The Exchange has requested that the Commission waive the 30-day operative delay. The Commission believes that waiver of the operative delay is consistent with the protection of investors and the public interest because the proposal is substantially similar to that of another exchange that was approved by the Commission.[23] Therefore, the Commission designates the proposal operative upon filing.[24]

At any time within 60 days of the filing of the 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.* Please include File Number SR–BX–2010–047 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–BX–2010–047. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of 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–BX–2010–047 and should be submitted on or before August 12, 2010.

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

Florence E. Harmon,

Deputy Secretary.

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[23] *See* Securities Exchange Act Release No. 59824 (April 27, 2009), 74 FR 20518 (May 4, 2009) (SR–CBOE–2009–018).

[24] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[25] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–62521; File No. SR–FINRA–2010–006]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of Amendment No. 1 to a Proposed Rule Change and Order Granting Accelerated Approval to a Proposed Rule Change, as Modified by Amendment No. 1, To Amend the Codes of Arbitration Procedure To Provide for Attorney Representation of Non-Party Witnesses in Arbitration

July 16, 2010.

I. Introduction

On January 22, 2010, the Financial Industry Regulatory Authority, Inc. ("FINRA") (f/k/a National Association of Securities Dealers, Inc. ("NASD")) filed with the Securities and Exchange Commission ("SEC" or "Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act") [1] and Rule 19b–4 thereunder, [2] a proposed rule change to amend Rule 12602 of the Code of Arbitration Procedure for Customer Disputes ("Customer Code") and Rule 13602 of the Code of Arbitration Procedure for Industry Disputes ("Industry Code") (collectively, the "Codes") to provide that a non-party witness may be represented by an attorney at an arbitration hearing while the witness is testifying. The proposed rule change was published for comment in the **Federal Register** on February 23, 2010.[3] The Commission received three comments in response to the proposed rule change.[4] FINRA responded to the comments and on June 14, 2010 filed Amendment No. 1 to the proposed rule change.[5] The Commission is publishing this notice and order to solicit comments on Amendment No. 1 and to approve the proposed rule change, as modified by Amendment No. 1, on an accelerated basis.

II. Description of the Proposed Rule Change

FINRA proposed to amend Rules 12602 and 13602 of the Codes to provide that a non-party witness has the right to be represented by an attorney at an arbitration proceeding held in a United States hearing location while the witness is testifying. The attorney would have to be in good standing and admitted to practice before the Supreme Court of the United States or the highest court of any state of the United States, the District of Columbia, or any commonwealth, territory, or possession of the United States, unless state law prohibits such representation. Under the proposal, the panel would have the authority to determine the extent to which the attorney could participate at the hearing.

While the Codes expressly allow a party in an arbitration proceeding to be represented by an attorney at any stage in the proceeding,[6] they do not address attorney representation of a non-party witness. As stated in the notice, FINRA

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

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 61517 (February 16, 2010), 75 FR 8169 (February 23, 2010), (SR–FINRA–2010–006) ("Notice").

[4] *See* letter from William A. Jacobson, Director, Cornell Securities Law Clinic and Rubina Ali, Cornell Law School, dated March 16, 2010 ("Cornell Letter"), letter from Richard P. Ryder, dated April 16, 2010 ("Ryder Letter") and letter from Scott R. Shewan, President, Public Investors Arbitration Bar Association, dated April 28, 2010 ("PIABA Letter"). The Ryder Letter and the PIABA Letter were submitted several weeks after the expiration of the comment period.

[5] *See* Amendment No. 1 dated June 14, 2010 ("Amendment No. 1"). The text of Amendment No. 1 is available on FINRA's Web site at *http:www.finra.org,* at the principal office of FINRA, and on the Commission's Internet Web site (*http://www.sec.gov.rules.sro.html*).

[6] Rules 12208 and 13208 of the Codes (Representation of Parties) provide that parties have the right to be represented by an attorney at any stage in an arbitration proceeding. They also allow parties to be represented by a person who is not an attorney subject to certain limitations.

believes that a non-party witness should be entitled to representation by an attorney while he or she is testifying. Currently, under the Codes, the arbitration panel determines whether a non-party witness' attorney may attend a hearing.[7] A non-party witness may testify at a hearing: (1) Voluntarily; (2) pursuant to a subpoena; [8] or (3) in compliance with an arbitrator's order for an associated person to appear and give testimony.[9]

Under the current Codes, arbitrators determine whether non-party witnesses can bring an attorney to a hearing. As indicated in the Notice, FINRA does not believe that arbitrators have been denying requests by non-party witnesses, including non-party associated persons,[10] to be represented by attorneys while testifying; nevertheless, to assure due process in its dispute resolution forum, FINRA believes that the Codes should expressly provide that a non-party witness is entitled to be represented by an attorney while testifying.

