

themselves of the designated co-location services.

BX's proposal to reduce fees by differing amounts is fair and equitable because it reflects the economic efficiency of higher density colocation cabinets. First, the underlying costs for co-location cabinets consists [sic] of certain fixed costs for the data center facility (space, amortization, etc.) and certain variable costs (electrical power utilized and cooling required). The variable costs are in total higher for the higher power density cabinets, as reflected in their higher current prices. Second, the higher density cabinets were introduced later than the lower density cabinets (High Density cabinet was introduced in 2009 and the Super High Density cabinet was introduced in 2011). Due to the competitive pressures that existed in 2011 and 2012, the fees for Super High Density cabinets were further reduced in 2012 to be more comparable with the lower fee per kilowatt of the High Density cabinet. As a result of these already-reduced rates on higher density cabinets, BX has greater flexibility to discount fees for lower density cabinets, on a per kilowatt basis.

BX operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive. In such an environment, BX must continually adjust its fees to remain competitive with other exchanges and with alternative trading systems that have been exempted from compliance with the statutory standards applicable to exchanges. BX believes that the proposed rule change reflects this competitive environment because it is designed to ensure that the charges for use of the BX colocation facility remain competitive.

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

The Exchange 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. To the contrary, the Exchange's voluntary fee reduction is a response to increased competition for colocation services by other exchanges and trading venues. As more venues offer colocation services, competition drives costs lower. The Exchange, in order to retain existing orders and to attract new orders, is forced to offer a lower effective rate for aggregate cabinet demand. This competition benefits users, members, and investors by lowering the average aggregate cost of trading on the Exchange.

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

Written comments were neither solicited nor received.

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

Pursuant to Section 19(b)(3)(A)(ii) of the Act,<sup>6</sup> the Exchange has designated this proposal as establishing or changing a due, fee, or other charge imposed by the self-regulatory organization on any person, whether or not the person is a member of the self-regulatory organization, which renders the proposed rule change effective upon filing.

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

#### **IV. Solicitation of Comments**

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

##### *Electronic Comments*

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-BX-2013-003 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-2013-003. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/>

[rules/sro.shtml](#)). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal offices 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-2013-003, and should be submitted on or before February 7, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>7</sup>

**Kevin M. O'Neill,**  
*Deputy Secretary.*

[FR Doc. 2013-00868 Filed 1-16-13; 8:45 am]

**BILLING CODE 8011-01-P**

## **SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-68632; File No. SR-FINRA-2013-003]

### **Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of Proposed Rule Change Relating to Amendments to the Customer and Industry Codes of Arbitration Procedure To Revise the Public Arbitrator Definition**

January 11, 2013.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Exchange Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on January 4, 2013, Financial Industry Regulatory Authority, Inc. ("FINRA") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by FINRA. The Commission is publishing this notice to

<sup>7</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>6</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

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 the Customer and Industry Codes of Arbitration Procedure ("Codes") to revise the definition of "public arbitrator" to exclude persons associated with a mutual fund or hedge fund from serving as public arbitrators and to require individuals to wait for two years after ending certain affiliations before they may be permitted to serve as public arbitrators. FINRA believes that the proposed amendments to the public arbitrator definition would improve investors' perception about the fairness and neutrality of FINRA's public arbitrator roster.

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

FINRA classifies arbitrators under the Codes as either "non-public" or "public" (non-public arbitrators are often referred to as "industry" arbitrators). Non-public arbitrators are affiliated with the securities industry either through their current or former employment in a securities business, or because they provide professional services to securities businesses. Public arbitrators do not have any significant affiliation with the securities industry; nor are they related to anyone with a significant affiliation with the securities industry.

To improve investor confidence in the neutrality of FINRA's public arbitrator roster, FINRA has amended its arbitrator

definitions a number of times over the years.

In 2004, FINRA amended the definitions of public arbitrator and non-public arbitrator to:

- Increase from three years to five years the period for transitioning from a non-public to public arbitrator after leaving the securities industry;
- Clarify that the term "retired" from the industry includes anyone who spent a substantial part of his or her career in the industry;
- Prohibit anyone who has been associated with the industry for at least twenty years from ever becoming a public arbitrator, regardless of how long ago the association ended;
- Exclude from the public arbitrator roster attorneys, accountants, or other professionals whose firms have derived ten percent or more of their annual revenue in the previous two years from clients involved in securities-related activities; and
- Provide that investment advisers may not serve as public arbitrators, and may only serve as non-public arbitrators if they otherwise qualify as non-public.<sup>3</sup>

