues a subpoena in a dispute, non-compliance is handled away from the arbitration forum through the courts. Conversely, FINRA staff and the arbitrators who are familiar with the case handle requests for arbitrator orders. Consequently, FINRA believes that arbitrator orders are cost effective for forum users because parties to the arbitration and non-parties would avoid the costs and risks associated with court proceedings. Moreover, FINRA does not believe that using arbitration orders instead of subpoenas in arbitration proceedings would adversely impact the ability of parties to an arbitration to obtain documents and witnesses at the forum.

To this end, FINRA proposed adding new Rules 12512(a)(2) and 13512(a)(2) to the Subpoena Rules to provide that unless circumstances dictate the need for a subpoena,[15] arbitrators shall not issue subpoenas to Non-Party Members at the request of Member Parties. Specifically, the proposal states that if the arbitrators determine that the request for the appearance of witnesses or the production of documents should be granted, then the arbitrators should order the appearance of such persons or the production of documents from such Non-Party Member under the Order Rules.

With the proposed rules, FINRA also intends to standardize its procedures relating to the use of orders and subpoenas in arbitration by adding to the Order Rules procedures substantially similar to those in the Subpoena Rules. In particular, the proposed rule would add Rules 12513(b) and 13513(b), setting forth procedures for any party to an arbitration to make a motion for an order for the appearance of Associated Persons (including both parties to the arbitration and non-parties) or the production of documents in the possession or control of such Associated Persons of FINRA members (including both parties to the arbitration and non-parties). Specifically, the requesting party must file a written motion with the Director (with an additional copy for the arbitrator) requesting that an arbitrator issue the order. The motion must include a draft order and the requesting party must serve the motion and draft order on each other party to the arbitration at the same time and in the same manner as on the Director. The requesting party, however, may not serve the motion or draft order on a Non-Party Member. These proposed procedures are substantially similar to those procedures used by a party to an arbitration to make a motion for a subpoena.[16]

The proposed rule would add other provisions substantially similar to certain Subpoena Rules. Specifically, new Rules 12513(c) and 13513(c) would provide a mechanism for a party to an arbitration receiving a motion and draft order to object to the scope or propriety of the order, as well as a mechanism for the requesting party to reply to another party's objection. Under the new provisions, if party receiving a motion and draft order objects to the scope or propriety of the order, the party shall, within ten (10) calendar days of service of the motion, file written objections with the Director (with an additional copy for the arbitrator) and serve copies on all other parties to the arbitration at the same time and in the same manner as on the Director. The party that requested the order may respond to the objections within ten (10) calendar days of receipt of the objections. After considering all objections, the arbitrator responsible for deciding discovery-related motions shall rule promptly on the issuance and scope of the order. Again, this proposal is substantially similar to the related provisions in the Subpoena Rules detailing how a party to an arbitration receiving a motion and draft subpoena may object to the scope or propriety of the subpoena; how the requesting party may reply to another party's objection; and how the arbitrator rules on the issuance and scope of the subpoena.[17]

In addition, under proposed new Rules 12513(d) and 12513(d), if an arbitrator ultimately issues the requested order, the requesting party must serve the order at the same time and in the same manner on all other parties to the arbitration and, if applicable, on any Non-Party Member receiving the order. These proposed new rules also parallel the related rules in the Subpoena Rules.[18]

Moreover, the proposed rules would add new Rules 12513(e) and 13513(e) to provide a mechanism for Non-Party Members to object to an order that an arbitrator issues to them. Under the new provisions, if a Non-Party Member receiving an order objects to the scope or propriety of the order, the Non-Party Member may, within ten (10) calendar days of service of the order, file written objections with the Director. The Director shall forward a copy of the written objections to the arbitrator and all the parties to the arbitration (including the requesting party). The party that requested the order may respond to the objections within ten (10) calendar days of receipt of the objections. After considering all objections, the arbitrator responsible for issuing the order shall rule promptly on the objections. These proposed new rules are substantially similar to the new rules that that proposal also proposes adding to the Subpoena Rules. This would codify FINRA's current practice relating to objections.

Finally, the proposed rule change would add new Rules 12513(f) and 13513(f), describing how parties to an arbitration must share any documents they receive in response to an order served on a non-party (*i.e.,* Non-Party Members). Specifically, under the new rules any party to an arbitration receiving documents in response to an order served on a Non-Party Member shall provide notice to all other parties within five (5) days of receipt of the documents. Thereafter, any party to the arbitration may request copies of such documents, which must be provided within ten (10) calendar days of receipt of such request. Again, these proposed new rules parallel the existing related provisions in the Subpoena Rules.[19]

[13] *See* FINRA Rules 12513(a) and 13513(a).

[14] IM–12000 states that it may be deemed conduct inconsistent with just and equitable principles of trade and a violation of Rule 2010 for a member or a person associated with a member to fail to appear or to produce any document in his possession or control as directed pursuant to provisions of the Code (*see* Customer Code of Arbitration Procedure Part I—Interpretative Material, Definitions, Organization and Authority).

