trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, 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. Specifically, Phlx believes that the change, which is responsive to member input, will facilitate transactions in securities and perfect the mechanism of a free and open market by providing members with additional optional functionality that may assist them with managing the book of orders that they submit to PSX and the associated execution costs.

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

Phlx does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended. Specifically, by offering market participants additional options with regard to preventing inadvertent internalization of orders submitted to PSX, the change has the potential to enhance PSX's competitiveness with respect to other trading venues, thereby promoting greater competition. Moreover, the change does not burden competition in that its use is optional and provided at no additional cost to members.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

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

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act [8] and subparagraph (f)(6) of Rule 19b–4 thereunder.[9]

[8] 15 U.S.C. 78s(b)(3)(a)(ii).

[9] 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.

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: (i) necessary or appropriate in the public interest; (ii) for the protection of investors; or (iii) 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 email to *rule-comments@sec.gov*. Please include File Number SR–Phlx–2014–011 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–Phlx–2014–011. 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, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. 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–Phlx–2014–011 and should be submitted on or before March 12, 2014.

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

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2014–03565 Filed 2–18–14; 8:45 am]

BILLING CODE 8011–01–P

[10] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–71534; File No. SR–FINRA–2014–005]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of Proposed Rule Change Relating to Broadening Arbitrators' Authority To Make Referrals During an Arbitration Proceeding

February 12, 2014.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] notice is hereby given that on January 29, 2014, 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 substantially prepared by FINRA.[3] The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

FINRA 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'') (together, ''Codes'') to broaden

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

[2] 17 CFR 240.19b–4.

[3] This notice includes some clarifying changes from the Form 19b–4 filed with the Commission that were discussed with FINRA. Telephone conversation on February 12, 2014 among Mignon McLemore of FINRA and John Fahey and Darren Vieira of the Commission.

arbitrators' authority to make referrals during an arbitration proceeding.

In July 2010, FINRA filed a proposal with the Commission to amend Rules 12104 and 13104 of the Codes to permit arbitrators to make referrals to FINRA during an arbitration case, and to adopt new rules to address the assessment of hearing session fees, costs, and expenses if an arbitrator made a referral during a case that resulted in withdrawal of the entire panel (''original proposal'').[4] Under the original proposal, if an arbitrator made a mid-case referral, a party could request that the referring arbitrator withdraw. Upon a party's request that the referring arbitrator withdraw, the entire panel also would have been required to withdraw. In July 2011, FINRA responded to comments received by the SEC by filing Amendment No. 1,[5] which replaced the original proposal in its entirety.

Under Amendment No. 1, an arbitrator would have been permitted to make a mid-case referral if an arbitrator became aware of any matter or conduct that the arbitrator had reason to believe posed a serious ongoing or imminent threat that was likely to harm investors. A mid-case referral could not have been based solely on allegations in the pleadings. Also, Amendment No. 1 would have instructed the arbitrator to wait until the arbitration concluded to make a referral, if investor protection would not have been materially compromised by the delay. Further, if an arbitrator made a mid-case referral, the Director of Arbitration (''Director'') would have disclosed the act of making the referral to the parties, and a party would have been permitted to request recusal of the referring arbitrator. Amendment No. 1 would have required either the President of FINRA Dispute Resolution (''President'') or the Director to evaluate the referral and determine whether to forward it to other divisions of FINRA for further review. Finally, Amendment No. 1 would have retained the provision in Rule 12104(b) of the Customer Code and Rule 13104(b) of the Industry Code that would have permitted an arbitrator to make a post-case referral. The SEC received five comments on Amendment No. 1.[6]

On January 29, 2014, FINRA withdrew SR–FINRA–2010–036[7] without responding to the comments submitted on Amendment No. 1. FINRA is filing the current proposal, SR–FINRA–2014–005, to replace the withdrawn proposal under a new rule filing number and under the SEC's new Rules of Practice.[8] While this new rule filing responds to the comments submitted on Amendment No. 1, FINRA is not proposing to make any changes to the rule language filed in Amendment No. 1.

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

Background

In light of well publicized securities markets schemes that resulted in harm to investors, FINRA has reviewed the 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 threats to investors as early as possible. FINRA is proposing, therefore, to broaden the arbitrators' authority under the Codes to make referrals during the hearing phase of an arbitration in those extremely rare circumstances in which investor protection requires that the referral not be delayed.

The Proposed Rule Change[9]

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 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 to disclose the mid-case referral to the parties and permit the parties to request the referring arbitrators' recusal, as is currently permitted under the Code. New subparagraph (d) would provide the 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.

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

[5] *See* Securities Exchange Act Rel. No. 64954 (July 25, 2011), 76 FR 45631 (July 29, 2011) (SR–FINRA–2010–036) (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).

[6] *See* note 40, *infra.*

[7] *See* SR–FINRA–2010–036, Withdrawal of Proposed Rule Change, available at *http://www.finra.org/Industry/Regulation/RuleFilings/2010/P121722.*

[8] *See* Securities Exchange Act Rel. No. 63723 (Jan. 14, 2011), 76 FR 4066 (Jan. 24, 2011), Final Rule (adopting new Rules of Practice to formalize the process used when conducting proceedings to determine whether an SRO's proposed rule change should be disapproved under Section 19(b)(2) of the Exchange Act).

