

*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**

Because the foregoing proposed rule change does not: (1) Significantly affect the protection of investors or the public interest; (2) impose any significant burden on competition; and (3) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, it has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>11</sup> and Rule 19b-4(f)(6) thereunder.<sup>12</sup> At any time within 60 days of the filing of such proposed rule change, the Commission may summarily abrogate 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 e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-CBOE-2008-98 on the subject line.

*Paper Comments*

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

All submissions should refer to File Number SR-CBOE-2008-98. This file

number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the CBOE. 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-CBOE-2008-98 and should be submitted on or before November 28, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>13</sup>

**Florence E. Harmon,**  
*Acting Secretary.*

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**SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-58886; File No. SR-FINRA-2008-010]

**Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Order Approving a Proposed Rule Change Amending the Codes of Arbitration Procedure To Establish Procedures for Arbitrators To Follow When Considering Requests for Expungement Relief**

October 30, 2008.

**I. Introduction**

On March 13, 2008, the Financial Industry Regulatory Authority, Inc. ("FINRA") filed with the Securities and Exchange Commission ("Commission")

or "SEC"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to adopt Rule 12805 of the Code of Arbitration Procedure for Customer Disputes ("Customer Code") and Rule 13805 of the Code of Arbitration Procedure for Industry Disputes ("Industry Code") to establish procedures that arbitrators must follow when considering requests for expungement relief under Rule 2130.

The proposed rule change was published in the **Federal Register** on April 3, 2008.<sup>3</sup> The Commission received eleven comment letters on the proposed rule change.<sup>4</sup> FINRA responded to the comments on June 11, 2008.<sup>5</sup> The Commission received an additional letter from one commenter in furtherance of its original comments.<sup>6</sup> On September 3, 2008, FINRA submitted a second response to comments.<sup>7</sup> This order approves the proposed rule change.

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

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

<sup>3</sup> See Securities Exchange Act Release No. 57572 (March 27, 2008), 73 FR 18308 (April 3, 2008) (the "Notice").

<sup>4</sup> See letters to Nancy M. Morris, Secretary, Commission, from Seth E. Lipner, Professor of Law, Bernard M. Baruch College, CUNY, and Member Deutsch Lipner, dated April 8, 2008 ("Lipner letter"); Steven B. Caruso, Maddox Hargett Caruso, P.C., dated April 8, 2008 ("Caruso letter"); Jill Gross, Director, Pace University, Investor Rights Clinic, and Teresa Milano, dated April 15, 2008 ("Gross and Milano letter"); Raghavan Sathianathan, dated April 17, 2008 ("Sathianathan letter"); William A. Jacobson, Associate Clinical Professor, Director, Cornell Securities Law Clinic, Cornell Law School and Arthur A. Andersen III, dated April 23, 2008 ("Cornell I letter"); Barbara Black, Charles Hartsock Professor of Law, director of Corporate Law Center, University of Cincinnati dated April 24, 2008 ("Black letter"); Karen Tyler, President, North American Securities Administrators Association, North Dakota Securities Commissioner, dated April 24, 2008 ("NASAA letter"); Scott R. Shewan, Born, Pape Shewan, LLP, dated April 24, 2008 ("Shewan letter"); Barry D. Estell, dated May 7, 2008 ("Estell letter"); Brian N. Smiley, Smiley Bishop Porter LLP, dated May 8, 2008 ("Smiley letter"); and Laurence S. Schultz, President, Public Investors Arbitration Bar Association, dated May 16, 2008 ("PIABA letter").

<sup>5</sup> See letter to Nancy M. Morris, Secretary, Commission, from Margo A. Hassan, Counsel, FINRA, dated June 11, 2008 ("First Response").

<sup>6</sup> See letter to Nancy M. Morris, Secretary, Commission, from William A. Jacobsen, Associate Clinical Professor, Director, Cornell Securities Law Clinic, Cornell Law School, dated June 17, 2008 ("Cornell II letter").

<sup>7</sup> See letter to Florence Harmon, Deputy Secretary [sic], Commission, from Margo A. Hassan, dated September 3, 2008 ("Second Response").

<sup>11</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>12</sup> 17 CFR 240.19b-4(f)(6). In addition, when filing a proposed rule change pursuant to Rule 19b-4(f)(6) under the Act, an Exchange is required to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of 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 provided such notice to the Commission.