III. Summary of Comment Letters and FINRA's Response

The Commission received three comments on the proposed rule change.[11] Two commenters suggested revisions to the proposed rule change.[12] The other commenter generally opposed the proposal and urged FINRA to withdraw it.[13] The Commission also received FINRA's response to comments, which is discussed below.[14]

One commenter supported FINRA's efforts to consider due process protections for non-party witnesses.[15] However, the commenter also expressed concern that unless FINRA adopts guidelines for arbitrators, the arbitration process could be impeded by attorneys for non-party witnesses using scheduling conflicts to delay an arbitration or "overstepping" their role with inappropriate objections not necessarily tied to their clients' testimony. This commenter suggested amending the proposal to limit the role of a non-party witness' attorney, absent extraordinary circumstances, to matters concerning privilege and conflicts arising under Fifth Amendment protections against self-incrimination.[16]

Another commenter did not support the proposal and suggested an amending it to limit the role of a non-party witness' attorney.[17] Specifically, this commenter suggested that attorneys for non-party witnesses should not be permitted to participate in an arbitration hearing or advocate on behalf of any particular party (*e.g.,* interjecting argument in the case or offering input or assistance to counsel for any other party) other than to raise an objection on behalf of a non-party witnesses based on privileges that have been well-accepted at the federal and state court level.[18]

The third commenter did not support the proposal stating that: (1) The proposal is unnecessary because arbitrators have apparently not been denying requests for representation from non-party witnesses; (2) FINRA's references to "due process" are inappropriate because arbitration proceedings are not designed to be structured as judicial proceedings; (3) the proposal would reduce control by arbitrators, add confusion and protract the process (*e.g.,* by adding time for developing bar qualifications for eligibility of counsel to participate in each respective arbitration forum); and (4) FINRA has not adequately justified its basis for the proposal.[19]

FINRA submitted Amendment No. 1 in response to comments.[20] Amendment No. 1 generally provides that unless otherwise authorized by the arbitration panel, the role of the attorney for a non-party witness would be limited to asserting recognized privileges such as the attorney-client and work product privileges and the privilege against self-incrimination.[21] FINRA indicated that Amendment No. 1 would provide additional guidance to parties and arbitrators about the role of a non-party witnesses' attorney while maintaining an arbitrator's authority and ability to determine the appropriate level of attorney representation at a hearing.[22] FINRA reiterated that it continually reviews the Codes to enhance its case administration processes and ensure that its forum is fair to all participants.[23] In addition, FINRA indicated that it strives to improve the Codes before problems arise and to this end the proposal would close a gap in the Codes relating to non-party witness representation.

IV. Discussion and Commission Findings

After carefully considering the proposal, as amended by Amendment No. 1, the comments, and FINRA's Response, the Commission finds that the proposed rule change is consistent with the requirements of the Act, and the rules and regulations thereunder that are applicable to a national securities association.[24] In particular, the Commission believes the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,[25] 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 it would enhance the fairness in the arbitration process by clarifying that a non-party witness may be represented by counsel during his or her testimony.

The Commission believes that FINRA has adequately addressed the concerns raised by the commenters. With respect

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[7] Rules 12602 and 13602 of the Codes (Attendance at Hearings) provide that parties and their representatives are entitled to attend all hearings and that, absent persuasive reasons to the contrary, expert witnesses should also be permitted to attend all hearings. The panel determines who else may attend any or all hearings.

[8] Rules 12512 and 13512 of the Codes (Subpoenas) provide that arbitrators have the authority to issue subpoenas for the production of documents or the appearance of witnesses. The rules permit a party to make a written motion requesting that an arbitrator issue a subpoena to a party or a non-party.

[9] Rules 12513 and 13513 of the Codes (Authority of Panel to Direct Appearances of Associated Person Witnesses and Production of Documents Without Subpoenas) provide that the panel may order the appearance of any employee or associated person of a FINRA member.

[10] The proposed rule change would apply to all non-party witnesses testifying at a FINRA arbitration hearing, including an associated person who handled the customer claimant's account but was not named as a respondent in the case.