[9] FINRA is proposing to amend Rules 12104 and 13104 of the Codes. To simplify the explanation, FINRA's discussion of the proposed changes focuses on changes to Rule 12104. However, as the proposed changes are the same for Rule 13104, the discussion also applies to Rule 13104.

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 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.

The first element of proposed Rule 12104(b) contains two prerequisites. The first prerequisite would permit any arbitrator [10] to make a mid-case referral to the Director but only after the commencement of an evidentiary hearing. The proposal would limit mid-case referrals so that they 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, and would thus eliminate unnecessary mid-case referrals. Furthermore, Dispute Resolution routinely provides copies of arbitration claims and other pleadings to other FINRA divisions for analysis; thus, mid-case referrals based only on the pleadings are not necessary to apprise these divisions of possible wrongdoing.

The second prerequisite would require that, before making a mid-case referral, the arbitrator must have reason to believe the serious threat, whether ongoing or imminent, is likely to harm investors unless immediate action is taken. Under the proposed standard for referral, the referring arbitrator would not need to conclude that there is a threat; the arbitrator would only need to have reason to believe that a threat, whether ongoing or imminent, is likely to harm investors unless immediate action is taken. FINRA believes the proposed standard 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 (''FAA'') establishes four grounds for vacating an arbitration award, one of which is evident partiality.[11] Arbitrator evident partiality encompasses both an arbitrator's explicit bias toward one party and an arbitrator's implicit bias when an arbitrator fails to disclose relevant information to the parties.[12] ''The party alleging evident partiality must establish specific facts which indicate improper motives'' on the part of the arbitrators.[13] The appearance of impropriety, standing alone, is insufficient.[14] In the context of mid-case referrals, FINRA acknowledges that a party may challenge an award on the ground that an arbitrator's mid-case referral demonstrates an arbitrator's evident partiality. For purposes of Section 10(a) of the FAA, courts have found that situations involving ''evident partiality'' include an arbitrator's financial interest in the outcome of the arbitration,[15] or an arbitrator's failure to disclose prior consulting work for a party,[16] for example. However, courts have not found that a situation rises to the level of evident partiality where an arbitrator forms an opinion using evidence presented during a hearing and then acts on that evidence.[17]

Further, courts expect that after an arbitrator has heard considerable testimony, the arbitrator will have some view of the case.[18] As long as that view is one that arises from the evidence and the conduct of the parties, courts have found that it cannot be fairly claimed that some expression of that view amounts to bias.[19] FINRA believes, therefore, that, as arbitrators are expected to form opinions based on evidence presented to them after they are appointed, a prevailing investor's award would not likely be vacated because arbitrators acted on their views, in the form of a mid-case referral, prior to the conclusion of the proceedings.[20]

The second element of 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.[21] 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.[22] By ensuring that a mid-case referral is based on testimony and other evidence presented at the hearing on the merits, the rule would limit mid-case referrals to situations where facts warranting a referral may not generally be known to FINRA regulators.

The final element of proposed Rule 12104(b) would instruct the arbitrators to delay their referral until the conclusion 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. Arbitrators may have the opportunity to exercise such judgment if, for example, during the third of four consecutively

[10] Under the proposal, an arbitrator on a three-person panel may make a mid-case referral alone or together with either or both of the other arbitrators on the panel.

[11] An award may be vacated upon the application of any party to the arbitration: (1) Where the award was procured by corruption, fraud, or undue means; (2) where there was evident partiality or corruption in the arbitrators, or either of them; (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy, or of any other misbehavior by which the rights of any party have been prejudiced; or (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made. *See* 9 U.S.C. 10(a).

[12] Windsor, Kathryn A. (2012) ''Defining Arbitrator Evident Partiality: The Catch-22 Of Commercial Litigation Disputes,'' *Seton Hall Circuit Review:* Vol. 6: Iss. 1, Article 7, p. 192. Available at: *http://erepository.law.shu.edu/circuit_review/vol6/iss1/7.*

[13] *Sheet Metal Workers International Association Local Union 420* v. *Kinney Air Conditioning Co.,* 756 F.2d 742, 746 (9th Cir. 1985).

[14] *Kinney,* 756 F.2d at 746 (citing *International Produce, Inc.* v. *Rosshavet,* 638 F.2d 548, 551 (2d Cir.), *cert. denied,* 451 U.S. 1017 (1981)).

[15] *Id.*

[16] *Commonwealth Coatings Corp.* v. *Continental Casualty Co.,* 393 U.S. 145, 146, 89 S. Ct. 337 (1968), *reh. den.* 393 U.S. 1112, 89 S. Ct. 848 (1968).

[17] *Ballantine Books Inc.* v. *Capital Distributing Company,* 302 F.2d 17, 21 (2nd Cir. 1962). *See also Bell Aerospace Co.* v. *Local 516, UAW,* 500 F.2d 921, 923 (2nd Cir. 1974).

[18] *Ballantine,* 302 F.2d at 21.

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

[20] *Health Services Management Corp.,* 975 F.2d at 1267.

[21] 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.

[22] 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.

scheduled hearing days,[23] they learn of a serious, ongoing or imminent threat that meets the criteria of the proposed rule. If the arbitrators anticipate that they can complete their remaining tasks shortly after the last hearing session is conducted on the fourth day, the arbitrators could defer making the mid-case referral until the case concludes so that they would not delay significantly the conclusion of the case.[24] In deciding whether to delay 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 could cause.