<sup>13</sup> 17 CFR 200.30-3(a)(12).

## II. Description of the Proposed Rule Change

### Background

FINRA operates the Central Registration Depository ("CRD")<sup>8</sup> pursuant to policies developed jointly with the North American Securities Administrators Association ("NASAA"). FINRA works with the SEC, NASAA, other members of the regulatory community, and broker-dealer firms to establish policies and procedures reasonably designed to ensure that information submitted to and maintained in the CRD is accurate and complete. These procedures, among other things, cover expungement of information from the CRD.

In December 2003, the SEC approved Rule 2130, which contains procedures for expungement of customer dispute information regarding member firms or associated persons from the CRD.<sup>9</sup> Under Rule 2130, FINRA members or associated persons seeking to expunge information from the CRD arising from disputes with customers must obtain an order from a court of competent jurisdiction directing expungement of information or confirming an arbitration award that contains expungement relief.<sup>10</sup> It also requires that FINRA members or associated persons name FINRA as an additional party in any court proceeding in which they seek an order to expunge customer dispute information or request confirmation of an award containing an order of expungement.<sup>11</sup>

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

information is false. If expungement relief is based on a judicial or arbitral finding other than those above, FINRA may also waive the requirement to be named as a party if it determines that the expungement relief and accompanying findings on which it is based are meritorious and that expungement would not have a material adverse effect on investor protection, the integrity of the CRD, or regulatory requirements.<sup>12</sup>

According to FINRA, although arbitrators may order expungement at the conclusion of an evidentiary hearing on the merits of a case, it is more common for arbitrators to order expungement at the request of a party to facilitate settlement of a dispute. For example, as part of a settlement in which customers receive monetary compensation, the terms of that settlement require the customer to consent to (or not oppose) the entry of a stipulated award containing an order of expungement. In such cases, FINRA expected that arbitrators would examine the amount paid and any other terms and conditions of the settlement that might raise concerns about the associated person's behavior before awarding expungement.<sup>13</sup> Contrary to this expectation, however, arbitrators often do not inquire into the terms of settlement agreements. Recently, for example, one New York state court expressed concern because arbitrators did not describe "a single fact or circumstance" for their conclusion that the grounds for expungement had been met.<sup>14</sup> Another New York state court acknowledged that it has reservations about the existing law on expungement, which resulted in the confirmation of an award on which the arbitrator gave no explanation for his factual finding.<sup>15</sup>

### Proposed Rule Change

Thus, FINRA developed proposed rules 12805 and 13805 which set forth procedures that arbitrators must follow before granting expungement of information from an associated person's CRD record. Specifically, under the proposed rules, in order to grant expungement of customer dispute information under Rule 2130, the panel must: (i) Hold a recorded hearing session by telephone or in person

regarding the appropriateness of expungement, even if a claimant did not request a hearing on the merits; (ii) for cases involving settlements, review the settlement documents to examine the amount paid to any party and any other terms and conditions of the settlement that might raise concerns about the associated person's involvement in the alleged misconduct before awarding expungement; (iii) indicate in the arbitration award which of the grounds for expungement in Rule 2130(b)(1)(A)–(C) serves as the basis for the expungement order and provide a brief written explanation of the reason(s) for its finding that one or more grounds for expungement exists; and (iv) assess forum fees for hearing sessions in which the sole topic is the determination of the appropriateness of expungement against the parties requesting expungement.

The proposed rule change would not affect FINRA's current practice of permitting expungement, without judicial intervention, of information from the CRD as directed by arbitrators in intra-industry arbitration awards that involve associated persons and firms based on the defamatory nature of the information ordered expunged.<sup>16</sup>

### III. Summary of Comments

As noted above, the Commission received twelve comment letters from a variety of sources. Six comments supported the proposal,<sup>17</sup> but a majority of those six shared a variety of concerns and suggestions for how to make the proposal more effective, as discussed in greater detail below. Five commenters opposed the proposal, and one of those commenters submitted two letters.<sup>18</sup>

More specifically, the commenters raised the following issues:

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

<sup>17</sup> *See* Caruso, Gross and Milano, NASAA, Shewan, Smiley, and PIABA letters.

<sup>18</sup> *See* Lipner, Sathianathan, Cornell I (and in furtherance of its original comments, Cornell II), Black, and Estell letters.