[15] For example, an arbitrator might issue a subpoena if a firm failed to produce documents pursuant to an arbitrator order, or if a former associated person of a FINRA member has left the industry and the arbitrator believes that an arbitrator order would not be effective.

[16] *See* FINRA Rules 12512(b) and 13512(b).

[17] *See supra* note 9.

[18] *See supra* note 10.

[19] *See supra* note 11.

III. Discussion of Comment Letters

The Commission received three comment letters on the proposed rule change in response to the Notice.[20] All three comment letters supported the proposed rule change. The St. John's Letter supported the proposed rule change noting that St. John's believes that encouraging the use of orders instead of subpoenas would minimize the involvement of courts in the arbitration process and, consequently, maximize efficiency of the arbitration process. In addition, St. John's believes that by codifying existing processes for non-parties to file objections to a subpoena, and clarifying the process for determining responsibility for fees related to the appearance of witnesses by and production of documents from non-parties, the proposal would create greater certainty for arbitration participants.

The Pace Letter supported the proposed rule change, also noting that encouraging the issuance of orders instead of subpoenas would minimize the involvement of litigation in arbitration and consequently reduce associated costs and delays. The Pace Letter also noted that the proposal would create a unified enforceable process that enhances efficiency for resolving disputes.

The PIABA Letter also supported the proposed rule change because it would encourage the use of orders rather than subpoenas for compelling the appearance of witnesses by and production of documents from non-parties. In addition, PIABA favors codifying previously undocumented processes and making consistent arbitration procedures governing the use of orders and subpoenas.[21]

IV. Discussion and Commission's Findings

The Commission has carefully reviewed the proposed rule change and the comments received. Based on its 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. In particular, the Commission finds that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,[22] 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.

More specifically, the Commission believes that the proposed amendments would encourage the use of orders instead of subpoenas in arbitration, codify certain existing processes, and standardize other procedures relating to subpoenas and arbitrator orders. In particular, the Commission believes that the use of orders in the first instance instead of subpoenas, with respect to compelling the appearance of witnesses and production of documents, could lower discovery costs. The Commission also believes that by codifying existing processes and eliminating the disparity between the Subpoena Rules and the Order Rules, the proposed rule will eliminate potential confusion over the applicability of certain provisions of the Codes and, consequently, enhance the efficiency of the arbitration process for its users.

The Commission has reviewed the record for the proposed rule change and believes that the record does not contain any information to indicate that the proposed rule would have a significant effect on efficiency, competition, or capital formation. In light of the record, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation and has concluded that the proposed rule is unlikely to have any significant effect.[23]

For the reasons stated above, the Commission finds that the rule change is consistent with the Act and the rules and regulations thereunder.

V. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[24] that the proposed rule change (SR–FINRA–2012–041) be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[25]

Kevin O'Neill,

Deputy Secretary.

[FR Doc. 2012–30273 Filed 12–14–12; 8:45 am]

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[20] *See supra* notes 4, 5 and 6.

[21] In a telephone conversation on October 22, 2012, among Margo Hassan, Ken Adrichik and Linda Fienberg of FINRA, Ryan Bakhtiari of PIABA, and Leila Bham of the Commission, PIABA confirmed that the entirety of the last paragraph of the PIABA Letter should be disregarded and considered deleted. This last paragraph had expressed concern over FINRA rules regarding allocation of costs in connection with the use of subpoenas and orders in FINRA arbitration. As a result, the PIABA Letter is considered in its entirety to be supportive of the proposed rule change.

[22] 15 U.S.C. 78o-3(b)(6).

[23] *See* 15 U.S.C. 78c(f).

[24] 15 U.S.C. 78s(b)(2).

[25] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68406; File No. SR–Phlx–2012–138]

Self-Regulatory Organizations; NASDAQ OMX PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Strategies

December 11, 2012.

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 December 3, 2012, NASDAQ OMX PHLX LLC (''Phlx'' or ''Exchange'') 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 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 amend the fee caps applicable to certain strategies on Multiply Listed Options in Section II, entitled ''Equity Options Fees.'' [3] The Exchange also proposes to apply the fee caps to transactions on certain reversal [4] and conversion [5] strategies.

The text of the proposed rule change is available on the Exchange's Web site at *http://www.nasdaqtrader.com/micro.aspx?id=PHLXfilings,* 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 Exchange 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. The Exchange has prepared summaries, set

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

[2] 17 CFR 240.19b–4.

[3] Section II Equity Options fees include options overlying equities, ETFs, ETNs and indexes which are Multiply Listed.

[4] Reversals are established by combining a short stock position with a short put and a long call position that shares the same strike and expiration.

[5] Conversions are established by combining a long position in the underlying stock with a long put and a short call position that share the same strike and expiration.