FINRA contemplates that the mid-case referral rule would typically be used in those circumstances where hearings are scheduled for many days, or even weeks, and, in particular, when the hearing days are not scheduled consecutively. In the example above, if four hearing days were scheduled, but not consecutively, and this scheduling resulted in a significant time gap between when they learned of the ongoing or imminent threat and the potential conclusion of the case, 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.

Accordingly, FINRA believes that, as a result of the strict criteria in proposed Rule 12104(b), there would be very few mid-case referrals.

Rule 12104(c)—Arbitrator Disclosure and Arbitrator Recusal

To make a referral under proposed Rule 12104(c), the arbitrator would notify the Director, who, in turn, would notify the parties about the arbitrator's act of making the referral. The proposed rule also states that a party may request that the referring arbitrators recuse themselves, as provided in the Codes.

FINRA believes that if an arbitrator makes a mid-case referral, this information must be disclosed to the parties.[25] This disclosure might prompt a party to make a recusal motion, which a party currently may do under the Codes.[26] However, it is FINRA's view that an arbitrator would not be required to withdraw from the case because of the act of making a mid-case referral. Under the Codes, an arbitrator who is the subject of a recusal request has the discretion to decide whether to withdraw from the case.[27] FINRA rules do not dictate the grounds for granting recusal requests and do not require specific decisions by arbitrators in response to such requests. Consistent with other recusal requests, an arbitrator challenged because of a mid-case referral is required to make that decision in accordance with the Codes [28] and the Code of Ethics for Arbitrators in Commercial Disputes.[29] FINRA does not believe the proposed rule should change this authority, or the right of a non-moving party to oppose the request.

Thus, under the proposed rule, neither the referring arbitrator nor the panel would be required to recuse itself upon a party's recusal motion to the referring arbitrator. This means that the entire panel could remain after a party's recusal motion, and the case would proceed as normal. This should minimize the possibility that the arbitration where a mid-case referral occurs would have to start anew; thus, the investor would be less likely to experience procedural disadvantages, significant delays, or increased costs.

Moreover, if a referring arbitrator from a three-person panel, in his or her discretion, grants a recusal request, the parties may agree to proceed with the remaining two arbitrators to limit expenses rather than seek a replacement arbitrator.[30] If the parties agree to select a replacement arbitrator, or the parties do not agree on the issue of a replacement, FINRA would appoint a replacement arbitrator.

If an arbitrator from a three-person panel is replaced, the parties may agree to methods of saving time and costs, such as rehearing only one or two key witnesses, or stipulating to summaries of prior testimony.[31] If an arbitrator from a single-arbitrator panel agrees to a recusal request after making a mid-case referral, FINRA would appoint a replacement arbitrator who would review the hearing record (*e.g.,* digital recordings and exhibits), and the case would proceed from where it was interrupted.

In either instance, FINRA would pay the replacement arbitrator to review the hearing record and learn about the arbitration case up to the point at which it was interrupted. Pursuant to forum policy, the parties would not be assessed this fee.

While FINRA cannot eliminate the attendant costs or potential delays that may arise if an arbitrator grants a recusal request after a mid-case referral, the Codes provide parties with tools to minimize them. Further, under the circumstances that would warrant a mid-case referral, the referral could save a substantial number of non-party investors from losses or costs.

Rule 12104(d)—Authority To Forward the Arbitrator Referral to FINRA Divisions

Proposed Rule 12104(d) would authorize only the President or Director to evaluate the arbitrator referral to determine whether it should be transmitted to other FINRA divisions to begin a regulatory investigation.

Under this provision, the President or Director would have the discretion not to forward information revealed during hearings that an arbitrator believed warranted a mid-case referral. Whether or not the mid-case referral is forwarded, the staff [32] would disclose to the parties that an arbitrator had made a mid-case referral to the President or Director.

This provision would ensure that an experienced regulator reviews the referral in order to alert the appropriate FINRA divisions. In most cases, the President or Director would forward the mid-case referral, unless the President or Director knows that an investigation involving such matter or conduct has begun.

Rule 12104(e)—Post-Case Referral Provision

The language in current subparagraph (b) of Rule 12104, which addresses

[23] The average arbitration hearing takes about 5 days.

[24] If the referring arbitrator delays making the referral until the conclusion of the case, the referral would then take place under the proposed Rule 12104(e), which provides for referrals at the conclusion of a case.

[25] *See Commonwealth Coatings Corp.,* 393 U.S. 145, (establishing a broad requirement that arbitrators make full disclosures of facts that could create an ''impression of bias'').

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

[27] *Id.*

[28] *Id.*

[29] *See* The Code of Ethics for Arbitrators in Commercial Disputes, Canon II(G). Section G states, in relevant part, that ''if an arbitrator is requested to withdraw by less than all of the parties because of alleged partiality, the arbitrator should withdraw unless either of the following circumstances exists: (1) An agreement of the parties, or arbitration rules agreed to by the parties, or applicable law establishes procedures for determining challenges to arbitrators, in which case those procedures should be followed; or (2) in the absence of applicable procedures, if the arbitrator, after carefully considering the matter, determines that the reason for the challenge is not substantial, and that he or she can nevertheless act and decide the case impartially and fairly.''

[30] Rules 12403(c)(6) and 12403(d)(6)(A), 12403(d)(7)(A) and 12403(d)(8)(A) of the Customer Code and Rule 13411 of the Industry Code.