<sup>8</sup> The CRD is an online registration and licensing system used by members of the securities industry, state and federal regulators, and self-regulatory organizations. It contains administrative information (e.g., personal, educational, and employment history) and disclosure information (e.g., criminal matters, regulatory and disciplinary actions, civil judicial actions, and information relating to customer disputes) regarding broker-dealers and their associated persons.

<sup>9</sup> *See* Securities Exchange Act Release No. 48933 (December 16, 2003), 68 FR 74667 (December 24, 2003) (SR-NASD-2002-168) (the "Expungement Order"). *See also* NASD Notice to Members 04-16 (March 2004) (NASD Adopts Rule 2130 Regarding Expungement of Customer Dispute Information From The Central Registration Depository).

<sup>10</sup> *See* NASD Conduct Rule 2130(a).

<sup>11</sup> *See* NASD Conduct Rule 2130(b).

<sup>12</sup> *Id.*

<sup>13</sup> *See* NASD Notice to Members 04-43 (June 2004) (Members' Use of Affidavits in Connection with Stipulated Awards and Settlements to Obtain Expungement of Customer Dispute Information under Rule 2130).

<sup>14</sup> *See Matter of Sage, Ruttly & Co., Inc. v. Salzberg*, Index No. 2007-01942 (N.Y. Sup. Ct. May 30, 2007).

<sup>15</sup> *See Matter of Kay v. Abrams*, 853 N.Y.S.2d 862 (N.Y. Sup. Ct. February 21, 2008).

*Argument 1:* The proposed rule may enable the party requesting expungement to use expungement findings against a customer in a subsequent proceeding based on the doctrine of collateral estoppel.<sup>19</sup>

*Response:* FINRA was not persuaded by the argument and stated it does not have the authority to dictate how parties may use an arbitral finding after the arbitration is over; other forums are not bound to accept FINRA's determination; and expungement findings, in FINRA's view, should be treated in the same manner as other arbitral findings.

An additional comment letter was submitted in rebuttal.<sup>20</sup> The commenter argued that nothing in FINRA's rules prohibits it from exercising power to limit the use of expungement findings; FINRA may promulgate rules regardless of whether a court will be "bound" by those rules; and because the expungement process is unique and has a public interest element with respect to regulatory record-keeping, FINRA would be justified in treating expungement findings in a different manner than other arbitral findings.

FINRA stated in its Second Response that modifying the proposal to prohibit collateral use of expungement findings could result in associated persons who are respondents asserting counterclaims against customers in arbitration to preserve their ability to have the claims resolved. In response to the argument that customers who settle and agree to expungement may subsequently be subject to a lawsuit alleging malicious prosecution based on the expungement findings, FINRA believes that the high evidentiary standard applied in such cases, and the fact that most customers are represented by counsel, provide sufficient safeguards for the customer.<sup>21</sup>

*Argument 2:* If customer claimants do not participate in the expungement hearing, arbitrators will hear only the requesting party's position.<sup>22</sup>

*Response:* FINRA noted that under the proposal, customers will continue to have the opportunity to attend and participate in expungement hearings in person or via telephone, and the customer may submit a written statement if he chooses not to participate or attend in person.<sup>23</sup> In addition, FINRA vowed to take measures to ensure that arbitrators are prepared to perform the critical fact-finding that is required by the rule

proposal, whether or not a customer is present at the hearing.<sup>24</sup>

*Argument 3:* The proposed rule inadequately attempts to fix the expungement process.<sup>25</sup>

*Argument 4:* Expungement affects the integrity of the CRD by permanently deleting information that is relevant to the regulatory function of the SEC, FINRA, and the states, making the CRD an unreliable and incomplete source of information.<sup>26</sup> It may be possible for the public to obtain more complete records through independent investigation than regulators can obtain through the CRD.<sup>27</sup>

*Response to Arguments 3 and 4:* FINRA stated in its First Response that arguments which express opinions on the expungement process set forth in Rule 2130 are outside the scope of the present filing. Nevertheless, FINRA also stated that it believes the current proposal contains appropriate new procedures for arbitrators to follow when considering expungement requests under Rule 2130 that should help ensure that expungement is an extraordinary remedy and is granted only under appropriate circumstances. FINRA stated it believes the proposal would add transparency to the expungement process and would help enhance the integrity of information in the CRD.<sup>28</sup>

