

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-58739; File No. SR-FINRA-2008-005)

October 6, 2008

Self-Regulatory Organizations: Financial Industry Regulatory Authority, Inc.; Notice of Filing of Amendment No. 1 and Order Granting Accelerated Approval of Proposed Rule Change as Modified by Amendment No. 1 Thereto to Adopt Rule 12905 of the Code of Arbitration Procedure for Customer Disputes and Rule 13905 of the Code of Arbitration Procedure for Industry Disputes to Permit Submissions Under Limited Circumstances to Arbitrators after a Case has Closed

I. Introduction

On February 7, 2008, the Financial Industry Regulatory Authority, Inc. (“FINRA”) (f/k/a/ National Association of Securities Dealers, Inc. (“NASD”)) 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 amend the NASD Code of Arbitration Procedure for Customer Disputes (“Customer Code”) and the NASD Code of Arbitration Procedure for Industry Disputes (“Industry Code”) to permit submissions to arbitrators after a case has closed only under limited, enumerated circumstances. The proposed rule change was published for comment in the Federal Register on March 18, 2008.<sup>3</sup> The Commission received 13 comment letters in response to the proposed rule change.<sup>4</sup> On June 19, 2008, FINRA

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

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

<sup>3</sup> See Securities Exchange Act Release No. 34-57525 (March 18, 2008); 73 FR 15815-15817 (March 25, 2008) (notice).

<sup>4</sup> The following submitted comment letters: Steven B. Caruso, Maddox Hargett & Caruso, P.C. (March 21, 2008) (“Caruso letter”); Jeff Sonn, Sonn, Erez, PLC (March 26, 2008) (“Sonn letter”); Seth E. Lipner, Professor of Law, Zicklin School of Business, Baruch College, CUNY, Member, Deutsch Lipner (March 28, 2008) (“Lipner letter”); Steve Buchwalter, Attorney (March 29, 2008 and May 15, 2008) (“Buchwalter letters”); William A. Jacobson, Associate Clinical

responded to the comment letters<sup>5</sup> and submitted Amendment 1 to the proposed rule change. This order provides notice of the proposed rule change, as modified by Amendment No. 1, and approves the proposed rule change as amended on an accelerated basis.

## II. Description of the Proposed Rule Change

FINRA initially proposed to adopt Rule 12905 of the Customer Code and Rule 13905 of the Industry Code to permit submissions to arbitrators after a case has closed only under the following circumstances: (1) as ordered by a court; (2) at the request of any party within 30 days of service of an award or notice that a matter has been closed, for ministerial matters; or (3) if all parties agree and submit documents within 30 days of service of an award or notice that a matter has been closed.

After reviewing the comments, FINRA amended its proposed rule change on June 19, 2008, so that submissions to arbitrators after a case has closed would only be permitted under the following circumstances: (1) as ordered by a court;<sup>6</sup> (2) at the request of any

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Professor, Director, Cornell Securities Law Clinic, Cornell Law School (March 31, 2008) (“Cornell letter”); Scott R. Shewan, Born, Pape & Shewan, LLP (April 1, 2008) (“Shewan letter”); Barry D. Estell, Attorney (April 9, 2008) (“Estell letter”); Timothy Canning, Canning & Associates (April 10, 2008); Joseph Fogel, Fogel Associates (April 11, 2008) (“Fogel letter”); David P. Neuman, Stoltmann Law Offices, P.C. (April 14, 2008) (“Neuman letter”); Debra B. Hayes, Attorney (April 15, 2008) (“Hayes letter”); Karen Tyler, President, North American Securities Administrators Association (“NASAA”), Inc., and North Dakota Securities Commissioner (April 17, 2008) (“NASAA letter”); and Laurence S. Schultz, President, Public Investors Arbitration Bar Association (“PIABA”) (April 18, 2008) (“PIABA letter”).

<sup>5</sup> See Letter from Margo A. Hassan, Counsel, FINRA, to Florence E. Harmon, Deputy Secretary, Commission (June 19, 2008).

<sup>6</sup> The Director, as defined in Rule 12100 of the Customer Code and Rule 13100 of the Industry Code, will forward documents submitted pursuant to this circumstance, along with any responses from parties, to the arbitrators.

party within 10 days of service of an award or notice that a matter has been closed, for typographical or computational errors or mistakes in the description of any person or property referred to in the award; or (3) if all parties agree and submit documents within 10 days of service of an award or notice that a matter has been closed.<sup>7</sup> If the Director determines submissions made pursuant to circumstances (2) and (3) comply with the grounds for submission, the proposed rules would require the Director to forward the submissions, along with any responses from the parties, to the arbitrators. The arbitrators have the discretion under the proposed rules to decline the requests made pursuant to circumstances (2) and (3). Under the proposed rules, the requests would be considered denied unless the arbitrators rule within 10 days after the Director forwards the documents. The proposed rules would not allow any requests to extend the time period for the payment of any award pursuant to Rule 12904 for customer disputes or to Rule 13904 for industry disputes.