[31] Rule 12105 of the Customer Code and Rule 13105 of the Industry Code.

[32] In this case, FINRA staff, likely a case administrator, would serve as the delegate for the Director, pursuant to delegated authority. Rules 12100(k) and 13100(k).

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 proposed rule. Also, the proposed rule 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 additional protection to investors and the securities markets. In addition, FINRA believes the proposed rule change would provide it with an important tool for detecting and addressing serious ongoing or imminent threats to investors that may only be known to the participants in the arbitration.

2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,[33] 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 help curb the financial losses of investors as well as the effects these threats could have on investors if left unchecked. Thus, the proposed rule change would strengthen FINRA's ability to carry out its regulatory mission and provide additional protection to investors and the markets.

As noted in Item 2 of this filing, FINRA will announce the effective date of the proposed rule change in a *Regulatory Notice* to be published no later than 60 days following Commission approval. The effective date will be no later than 30 days following publication of the *Regulatory Notice* announcing Commission approval.

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

FINRA does not believe that the proposed rule change will be a burden on competition. All members would be subject to the proposed rule change, so they would be affected in the same manner.

While the proposed rule change would not be a burden on competition for members, FINRA acknowledges that an individual claimant may experience delays and costs if an arbitrator makes a mid-case referral under the proposed rule change and the arbitrator recuses himself or herself as a result. However, the procedural safeguards of the proposed rule change would help to ameliorate the negative effects such a referral could have on the individual claimant's case. These procedural safeguards would help minimize delays and cumbersome administrative procedures, and reduce the potential for a finding of arbitrator bias, which would help a prevailing investor defend against a motion to vacate. When balancing the potential outcomes of possible serious misconduct that goes undetected, FINRA believes the proposed rule change would save a substantial number of other investors from significant losses, which would outweigh the risk of potentially increasing hearing costs for an individual claimant.

In addition, the proposed rule change would help FINRA detect serious, ongoing or imminent threats to investors at an earlier stage, which could help curb the financial losses of investors as well as the effects these threats could have on investors if left unchecked. For these reasons, FINRA believes the proposal would not burden competition, but, instead, would strengthen FINRA's regulatory structure and provide additional protection to investors.

In assessing the economic impact of the proposed rule change, FINRA considered the comments submitted on the original proposal [34] to guide further the process of balancing the risk of potentially increasing the costs to an individual investor against the harm of significant losses to a larger group of investors. Amendment No. 1 incorporated FINRA's economic impact assessment by focusing on minimizing the costs to the individual claimant under the proposed rule change.

First, Amendment No. 1 addressed a chief concern raised by the commenters with the original proposal by removing the requirement that the entire panel withdraw upon a party's request that a referring arbitrator withdraw. Under the original proposal, this procedural step would likely have required the arbitration case to start over, thereby increasing the individual claimant's costs (as well as those of the respondent) and delaying resolution of the dispute. In Amendment No. 1, FINRA changed the withdrawal requirement to permit a party to submit a recusal motion to the referring arbitrator upon learning of the mid-case referral.

FINRA notes that under Amendment No. 1, which is identical to the current proposal, the referring arbitrator would not have been required to grant a recusal motion upon a party's request. FINRA rules do not dictate the grounds for granting recusal requests and do not require written decisions by arbitrators in response to such requests.[35] Amendment No. 1 reflects FINRA's view that arbitrators who make a mid-case referral are not required to recuse themselves. Therefore, the entire panel could remain after a party's recusal motion, and the case would proceed. As a result, the individual claimant would be less likely to experience procedural disadvantages, significant delays, and increased costs, because Amendment No. 1 minimizes the possibility that the arbitration would start anew.

Second, the Codes provide parties with tools to minimize these costs and delays if a referring arbitrator, in his or her discretion, grants a recusal request. For example, the parties could proceed with the remaining two arbitrators in a case with a three-arbitrator panel to limit expenses, rather than seek a replacement arbitrator.[36] Alternatively, the parties could agree to other methods to save time and cost, such as rehearing

[33] 15 U.S.C. 78o–3(b)(6).

[34] *See* note 38, *infra.*

[35] *See* note 51, *infra.*

[36] *See* note 56, *infra.*

only one or two key witnesses, or stipulating to summaries of prior testimony.[37] Further, a party could seek recovery of any additional costs as part of an award.

Third, under forum policy, if an arbitrator agrees to a recusal request after making a mid-case referral and the parties do not agree on how to proceed, FINRA would appoint a replacement arbitrator to review the hearing record, and the case would proceed from where it was interrupted. FINRA would pay the replacement arbitrator to review the hearing record and other case documents. The parties would not be assessed any fees in conjunction with those payments.

FINRA recognizes that Amendment No. 1, like the current proposed rule change, would not have eliminated all of the potential costs or delays that may occur if an arbitrator grants a recusal request. In light of its economic impact assessment, FINRA believes that the proposed rule change provides targeted solutions to address some of the measurable economic effects on the individual claimant.