*Argument 5:* Arbitrators may not be the proper parties to make expungement decisions.<sup>29</sup> Related comments (i) argue that expungement decisions should be made by regulators and/or by a regulatory tribunal, not by arbitrators,<sup>30</sup> and (ii) question whether arbitrators may exceed their authority when considering requests for expungement.<sup>31</sup>

*Response:* FINRA believes that this argument also goes to Rule 2130 and is

<sup>24</sup> FINRA will notify all arbitrators of the rule change. In addition, FINRA will (i) update its online training program to reflect the new expungement guidelines and encourage all of its arbitrators to take the training; (ii) send arbitrators written materials with questions and answers; (iii) publish an article in *The Neutral Corner* explaining the new rules; (iv) conduct a call-in workshop during which staff will discuss the rule change and answer questions previously submitted by arbitrators and mediators; and (v) have a broadcast e-mail which discusses the new rules. FINRA will require arbitrators to certify in writing that they have familiarized themselves with the new rule via at least one of the training methods. Telephone call among Jean I. Feeney, Vice President and Chief Counsel, FINRA Dispute Resolution, Katherine A. England, Assistant Director, Commission, and Kristie Diemer, Special Counsel, Commission on October 29, 2008.

<sup>25</sup> See Cornell I, NASAA, and Estell letters.

<sup>26</sup> See Cornell I, Shewan, Estell, and Smiley letters.

<sup>27</sup> See Cornell I letter.

<sup>28</sup> See First Response.

<sup>29</sup> See Caruso and Cornell I letters.

<sup>30</sup> See Lipner, Black, Shewan, and PIABA letters.

<sup>31</sup> See NASAA letter.

thus outside the scope of the proposal.<sup>32</sup> FINRA noted, however, that Rule 2130 requires a firm or associated person petitioning a court for expungement relief or seeking judicial confirmation of an arbitration award containing expungement relief to name FINRA as a party in the court proceeding and serve FINRA with all appropriate documents, unless FINRA waives this requirement. Therefore, FINRA is able to conduct a regulatory review of all such waiver requests and/or participate in the judicial expungement proceeding. FINRA further noted it has a process whereby it notifies the states where the individual is registered or seeking registration of the expungement notice or waiver request,<sup>33</sup> and if the state should wish to intervene, it may petition the court.<sup>34</sup> Finally, as discussed above, FINRA would revise its arbitrator training to include guidance on the proposed rule change.

*Argument 6:* The proposal should address the situation in which an arbitration brought against a firm that does not also name the individual broker as a party is not considered a complaint against the broker, even if the broker's name appears prominently in the text of the arbitration complaint.<sup>35</sup>

*Response:* FINRA stated in its Second Response that this issue is outside the scope of this proposal, but notes that in April 2008, it sought comment on a proposed change which would revise the customer complaint questions to elicit reporting of allegations of sales practice violations made in arbitrations or civil suits against registered persons not named as parties in those proceedings, and the proposed revisions would require firms to treat these matters as customer complaints.<sup>36</sup>

*Argument 7:* The proposal should include a provision to deter overuse of expungement, particularly in settlements and/or as a condition of monetary payment to the customer.<sup>37</sup>

*Response:* FINRA has expressly stated that expungement should be an extraordinary remedy<sup>38</sup> and has

<sup>32</sup> See Second Response.

<sup>33</sup> See NASD Notice to Members 04-16 (March 2004) (NASD Adopts Rule 2130 Regarding Expungement of Customer Dispute Information From The Central Registration Depository).

<sup>34</sup> See the Expungement Order, *supra* note 9, 68 FR at 74671.

<sup>35</sup> See Lipner, Shewan, and PIABA letters.

<sup>36</sup> See FINRA Regulatory Notice 08-20 (April 2008) (Proposed Changes to Forms U4 and U5). The comment period ended on May 27, 2008, and FINRA stated that it expects to file these changes with the Commission shortly.

<sup>37</sup> See Cornell I, NASAA, and PIABA letters.

<sup>38</sup> See, e.g., NASD Notice to Members 01-65 (October 2001) (NASD Seeks Comment On Proposed Rules And Policies Relating To

<sup>19</sup> See Cornell I and Cornell II letters.

<sup>20</sup> See Cornell II letter.

<sup>21</sup> See Second Response.