In 2007, FINRA revised the public arbitrator definition to exclude individuals who were employed by, or who served as an officer or director of, a company in a control relationship with a broker-dealer. Individuals were also excluded if a spouse or immediate family member served in such a capacity. In this rule change, FINRA also made it clear that people registered through a broker-dealer could not be public arbitrators even if they are employed by a non-broker-dealer (such as a bank).<sup>4</sup>

Finally, in 2008, FINRA revised the public arbitrator definition to add a dollar limit to the 2004 ten-percent rule. This precluded an attorney, accountant, or other professional from serving as a public arbitrator if the individual's firm derived \$50,000 or more in annual revenue in the past two years from professional services rendered to certain industry entities relating to customer

<sup>3</sup> See Exchange Act Rel. No. 49573 (April 16, 2004), 69 FR 21871 (Apr. 22, 2004) (File No. SR-NASD-2003-95) (Order Granting Approval to a Proposed Rule Change Relating to Arbitrator Classification and Disclosure in NASD Arbitrations). The changes were announced in Notice to Members 04-49 (June 2004).

<sup>4</sup> See Act Rel. No. 54607 (Oct. 16, 2006), 71 FR 62026 (Oct. 20, 2006) (File No. SR-NASD-2005-094) (Order Approving Proposed Rule Change and Amendment No. 1 Thereto Relating to Amendments to the Classification of Arbitrators Pursuant to Rule 10308 of the NASD Code of Arbitration Procedure). The changes were announced in Notice to Members 06-64 (Nov. 2006).

disputes concerning an investment account or transaction.<sup>5</sup>

#### **Proposal To Amend the Arbitrator Definition**

Recently, FINRA investor representatives raised concerns that they do not perceive certain arbitrators on the public roster as public because of their background or experience. To respond to this perception, FINRA is proposing to amend the public arbitrator definition to exclude persons associated with a mutual fund or hedge fund from serving as public arbitrators and to require individuals to wait for two years after ending certain affiliations before FINRA permits them to serve as public arbitrators.

The public arbitrator definition does not expressly prohibit individuals associated with mutual funds and hedge funds from serving as public arbitrators. However, because of their association with the financial services industry, FINRA believes that these individuals should not serve as public arbitrators. Therefore, FINRA's current practice is to exclude these individuals from the public arbitrator roster until they terminate their affiliation with the hedge fund or mutual fund. For example, FINRA removed a public arbitrator from the roster because he was serving as a director of a mutual fund. FINRA is proposing to amend Rules 12100(u)(3) and 13100(u)(3), which exclude investment advisers from serving as public arbitrators, to exclude also persons associated with, including registered through, a mutual fund or hedge fund. The proposed rule change would respond to questions and concerns raised about arbitrator service by persons associated with mutual funds and hedge funds.

FINRA is also proposing to amend the public arbitrator definition to add a two-year "cooling off" period before FINRA permits certain individuals to serve as public arbitrators. Currently under the Codes, an individual may not serve as a public arbitrator if he or she is:

- An investment adviser;
- An attorney, accountant, or other professional whose firm derived ten percent or more of its annual revenue in the past two years from certain financial industry entities;
- An attorney, accountant, or other professional whose firm derived \$50,000 or more in annual revenue in the past two years from professional

<sup>5</sup> See Exchange Act Rel. No. 57492 (Mar. 13, 2008), 73 FR 15025 (Mar. 20, 2008) (File No. SR-NASD-2007-021) (Order Approving Proposed Rule Change To Amend the Definition of Public Arbitrator). The changes were announced in Regulatory Notice 08-22 (May 2008).

services rendered to certain financial industry entities relating to any customer disputes concerning an investment account or transaction;

- Employed by, or is the spouse or an immediate family member of a person who is employed by, an entity that directly or indirectly controls, is controlled by, or is under common control with, any partnership, corporation, or other organization that is engaged in the securities business; or
- A director or officer of, or is the spouse or an immediate family member of a person who is a director or officer of, an entity that directly or indirectly controls, is controlled by, or is under common control with, any partnership, corporation, or other organization that is engaged in the securities business.