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 the original proposal with the SEC to amend Rules 12104 and 13104 of the Codes; the proposal would have permitted arbitrators to make referrals during an arbitration. The SEC published the original proposal in the **Federal Register** on September 23, 2010.[38] 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 any matter or conduct that they had reason to believe posed a serious, ongoing, imminent threat to investors that required immediate action. Also, the original proposal 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. The SEC received eleven comments, all of which opposed the original proposal.[39]

On July 7, 2011, in response to the comments, FINRA filed Amendment No. 1 (''Amendment No. 1''), which replaced the original proposal in its entirety.[40] The SEC received five comments on Amendment No. 1.[41] FINRA withdrew Amendment No. 1 prior to filing a response to comments.[42] Accordingly, FINRA discusses the comments to Amendment No. 1 and its responses below.

Disclosure of Mid-case Referral to Parties:

Three commenters[43] opposed proposed Rule 12104(c) of Amendment No. 1, which would have required the Director to disclose to the parties when an arbitrator makes a mid-case referral, and would have permitted a party to request recusal of the referring arbitrator. These commenters noted that the proposed rule would have permitted counsel for the party that is the subject of the referral to request recusal of the referring arbitrator based solely on the act of making the referral.[44] Two commenters suggested that FINRA amend proposed Rule 12104(c) to provide that making a mid-case referral would not be grounds for recusal of an arbitrator.[45]

Disclosure of an arbitrator's mid-case referral is consistent with an arbitrator's duty to disclose potential sources of bias.[46] This disclosure might prompt a party to make a recusal motion, which a party currently may do under the Codes in other circumstances.[47] However, an arbitrator would not be required to withdraw from the case because of a mid-case referral. Under the Codes, an arbitrator who is the subject of a recusal request has the discretion to decide whether to withdraw from the case.[48] Amendment No. 1 did not propose to change this authority, or the right of a non-moving party to oppose the request. Three commenters to the original proposal[49] cited case law that suggests arbitrators are expected to form opinions based on the evidence presented to them after they are appointed, and such an expression of those views prior to the conclusion of the case would not be considered proof of bias.[50] FINRA believes the disclosure provision in Amendment No. 1 is consistent with current practice and case law and declines to change it in response to the comments.

FINRA notes that the original proposal would have required the entire panel to withdraw upon a party's request that the referring arbitrator withdraw.[51] After considering the comments and our rules concerning arbitrator recusal, FINRA determined not to include this requirement in Amendment No. 1, which is identical to the current proposal. Some commenters suggested that FINRA should have added rule language noting that a mid-case referral would not be a valid basis for making a motion to recuse. FINRA rules do not dictate the grounds for granting recusal requests and do not require specific decisions by arbitrators in response to such requests. Consistent with any other recusal requests, an arbitrator challenged because of a mid-case referral is required to make that decision in accordance with the Codes.[52] As in Amendment No. 1, the current proposal reflects FINRA's view that recusal of arbitrators making a mid-case referral is not mandated.

Updating Training Materials:

One commenter suggested that FINRA update its arbitrator training materials and reference guides with relevant case law citations that support the argument that mid-case referrals should not provide new grounds for recusal.[53]

Whenever the SEC approves a proposed rule change involving its dispute resolution forum, FINRA reviews its arbitrator training materials and reference guides and, when

[37] *See* note 57, *infra.*

[38] *See* note 3, *supra.*

[39] *See* Comments on FINRA Rulemaking, Notice of Proposed Rule Change to Amend the Codes of Arbitration Procedure to Permit Arbitrators to Make Mid-case Referrals, available at *http://www.sec.gov/comments/sr-finra-2010-036/finra2010036.shtml* (last visited February 10, 2014).

[40] *See* Securities Exchange Act Rel. No. 64954 (July 25, 2011), 76 FR 45631 (July 29, 2011) (File No. SR–FINRA–2010–036, Notice of Filing of Proposed Rule Change and Amendment No. 1 to Amend the Codes of Arbitration Procedure to Permit Arbitrators to Make Mid-Case Referrals).

[41] Comments on Amendment No. 1 were submitted from: Peter J. Mougey, President, Public Investors Arbitration Bar Association, Aug. 18, 2011 (''PIABA Comment''); Richard P. Ryder, Esquire, Securities Arbitration Commentator, Inc., Aug. 27, 2001 (''Ryder Comment''); William A. Jacobson, Esq., Director, Cornell Securities Law Clinic, Aug. 22, 2011 (''Cornell Comment''); Seth E. Lipner, Professor of Law, Baruch College, Sept. 8, 2011 (''Lipner Comment''); and Barry D. Estell, Attorney at Law, Sept. 12, 2011 (''Estell Comment'').

[42] *See* note 6, *supra.*

[43] PIABA Comment, Cornell Comment, and Estell Comment.

[44] *Id.*

[45] The Cornell Comment suggested amending Rule 12104(b) only to state that a referral under the rule would not be grounds for recusal or removal of an arbitrator. The Estell Comment supported this suggestion. However, the Ryder Comment opposed the suggestion.

[46] *See Commonwealth Coatings Corp.,* 393 U.S. 145 (establishing a broad requirement that arbitrators make full disclosures of facts that could create an ''impression of bias'').

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

[48] *Id.*

[49] Theodore M. Davis, Esq. Law Office of Theodore M. Davis, Oct. 11, 2010; Dale Ledbetter, Ledbetter & Associates, P.A., Oct. 13, 2010, and Richard A. Stephens, Esq., Attorney, Oct. 11, 2010.

[50] *See Ballantine Books Inc.,* 302 F.2d at 21; *see also Health Services Management Corp.,* 975 F.2d at 1267.