<sup>22</sup> See Cornell I, NASAA, and Estell letters.

<sup>23</sup> See First Response.

addressed the use of customer affidavits in settlements leading to stipulated awards.<sup>39</sup> The proposed rule would require arbitrators to review settlement documents and consider the amount of payments made to any party as well as any other terms and conditions of the settlement. Arbitrators would be required to provide a written explanation of the reasons for finding that one or more of the grounds for expungement apply to the facts of the case. FINRA believes that the rule proposal will help ensure that arbitrators fully evaluate each request for expungement of information from the CRD.

*Argument 8:* Payment for settlement in excess of the reporting threshold on Forms U4 and U5 should raise a presumption that expungement is not appropriate.<sup>40</sup>

*Argument 9:* There should be an express presumption that claims should not be expunged from a representative's CRD record unless the person seeking expungement is able to overcome the presumption by a preponderance of the evidence.<sup>41</sup>

*Response to Arguments 8 and 9:* FINRA stated that because it is not proposing to amend the evidentiary standards in the Codes, these comments are outside the scope of the rule filing.<sup>42</sup> Nonetheless, FINRA states that the proposal requires arbitrators to evaluate fully whether the party requesting expungement either in arbitration or in connection with a settlement agreement has met the criteria promulgated under Rule 2130(b)(1)(A)–(C), and FINRA notes that the proposal requires the arbitrators, if expungement is ordered, to set forth a written explanation regarding that decision.

*Argument 10:* The effect of the proposal, combined with the current rule, is that there will be greater potential for broker-dealer misuse because (i) it will be more difficult to expunge defamatory information filed on CRD and will increase the power that

FINRA member firms have over employees; and (ii) allegations by a whistleblower-employee of a FINRA member firm of criminal activities by the FINRA member firm or its senior executives can be expunged without judicial approval.<sup>43</sup>

*Response:* FINRA stated in its First Response that Argument 10 is outside the scope of the filing.

#### IV. Discussion and Commission Findings

After careful review of the proposal and consideration of the comment letters and FINRA's response to the comment letters, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to FINRA.<sup>44</sup> In particular, the Commission finds that the proposed rule change is consistent with Section 15A(b)(6) of the Act,<sup>45</sup> which requires, among other things, that FINRA's rules be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

The Commission finds that the proposed rule change is reasonably designed to accomplish these ends by establishing procedures that arbitrators must follow when considering whether to grant requests for expungement either in connection with arbitration or with a settlement agreement, thus making the expungement process more transparent. The additional procedures, such as the required review of settlement documents, and the written explanation of the regulatory basis and reason for granting expungement, in the proposed rule are designed to help assure that the expungement process is not abused. This, in turn, should help ensure that investors and regulators have access to all relevant data in the CRD.

The Commission believes that FINRA has adequately addressed the issues raised by the commenters. The CRD is an important regulatory tool as well as an important tool for investors who seek information about associated persons and member firms.<sup>46</sup> Once information is removed from CRD via expungement

it is lost to both the regulators and the investing public. Therefore, the Commission takes seriously the concerns raised by the commenters. The commenters raised concerns both of a general nature and of a specific nature. The general concerns related to the integrity of the CRD, who should make the decision to grant expungement, and the frequency with which expungement is granted. The specific concerns related to whether the new rules will result in findings that can be used in a subsequent legal proceeding based on the doctrine of collateral estoppel and the meaning of the standards in the new rules and how the standards will be applied.

The Commission agrees with FINRA that the comments about existing Rule 2130 and the expungement process itself, as well as comments with respect to whether arbitrators are the proper parties to decide if information should be expunged from CRD, are technically outside the scope of the proposed rule change.<sup>47</sup> The Commission notes, however, that FINRA has stated repeatedly that expungement is meant to be an extraordinary remedy,<sup>48</sup> and recognizes it "should be used only when the expunged information has no meaningful regulatory or investor protection value."<sup>49</sup> The Commission agrees with FINRA that expungement should be an extraordinary remedy. Information that is expunged from CRD is permanently deleted and thus no