However, as soon as the individual ends the affiliation that was the basis for the exclusion from the public roster, the individual may begin serving as a public arbitrator. In one instance, an individual applying to be a public arbitrator had retired one month earlier from a lengthy career at a law firm that represented securities industry clients. Currently, Rule 12100(u)(5) provides that a public arbitrator may not be an attorney, accountant, or other professional whose firm derived \$50,000 or more in annual revenue in the past two years from professional services rendered to specified securities industry clients relating to any customer disputes concerning an investment account or transaction. The applicant confirmed that the firm derived revenue of at least \$50,000 during the past two years from clients in the securities industry relating to customer disputes. If the individual applied while employed at the firm, FINRA would not have approved the application. However, since the applicant left the firm one month earlier, and the rule does not include a cooling off period, the applicant was permitted to join the public arbitrator roster.

FINRA is proposing to amend Rules 12100(u) and 13100(u) to provide that a person whom FINRA would not designate as a public arbitrator because of an affiliation under subparagraphs (3)–(7) (the exclusions detailed in the bullets above) shall not be designated as a public arbitrator for two calendar years after ending the affiliation. As stated above, FINRA is also proposing to add persons associated with mutual funds and hedge funds to Rules 12100(u)(3) and 13100(u)(3). Therefore, the two-year cooling off period would apply to these individuals as well. FINRA believes that the cooling off period would improve its constituents'

perception about the neutrality of the arbitrators on the public roster.

## 2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Exchange Act,<sup>6</sup> 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. FINRA believes that the proposed amendments to the public arbitrator definition would benefit investors by addressing concerns raised about the fairness and neutrality of FINRA's public arbitrator roster. FINRA believes that by prohibiting persons associated with mutual funds or hedge funds from serving on the public roster, the proposed amendments further restrict the professional affiliations that a public arbitrator may have with the securities industry. The proposed two-year cooling off period seeks to ensure that potential arbitrators have sufficient separation from their affiliations with the securities industry. FINRA believes these restrictions would improve investors' perception of fairness and neutrality of the public roster.

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

FINRA does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act.

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

Written comments were neither solicited nor received.

## 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 Exchange 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](mailto:rule-comments@sec.gov). Please include File Number SR-FINRA-2013-003 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-2013-003. 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 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-2013-003 and should be submitted on or before February 7, 2013.

<sup>6</sup> 15 U.S.C. 78o-3(b)(6).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>7</sup>

**Kevin M. O'Neill,**  
Deputy Secretary.

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-68629; File No. SR-NASDAQ-2012-059]

### Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Order Disapproving Proposed Rule Change To Establish “Benchmark Orders” Under NASDAQ Rule 4751(f)

January 11, 2013.

#### I. Introduction

On May 1, 2012, The NASDAQ Stock Market LLC (“NASDAQ” or “Exchange”) filed with the Securities and Exchange Commission (“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 various “Benchmark Orders” under NASDAQ Rule 4751(f). The proposed rule change was published for comment in the **Federal Register** on May 17, 2012.<sup>3</sup> On June 26, 2012, the Commission extended to August 15, 2012, the time period in which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change.<sup>4</sup>

On August 14, 2012, the Commission instituted proceedings to determine whether to approve or disapprove the proposed rule change.<sup>5</sup> The Commission thereafter received two comment letters on the proposal.<sup>6</sup> On November 9, 2012, the Commission issued a notice of designation of a longer period for Commission action on proceedings to determine whether to approve or

disapprove the proposed rule change.<sup>7</sup> On December 17, 2012, NASDAQ submitted a response letter to the comments on the proposal.<sup>8</sup> This order disapproves the proposed rule change.

#### II. Description of the Proposal

As set forth in more detail in the Notice, the Exchange has proposed to offer Benchmark Orders that would seek to achieve the performance of a specified benchmark—Volume Weighted Average Price (“VWAP”), Time Weighted Average Price (“TWAP”), or Percent of Volume (“POV”)—over a specified period of time for a specified security.<sup>9</sup> The entering party would specify the benchmark, period of time, and security, as well as the other order information common to all order types, such as buy/sell side, shares and price.<sup>10</sup>

Benchmark Orders would be received by NASDAQ but by their terms would not be executable by the NASDAQ matching engine upon entry.<sup>11</sup> Rather, NASDAQ would direct them to a system application (“Application”) that is licensed from a third-party provider and dedicated to processing Benchmark Orders.<sup>12</sup> The Application would process Benchmark Orders by generating “Child Orders” in a manner designed to achieve the desired benchmark performance, *i.e.*, VWAP, TWAP or POV, in accordance with the member’s instructions.<sup>13</sup> Child Orders would be executed within the NASDAQ system under NASDAQ’s existing rules, or made available for routing under NASDAQ’s current routing rules.<sup>14</sup> The Application would not be capable of executing Child Orders, but instead would send Child Orders, using the proper system protocol, to the NASDAQ matching engine or to the NASDAQ router as needed to complete the Benchmark Order.<sup>15</sup> Child Orders would be processed in an identical manner to orders generated

independently of a Benchmark Order.<sup>16</sup> NASDAQ states that the third-party provider of the Application would have no actionable advantage over NASDAQ members with respect to the NASDAQ system.<sup>17</sup>