[51] *See* note 3, *supra.*

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

[53] PIABA Comment.

appropriate, updates them to give guidance on the issue addressed in the proposed rule change.

Impact of Mid-case Referral on Investors:

Two commenters argued that Amendment No. 1 would have cause claimants to incur increased costs if an arbitrator made a mid-case referral under the proposed rule.[54] The commenters expressed concern that replacing an arbitrator who granted a recusal request would result in additional time and expense to reschedule delayed hearing dates.[55]

Amendment No. 1 addressed a chief concern expressed by commenters with the original proposal by removing the requirement that the entire panel withdraw upon a party's request that a referring arbitrator withdraw.[56] Under Amendment No. 1, which is identical to the current proposal, neither the referring arbitrator nor the panel would have been required to withdraw as the original proposal would have required. Instead, a party would have been permitted to submit a recusal motion to the referring arbitrator. This means that the entire panel could remain after a party's recusal motion, and the case could proceed as normal. The investor would have been less likely, therefore, to experience procedural disadvantages, significant delays, and increased costs, because Amendment No. 1 would have minimized the possibility that the arbitration would start anew.

Further, the Codes provide parties with tools to minimize these costs and delays, if a referring arbitrator, in his or her discretion, granted a recusal request under Amendment No. 1. For example, the parties could agree to proceed with the remaining two arbitrators in a three-arbitrator panel to limit expenses rather than seek a replacement arbitrator[57] or could agree to other methods of saving time and cost, such as rehearing only one or two key witnesses, or stipulating to summaries of prior testimony.[58] Further, a party could seek recovery of any additional costs as part of an award.

FINRA recognizes that Amendment No. 1 could not have eliminated the attendant costs or potential delays that may have arisen if an arbitrator granted a recusal request after making a mid-case referral. FINRA believes, however, that the ability to retain the panel after an arbitrator makes a mid-case referral would ameliorate the negative effects that a mid-case referral could have on the individual claimant's case. In addition, the provisions in the Codes help parties minimize costs and delays in the event of an arbitrator's recusal.

Costs of a Replacement Arbitrator:

Some commenters[59] contended that arbitrator discretion to assess costs associated with selecting and educating a replacement arbitrator could have exposed claimants to additional costs that they otherwise would not have incurred but for the past conduct of the party that was the subject of the mid-case referral.

If an arbitrator were to have agreed to a recusal request after making a mid-case referral and the parties did not agree on how to proceed, FINRA would have appointed a replacement arbitrator to review the hearing record (*e.g.,* digital recordings and exhibits), and the case would have proceeded from where it was interrupted. FINRA would have paid the replacement arbitrator to review the hearing record and learn about the arbitration case up to the point at which it was interrupted. Pursuant to forum policy, the parties would not have been assessed any fees in conjunction with those payments. Thus, as these costs could not be allocated to the parties, FINRA did not incorporate the commenters' suggestion in Amendment No. 1, or in the current proposal.

Motions to Vacate After a Mid-case Referral:

One commenter suggested that the party that is the subject of the referral would be more likely to file a motion to vacate any award in favor of an investor regardless of the referring arbitrator's decision on the recusal motion.[60] This commenter suggested that, even when courts deny motions to vacate, investors would incur additional delay and expense related to defending against such motions.[61]

The proposed criteria in Amendment No. 1 for a mid-case referral would have helped the prevailing party minimize the expense of defending against an attack on the award based on the use of the mid-case referral rule. Under Amendment No. 1, a mid-case referral would have been based on evidence presented at a hearing, not information provided in the pleadings. Further, the evidence must have supported the arbitrator's belief that the threat was serious, either ongoing or imminent, and likely to harm investors unless immediate action was taken. Under this standard of referral, which is lower than the threshold in the original proposal, the referring arbitrator would not need to conclude that there is a violation, just that there might be a serious problem that required immediate action.[62] Moreover, Amendment No. 1 instructed arbitrators to consider delaying their referral until the conclusion of a case if, in their judgment, investor protection would not have been materially compromised by a short delay in making the referral.

FINRA acknowledges that under Amendment No. 1, which is identical to the current proposal, there is a risk that a claimant would incur costs defending against a motion to vacate. FINRA believes, however, that the rule language attempts to minimize this risk by reducing the potential for establishing arbitrator bias to help a claimant successfully defend against a party's challenge to an award. Despite this risk, FINRA believes the theoretical cost to one claimant must be weighed against the potential harm to numerous other investors.

Effect of Mid-case Referral on Case Strategy:

Some commenters to Amendment No. 1 argued that, if an arbitrator made a mid-case referral, the application of the rule would negatively impact the investor's case strategy.[63] Specifically, they contended that if parties cannot stipulate how evidence would be presented to the replacement arbitrator, the arbitrators, including the replacement arbitrator, would decide what evidence would be reviewed and how to proceed.[64] Under this scenario, the commenters contended that investors could lose the ability to present their case as they were otherwise entitled to do.[65]

Under the Codes, if the parties cannot agree or are unable to provide suggestions on how to educate a replacement arbitrator, arbitrators are permitted to use their discretion in

[54] PIABA Comment and Ryder Comment.

[55] *Id.*

[56] The Lipner Comment suggested that FINRA amend its proposal to provide only the investor with the option to continue with the existing panel or request a new panel. Amendment No. 1 removed the requirement that the entire panel withdraw upon a party's request that the referring arbitrator withdraw. Hence, FINRA believes this comment was addressed with the changes made by Amendment No. 1.