<sup>47</sup> Another commenter's concern which FINRA stated was outside the scope of the proposal was the belief that under the proposal, allegations by a whistleblower-employee of a member firm of criminal activities by either the FINRA member firm or senior executives of a FINRA member firm could be expunged without judicial approval. The Commission urges all persons to report allegations of criminal activity to the relevant authority, regardless of the rules governing expungement. Furthermore, the Commission notes that criminal activity does not qualify for expungement under the current rule, and thus would not be more easily expunged under FINRA's proposed rules. As noted above, the arbitrator could not make an affirmative finding that one of the conditions for waiver was met, and FINRA would have to oppose the expungement. The Commission expects FINRA to review any allegations of misuse of the CRD by member firms. This is particularly important in light of the ruling in *New York that broker-dealer firms have absolute immunity for statements made on U4 and U5. See Rosenberg v. MetLife, Inc.*, 493 F.3d 290 (2d Cir. N.Y., June 14, 2007). CRD should not be used by broker-dealers against registered representatives. Such actions would violate FINRA rules.

<sup>48</sup> See, e.g., NASD Notice to Members 01–65 (October 2001) (NASD Seeks Comment On Proposed Rules And Policies Relating To Expungement Of Information From The Central Registration Depository); Securities Exchange Act Release No. 47435 (March 4, 2003), 68 FR 11435 (March 10, 2003); Second Response.

<sup>49</sup> See Rule 2130 Frequently Asked Questions, <http://www.finra.org/Industry/Compliance/Registration/CRD/FilingGuidance/P005224>.

Expungement Of Information From The Central Registration Depository); Securities Exchange Act Release No. 47435 (March 4, 2003), 68 FR 11435 (March 10, 2003) ("Rule 2130 Notice"); Second Response.

<sup>39</sup> See NASD Notice to Members 04–43 (June 2004) (Members' Use of Affidavits in Connection with Stipulated Awards and Settlements to Obtain Expungement of Customer Dispute Information under Rule 2130).

<sup>40</sup> See PIABA letter. The commenter states that this amount is currently \$10,000, but FINRA recently sought comment on a proposal to increase this amount to \$15,000. See FINRA Regulatory Notice 08–20 (April 2008) (Proposed Changes to Forms U4 and U5). The comment period ended on May 27, 2008.

<sup>41</sup> See NASAA and PIABA letters.

<sup>42</sup> See Second Response.

<sup>43</sup> See Sathianathan letter.

<sup>44</sup> In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>45</sup> 15 U.S.C. 78o–3(b)(6).

<sup>46</sup> See, e.g., <http://www.finra.org/Investors/ToolsCalculators/BrokerCheck/index.htm>.

longer available to regulators or the investing public.

Under Rule 2130, FINRA must be named as a party when a respondent is seeking confirmation from a court of an expungement award. FINRA can waive its right to be named as a party in the court confirmation process, if it makes an affirmative determination consistent with Rule 2130.<sup>50</sup> The Commission believes that FINRA should use its authority to review expungement requests to ensure that expungement is an extraordinary remedy.<sup>51</sup>

With respect to the issue of whether an associated person or member will be able to use the arbitrators' written findings on expungement as collateral estoppel in a subsequent legal proceeding against the customer, FINRA believes that the high evidentiary standard that applies in such cases, and the fact that most customers are represented by legal counsel, should address this issue. The Commission believes that this is a reasonable assessment and conclusion regarding this potential situation.

As discussed, the Commission believes that having accurate and complete information in the CRD is vital; information that has regulatory value or that could assist investors in protecting themselves should not be removed from CRD.<sup>52</sup> Because of the central role that arbitrators have in the expungement process, the Commission believes that it is critical for arbitrators to be well-informed regarding FINRA's rules governing expungement. FINRA stated that this proposal is part of its "continuing effort to ensure that arbitrators evaluate fully each request

for expungement."<sup>53</sup> The Commission believes that the training and education FINRA provides in conjunction with the proposed rule change will be critical to the implementation and proper application of the rules. Proper training of arbitrators should help make expungement the extraordinary remedy that it was meant to be and should convey to the arbitrators the importance of their role in maintaining the integrity of the CRD.

FINRA noted that it has requested comment on amendments to address the issue of complaints that do not name a registered representative as a party. FINRA stated that it expects to file these changes with the Commission shortly.<sup>54</sup> The Commission does not believe that it would be in the interest of investors to delay approval of the instant proposal while that rule change is being considered by FINRA; however given the interrelationship of the issues, the Commission urges FINRA to submit this filing as soon as possible so that this information will be recorded in CRD.