[11] *See* note 4, *supra.*

[12] Cornell Letter; PIABA Letter. The Cornell Letter expressed support for the proposed rule change subject to modification. The PIABA Letter indicated that it did not support the proposed rule in its current form.

[13] Ryder Letter.

[14] Letter from Margo A. Hassan, FINRA, dated April 1, 2010 (addressing the Cornell Letter) ("FINRA Letter I"). Because the Ryder and PIABA Letters were submitted after the expiration of the comment period, FINRA responded to these comments in a separate letter. *See* letter from Margo Hassan, FINRA, dated June 14, 2010 ("FINRA Letter II") (collectively with FINRA Letter I, "FINRA's Response").

[15] Cornell Letter.

[16] *Id.* The commenter also indicated that attorneys for non-party witnesses should not be able to participate generally in the proceedings or cross-examine witnesses.

[17] PIABA Letter

[18] The commenter listed the following non-exclusive privileges from state and federal courts: attorney-client privilege, work product doctrine, spousal privilege, clergy privilege and accountant-client privilege. *See* PIABA Letter.

[19] Ryder Letter.

[20] FINRA Letter II.

[21] *Id.*

[22] FINRA's Response.

[23] *Id.*

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

[25] 15 U.S.C. 78o–3(b)(6).

to the concern that the proposal is unnecessary because abuses have not been witnessed, the Commission notes that its oversight of the securities arbitration process is directed at ensuring that it is fair and efficient. The Commission believes that FINRA's proactive approach in proposing this rule change is consistent with ensuring a fair and efficient arbitration process for all persons involved in arbitration, including non-party witnesses.

Moreover, the Commission believes the concern that the proposal would reduce control by arbitrators, add confusion and protract the process will be mitigated by Amendment No. 1. Under the proposal, as modified by Amendment No. 1, the role of attorneys for non-party witnesses will generally be limited to asserting recognized privileges on behalf of the non-party witness; however, the arbitration panel will maintain overall control over the proceeding, including the ability to determine the appropriate level of attorney representation at a hearing. Further, FINRA has committed to alerting arbitrators to concerns regarding delayed or protracted proceedings.

Finally, the Commission does not agree that FINRA has not adequately justified its basis for the proposal. The Commission believes that FINRA's justification of enhancing fairness in the arbitration process by ensuring that a non-party witness may be represented by counsel during his or her testimony is consistent with the requirements of the Act.

V. Accelerated Approval

The Commission finds goods cause, pursuant to Section 19(b)(2) of the Act,[26] for approving the proposed rule change, as modified by Amendment No. 1 thereto, prior to the 30th day after publication of Amendment No.1 in the **Federal Register**. The changes proposed in Amendment No.1 respond to specific concerns raised by commenters. In particular, Amendment No. 1 proposes to limit the role of a non-party witness attorney, unless otherwise authorized by the arbitration panel, to the assertion of recognized privileges such as the attorney-client and work product privilege and the privilege against self-incrimination.

Accordingly, the Commission finds that good cause exists to approve the proposal, as modified by Amendment No. 1, on an accelerated basis.

VI. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether Amendment No. 1 to the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–FINRA–2010–006 on the subject line.

Paper Comments

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

All submissions should refer to File Number SR–FINRA–2010–006. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of FINRA. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–FINRA–2010–006 and should be submitted on or before August 12, 2010.

VII. Conclusions

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[27] that the proposed rule change (SR–FINRA–2010–006), as modified by Amendment No. 1, be, and hereby is, approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[28]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–17931 Filed 7–21–10; 8:45 am]

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[26] 15 U.S.C. 78s(b)(2).

[27] 15 U.S.C. 78s(b)(2).

[28] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–62504; File No. SR–Phlx–2010–93]

Self-Regulatory Organizations; NASDAQ OMX PHLX, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Delta Hedge Exemptions

July 15, 2010.

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 June 30, 2010, NASDAQ OMX PHLX, Inc. ("Phlx" or "Exchange") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

The Exchange proposes to (i) expand the delta hedging exemption available for equity options positions limits, (ii) amend the reporting requirements applicable to members relying on the delta hedging exemption and (iii) adopt a delta hedging exemption from certain index options position limits.

The text of the proposed rule change is available on the Exchange's Web site at *http://www.nasdaqtrader.com/micro.aspx?id=PHLXRulefilings,* at the principal office of the Exchange, and at the Commission's Public Reference Room.

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

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed

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

[2] 17 CFR 240.19b–4.