[57] Rules 12403(c)(6) and 12403(d)(6)(A), 12403(d)(7)(A) and 12403(d)(8)(A) of the Customer Code and Rule 13411 of the Industry Code.

[58] Rule 12105 of the Customer Code and Rule 13105 of the Industry Code.

[59] PIABA Comment and Cornell Comment (joining in concerns expressed by PIABA).

[60] PIABA Comment.

[61] *Id.*

[62] Under the original proposal, before making a mid-case referral, arbitrators would have been required to have ''reason to believe that a matter or conduct poses a serious, ongoing or imminent threat to investors that requires immediate action.'' Under that standard, the arbitrators would have had to be certain that an ongoing threat existed and the threat was imminent. *See* note 3, *supra.*

[63] PIABA Comment and Cornell Comment (joining in concerns expressed by PIABA).

[64] *Id.*

[65] *Id.*

deciding what evidence to consider and to admit.[66] Under Amendment No. 1, investors would not forfeit their case strategy because the arbitrators, including the replacement arbitrator, would have access to information and evidence submitted previously. Transcripts or recordings from prior hearing sessions would have provided a verbatim account of the sessions that were conducted in accordance with the claimant's original strategy. Thus, under current rules, if arbitrators make a mid-case referral as proposed, the claimant would be able to propose a method of reviewing the prior evidence or testimony.

Arbitrators' Code of Ethics:

One commenter[67] argued that Amendment No. 1 would cause an arbitrator who made a mid-case referral to violate the Code of Ethics for Arbitrators in Commercial Disputes (''Code of Ethics'').[68] Specifically, the commenter argued that the arbitrator's duty of confidentiality could be compromised if the arbitrator acted under the proposed rule.[69]

An arbitrator must adhere to the duty of confidentiality outlined in the Code of Ethics, which requires that if an agreement of the parties sets forth procedures to be followed conducting an arbitration, the arbitrators must comply with those procedures. Specifically, the Code of Ethics states, in relevant part that, ''[w]hen an arbitrator's authority is derived from the agreement of the parties, an arbitrator should neither exceed that authority nor do less than is required to exercise that authority completely. Where the agreement of the parties sets forth procedures to be followed in conducting the arbitration or refers to rules to be followed, it is the obligation of the arbitrator to comply with such procedures or rules.'' [70] Based on these criteria, the FINRA Submission Agreement provides arbitrators with the authority to conduct an arbitration pursuant to FINRA rules. Thus, arbitrators would not have violated their duty of confidentiality under the Code of Ethics by making a mid-case referral pursuant to Amendment No. 1, nor would they do so by making a referral under the proposed rule.

Post-Case Referral:

Three commenters supported proposed paragraph (e) of Rule 12104,[71] which makes minor changes to current Rule 12104(b) governing post-case referrals. Specifically, under proposed Rule 12104(e), FINRA would remove the term ''disciplinary'' as a qualification on the type of investigation FINRA may conduct once the arbitrators make a post-case referral. Further, as proposed in Amendment No. 1 and again here, FINRA would expand the type of activity that could be the subject of a referral to include ''conduct.'' These commenters believed that broadening the scope of potential post-case referrals by arbitrators would ''efficiently promote investor protections.'' [72]

Conclusion:

FINRA continues to believe that mid-case referrals would provide it with an important tool to protect investors by alerting FINRA to potentially serious wrongdoing earlier than is currently possible. Thus, FINRA has filed the current proposal, which is identical to Amendment No. 1. FINRA believes that like Amendment No. 1, the current proposal contains stringent criteria for making mid-case referrals, which should make them an extremely rare occurrence in its forum. If the arbitrators make a mid-case referral, the current proposal's other protections would help to ameliorate the negative effects such a referral could have on the individual claimant's case. These protections would help minimize delays, costs and cumbersome administrative procedures, as well as reduce the potential for a finding of arbitrator bias, which would help a prevailing investor defend against a motion to vacate. Despite these measures, FINRA acknowledges that some individual claimants may incur delays and costs. However, FINRA believes that its investor protection mission requires that an arbitrator who, based on testimony or evidence revealed at a hearing, has reason to believe that there is a serious threat, whether ongoing or imminent, that is likely to harm investors unless immediate action is taken must be permitted to alert FINRA regulators without waiting until a case is over. FINRA believes, therefore, that the current proposal could save a substantial number of other investors from losses, and that this benefit, on balance, outweighs the risk of potentially increasing hearing costs for an individual claimant.

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. The Commission solicits input on all aspects of the proposed rule. 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–FINRA–2014–005 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–2014–005. 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

[66] Rule 12604 of the Customer Code and Rule 13604 of the Industry Code.

[67] Ryder Comment.

[68] *See* The Code of Ethics for Arbitrators in Commercial Disputes *http://www.finra.org/ArbitrationMediation/Rules/RuleGuidance/P009525* (last visited January 23, 2014).

[69] Ryder Comment (citing The Code of Ethics for Arbitrators in Commercial Disputes (2004), Canons VI(A) & (B), which state, in relevant part, that ''[a]n arbitrator should not, at any time, use confidential information acquired during the arbitration proceeding to affect adversely the interest of another. The arbitrator should keep confidential all matters relating to the arbitration proceedings and decision.'').