In conclusion, the Commission believes that the proposed rule is consistent with the Act and will help assure that accurate information will remain in CRD and inaccurate information will be expunged. Given the importance of CRD for regulators and to customers who want to get information about registered persons or member firms before they do business with them, the Commission urges FINRA in its regulatory role to monitor how this rule is applied by arbitrators to assure that it is achieving its goals, and to propose additional changes, if needed.

## V. Conclusion

For the foregoing reasons, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to FINRA, and, in particular, with Section 15A(b)(6) of the Act.<sup>55</sup>

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>56</sup> that the proposed rule change (SR-FINRA-2008-010) is approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>57</sup>

**Florence E. Harmon,**  
Acting Secretary.

[FR Doc. E8-26442 Filed 11-5-08; 8:45 am]

**BILLING CODE 8011-01-P**

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-58891; File No. SR-NASDAQ-2008-072]]

### Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Order Approving a Proposed Rule Change To Establish a PORTAL Reference Database and Related Fees

October 30, 2008.

#### I. Introduction

On September 16, 2008, The NASDAQ Stock Market LLC ("Nasdaq" or "Exchange"), filed with the Securities and Exchange Commission ("SEC" or "Commission") pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to establish a PORTAL Reference Database and related fees. The proposed rule change was published for comment in the **Federal Register** on September 30, 2008.<sup>3</sup> The Commission received no comments on the proposal. This order approves the proposed rule change.

#### II. Description of the Proposal

Nasdaq has created, and has proposed to make publicly available, for a fee, a consolidated fully-electronic reference database of information culled from PORTAL offering documents and applications submitted to Nasdaq since 1990.<sup>4</sup> Nasdaq has represented that access to the database would be available to all market participants. The database would allow users to determine a PORTAL issue's name and offering description, CUSIP, country of incorporation, security class, maturity class and date, currency denomination, applicable interest and credit rating, convertibility and call provisions, total number of shares offered, and date of PORTAL designation, in addition to other information. On an ongoing basis, data regarding securities that obtain PORTAL designation would be added to the database.

Nasdaq has proposed that users of the PORTAL Reference Database would pay both an annual fee and an access fee per year of data desired. Annual fees would range between \$20,000 and \$100,000 and would be based on the number of users and are per calendar year. Access

<sup>50</sup> Rule 2130(b)(2), however, does allow for exceptions under extraordinary circumstances.

<sup>51</sup> FINRA also provides the states with all requests for expungement and petitions so that the states have an opportunity to review them and/or participate in the hearing. The ability for FINRA and the states to participate in the expungement process is critical so that information that should remain in CRD is not expunged. The Commission expects that all regulators will take these responsibilities seriously and work cooperatively as the new rule is implemented, and thereafter. See, e.g., *UBS Financial Services, Inc. v. Gibson*, 851 N.Y.S.2d 75 (N.Y. Sup. Ct.) (consolidated with *Johnson v. Summit Equities, Inc.*, 238 N.Y.L.J. 109 (Nov. 15, 2007)); *Zaferiou v. Holgado*, Index No. 102996/07 (N.Y. Sup. Ct. April 14, 2008); *Matter of Kay v. Abrams*, 853 N.Y.S.2d 862 (N.Y. Sup. Ct. Feb. 21, 2008); and *Karsner v. Lothian*, 532 F.3d 876 (D.C. Cir. July 15, 2008).

<sup>52</sup> FINRA routinely advises investors to check CRD before they decide to do business with a firm or a broker. See e.g., <http://www.finra.org/Investors/SmartInvesting/GettingStarted/SelectingInvestmentProfessional/index.htm>; <http://www.finra.org/Investors/ProtectYourself/InvestorAlerts/FraudsAndScams/P01492>; and <http://www.finra.org/Investors/ProtectYourself/BeforeYouInvest/AvoidProblemswithYourBroker/index.htm>.

<sup>53</sup> See Second Response.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> 15 U.S.C. 78s(b)(2).

<sup>57</sup> 17 CFR 200.30-3(a)(12).

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

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

<sup>3</sup> See Securities Exchange Act Release No. 58622 (September 23, 2008), 73 FR 56876 (September 30, 2008) (the "Notice").

<sup>4</sup> For more information related to the background of the PORTAL Market, see Securities Exchange Act Release No. 55669 (April 25, 2007), 72 FR 23874 (May 1, 2007).