### III. Summary of Comments Received and FINRA Response

As noted above, the Commission received 13 comment letters on the proposed rules.<sup>8</sup> Twelve commenters opposed the proposal;<sup>9</sup> one commenter supported the proposal but urged FINRA to make clear that the time period to pay an award would not be extended

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<sup>7</sup> Unilateral requests to reopen closed cases for expungement relief would not be permitted (Conversation between Margo A. Hassan, Counsel, FINRA and Lourdes Gonzalez, Assistant Chief Counsel – Sales Practices, Office of Chief Counsel of the Division of Trading and Markets, U.S. Securities and Exchange Commission on July 10, 2008).

<sup>8</sup> See supra, note 4.

<sup>9</sup> See Caruso, Sonn, Buchwalter (March 29, 2008 and May 15, 2008), Cornell, Shewan, Estell, Fogel, Neuman, Hayes, NASAA and PIABA letters.

by the proposed rule change.<sup>10</sup> A number of commenters argued that the term “ministerial matters” lacked specificity and requested further clarification.<sup>11</sup> Others predicted that permitting unilateral motions relating to ministerial matters would increase litigation costs for parties and that the rules would delay award payments.<sup>12</sup> Several commenters maintained that the rules would allow expungement to be accomplished without any outside oversight.<sup>13</sup> Other commenters suggested that the rule change should not allow a member or associated person to extend the 30-day period for payment of award.<sup>14</sup> A number of commenters stated that the proposed rule conflicts with the policy of finality in arbitration.<sup>15</sup> Several commenters argued that it is against the public interest to allow a party to raise an issue it did not raise during the hearing.<sup>16</sup>

In response to the comments, on June 19, 2008, FINRA filed Amendment No. 1 to the proposed rule change to address potential ambiguities in the rules and further limit the circumstances under which a party may make a request under the rules. In particular, FINRA proposed to shorten the time limit for requests made by the parties from 30 to 10 days to expedite requests under the rules and to avoid delays in award payments. FINRA also proposed to clarify that such a request would not extend the time period for paying

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<sup>10</sup> See Lipner letter.

<sup>11</sup> See, e.g., Caruso, Sonn, Cornell, Shewan, Estell, Hayes, NASAA and PIABA letters.

<sup>12</sup> See, e.g., Buchwalter, Cornell, Shewan, Estell, Fogel, Neuman, Hayes and PIABA letters.

<sup>13</sup> See, e.g., Estell, NASAA and PIABA letters.

<sup>14</sup> See, e.g., Lipner and Cornell letters.

<sup>15</sup> See, e.g., Buchwalter, Cornell, Estell, Hayes, Shewan, NASAA and PIABA letters.

<sup>16</sup> See, e.g., Cornell, Estell and PIABA letters.

an award. In addition, FINRA proposed to clarify the scope of the term “ministerial matters” by limiting the grounds for unilateral requests to typographical or computational errors, such as an addition mistake when computing forum fees, or to mistakes in the description of a person or property, such as an incorrect reference to the title of an account in an award.

Several commenters questioned whether there is sufficient need for the proposed rules given what they view as the limited number of requests to permit submissions to arbitrators after a case has closed.<sup>17</sup> FINRA responded that it receives an estimated 150 or more such requests per year, which is a significant number in FINRA’s view.<sup>18</sup> FINRA also stated that it believes the proposal would add transparency to the forum’s process for considering such requests.<sup>19</sup>

#### IV. Solicitation of Comments

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

##### Electronic Comments:

- Use the Commission’s Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-FINRA-2008-005 on the subject line.

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<sup>17</sup> See, e.g., Cornell, Shewan, NASAA and PIABA letters.

<sup>18</sup> See supra, note 5.

<sup>19</sup> Id.

Paper Comments:

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

All submissions should refer to File Number SR-FINRA-2008-005. 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, Amendment No. 1, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 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 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-2008-005 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

V. Discussion and Findings

After careful review, the Commission finds that the proposed rule change, as amended, is consistent with the requirements of the Act, and the rules and regulations

thereunder that are applicable to a national securities association.<sup>20</sup> In particular, the Commission finds that the proposed rule change, as amended, is consistent with the provisions of Section 15A(b)(6) of the Act, which provides that the rules of a national securities association should be designed “in general, to protect investors and the public interest[.]” The Commission concludes that the proposed rule change would strictly limit the circumstances under which a party would be permitted to submit documents to arbitrators in closed cases, add transparency to the process for considering such requests and support a fair arbitration process. The Commission finds that it is in the public interest to approve the proposed rule change as soon as possible to expedite its implementation. Accordingly, the Commission believes good cause exists, consistent with Sections 6(b)(5) and 19(b)(2) of the Act to approve on an accelerated basis the proposed rule change as modified by Amendment No. 1.

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<sup>20</sup> In approving this proposal, the Commission has considered the proposed rule’s impact on efficiency, competition and capital formation. See 15 U.S. C. 78c(f).

VI Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,<sup>21</sup> that the proposed rule change (SR-FINRA-2008-005), as modified by Amendment No. 1 thereto, be, and hereby is, approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>22</sup>

Florence E. Harmon  
Acting Secretary

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

<sup>22</sup> 17 CFR 200.30-3(a)(12).