[70] *See* The Code of Ethics for Arbitrators in Commercial Disputes, Canon I(E).

[71] PIABA Comment, Cornell Comment (citing support for PIABA Comment), and Estell Comment (citing support for Cornell Comment).

[72] *Id.*

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–2014–005 and should be submitted on or before March 12, 2014.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[73]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2014–03564 Filed 2–18–14; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–71531; File No. SR–NYSEMKT–2014–16]

Self-Regulatory Organizations; NYSE MKT LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending the NYSE Amex Options Fee Schedule in a Number of Different Ways

February 12, 2014.

Pursuant to Section 19(b)(1)[1] of the Securities Exchange Act of 1934 (the ''Act'')[2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on January 31, 2014, NYSE MKT LLC (the ''Exchange'' or ''NYSE MKT'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. 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 the Substance of the Proposed Rule Change

The Exchange proposes to amend the NYSE Amex Options Fee Schedule (''Fee Schedule'') in a number of different ways. The proposed changes will be operative on February 3, 2014. The text of the proposed rule change is available on the Exchange's Web site at *www.nyse.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

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

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

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

1. Purpose

The Exchange proposes to amend the Fee Schedule in a number of different ways as described below. The proposed changes will be operative on February 3, 2014.

First, the Exchange proposes to eliminate the existing Professional Customer and Broker Dealer Electronic average daily volume (''ADV'') Tiers For Taking Liquidity and the associated endnote 16. Instead, the Exchange will adopt a flat fee of $0.32 per contract for electronically executed Professional Customer and Broker Dealer volumes. The fee of $0.32 per contract is the same rate presently charged to Professional Customers and/or Broker Dealers for their electronic volumes up to and including 16,999 contracts of ADV in taking liquidity volume.[4]

Second, the Exchange proposes to make changes to what qualifies as a Firm Facilitation trade for purposes of the Fee Schedule by modifying Firm Facilitation to read as Firm Facilitation Manual and making edits to the associated endnote 6. Currently, Firm Facilitation trades are charged a rate of $0.00 per contract and are defined in endnote 6 as follows: ''The firm facilitation rate applies to trades that clear in the firm range (clearance account ''F'') and customer on the contra (clearance account ''C'') with the same clearing firm symbol on both sides of the trade''. At this time, the Exchange does not offer an electronic means for crossing a facilitation trade.[5] Consequently, the only manner that a Facilitation Cross Transaction can be executed is by trading in open outcry.[6] The Exchange proposes to revise endnote 6 to make clear that the Firm Facilitation rate of $0.00 per contract will apply only to those Facilitation Cross Transactions executed manually or in open outcry. In addition, the Exchange proposes to capitalize and revise the term ''firm facilitation'' as it appears in endnote 6 to ''Firm Facilitation Manual'' to conform to the amended Fee Schedule.

Third, the Exchange proposes to eliminate the Firm Proprietary Electronic ADV Tiers. Instead, the Exchange proposes to adopt a flat fee of $0.32 per contract for electronically executed Firm Proprietary volumes. The fee of $0.32 per contract is the same rate presently charged to Firms Proprietary trades for their electronic volumes up to and including .21% of Total Industry Customer equity and Exchange-Traded Funds (''ETF'') option ADV.[7]

Fourth, the Exchange proposes a non-substantive change to the Fee Schedule designed to make it easier to navigate. The Exchange recently submitted a filing to adopt a Market Access and Connectivity Subsidy (the ''MAC Subsidy'').[8] In proposing the MAC

[73] 17 CFR 200.30–3(a)(12).

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

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] *See* Securities and Exchange Release No. 34–68407 (December 11, 2012), 77 FR 74710 (December 17, 2012) (SR–NYSEMKT–2012–74).

[5] Although the Exchange does not currently offer an electronic means of executing Facilitation Cross Transactions, Firms have in the past received the Firm Facilitation rate for electronic trades by sheer happenstance, which would happen when an electronic Firm Proprietary order traded with an electronic Customer order where both sides of the trade had the same clearing firm symbol. When this has occurred, the Firm did not receive any participation entitlements or priority advantages, etc. that would normally be associated with a Facilitation Cross Transaction. The Exchange believes that, when this has occurred, it appropriately charged any Firms the Firm Facilitation rate of $0.00 for electronic trades and the Exchange will continue to charge this rate under these circumstances, until the effective date of this filing. Upon the effective date of this filing, if an electronic Firm Proprietary order were to execute against an electronic Customer order, where the same clearing firm symbol is present on both sides of the trade, the Firm Proprietary order would be subject to the Firm Proprietary Electronic charge of $0.32 per contract, as proposed herein and discussed below, and the electronic Customer order would be subject to the current Non BD Customer Electronic charge of $0.00 per contract.

[6] *See* Rule 934.1NY (Facilitation Cross Transactions).

[7] *See* Securities Exchange Act Release 34–71275 (January 9, 2014), 79 FR 2723 (January 15, 2014) (SR–NYSEMKT–2014–04).

[8] *See* SR–NYSEMKT–2014–12. Because the Exchange has previously filed the MAC Subsidy filing, which is immediately effective upon filing, the Exchange has not included as new rule text in the accompanying Exhibit 5 the subsection entitled ''NYSE AMEX OPTIONS: TRADE-RELATED REBATES OR SUBSIDIES FOR STANDARD

Continued