NASDAQ represents that it would test the Application rigorously and regularly, monitor the Application performance on a real-time and continuous basis, and have access to the technology, employees, books and records of the third-party provider that are related to the Application and its interaction with NASDAQ.<sup>18</sup> NASDAQ states that it considers the Application to be a functional offering of the NASDAQ Stock Market, and that it would be integrated closely with the NASDAQ system and provided to members subject to NASDAQ’s obligations and responsibilities as a self-regulatory organization.<sup>19</sup> In addition, NASDAQ represents that it would maintain control of and responsibility for the Application.<sup>20</sup>

#### III. Discussion

Under Section 19(b)(2)(C) of the Act, the Commission shall approve a proposed rule change of a self-regulatory organization if it finds that such proposed rule change is consistent with the requirements of the Act, and the rules and regulations thereunder that are applicable to such organization.<sup>21</sup> The Commission shall disapprove a proposed rule change if it does not make such a finding.<sup>22</sup> The Commission’s Rules of Practice, under Rule 700(b)(3), state that the “burden to demonstrate that a proposed rule change is consistent with the Exchange Act and the rules and regulations issued thereunder \* \* \* is on the self-regulatory organization that proposed the rule change” and that a “mere assertion that the proposed rule change is consistent with those requirements \* \* \* is not sufficient.”<sup>23</sup>

<sup>7</sup> See Securities Exchange Act Release No. 68199 (November 9, 2012), 77 FR 68873 (November 16, 2012).

<sup>8</sup> See Letter to the Commission from Jeffrey S. Davis, Vice President and Deputy General Counsel, NASDAQ, dated December 17, 2012 (“NASDAQ Letter”).

<sup>9</sup> See proposed NASDAQ Rule 4751(f)(15).

<sup>10</sup> *Id.*; see also Notice, 77 FR at 29436.

<sup>11</sup> See proposed NASDAQ Rule 4751(f)(15); see also Notice, 77 FR at 29435–36.

<sup>12</sup> See Notice, 77 FR at 29436.

<sup>13</sup> See proposed NASDAQ Rule 4751(f)(15); see also Notice, 77 FR at 29435–36.

<sup>14</sup> See Notice, 77 FR at 29435. Child Orders that require routing would be routed by NASDAQ Execution Services, NASDAQ’s wholly-owned routing broker-dealer. *Id.* at 29436 n.8. In addition, fees applicable to existing orders and trades would apply to Child Orders. *Id.* at 29436.

<sup>15</sup> *Id.* at 29435–36.

<sup>16</sup> *Id.* at 29436.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 29437.

<sup>21</sup> See 15 U.S.C. 78s(b)(2)(C)(i).

<sup>22</sup> See 15 U.S.C. 78s(b)(2)(C)(ii).

<sup>23</sup> See 17 CFR 201.700. The description of a proposed rule change, its purpose and operation, its effect, and a legal analysis of its consistency with applicable requirements must all be sufficiently detailed and specific to support an affirmative Commission finding. See *id.* Any failure of a self-regulatory organization to provide the information elicited by Form 19b-4 may result in the Commission not having a sufficient basis to make an affirmative finding that a proposed rule change is consistent with the Act and the rules and regulations issued thereunder that are applicable to the self-regulatory organization. *Id.*

<sup>1</sup> 17 CFR 200.30-3(a)(12).

<sup>2</sup> 15 U.S.C. 78s(b)(1).

<sup>3</sup> 17 CFR 240.19b-4.

<sup>4</sup> See Securities Exchange Act Release No. 66972 (May 11, 2012), 77 FR 29435 (May 17, 2012) (“Notice”).

<sup>5</sup> See Securities Exchange Act Release No. 67258 (June 26, 2012), 77 FR 39314 (July 2, 2012).

<sup>6</sup> See Securities Exchange Act Release No. 67655 (August 14, 2012), 77 FR 50191 (August 20, 2012) (“Order Instituting Proceedings”).

<sup>7</sup> See Letters to the Commission from Theodore R. Lazo, Managing Director and Associate General Counsel, SIFMA, dated October 5, 2012 (“SIFMA Letter”); and James J. Angel, dated August 16, 2012 (“Angel Letter”).