Financial Industry Regulatory Authority

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October 31, 2016

Mr. Brent J. Fields
Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090

Re: File No. SR-FINRA-2016-030 – Proposed Rule Change Relating to Motions to Dismiss in Arbitration; Response to Comments

Dear Mr. Fields:

This letter responds to comments submitted to the Securities and Exchange Commission ("Commission") regarding the above-referenced filing. In this filing, FINRA is proposing to amend FINRA Rule 12504 of the Code of Arbitration Procedure for Customer Disputes and FINRA Rule 13504 of the Code of Arbitration Procedure for Industry Disputes (together, the "Codes"), to provide that arbitrators may act upon a motion to dismiss a party or claim prior to the conclusion of a party's case in chief if the arbitrators determine that the non-moving party previously brought a claim regarding the same dispute against the same party, and the dispute was fully and finally adjudicated on the merits and memorialized in an order, judgment, award, or decision.[1]

The Commission received four comment letters in response to the proposed rule change.[2] Two commenters supported the proposed rule change.[3] Caruso stated that "the proposed amendments would be a fair, equitable and reasonable approach." FSI stated that the proposed rule change "will enhance the efficiency and effectiveness of the dispute resolution process" and "would promote both the integrity and fairness of arbitration proceedings." PIABA neither supported nor opposed the proposed rule change. PIABA stated that "a current ground for dismissal under the present rule, that 'the non-moving party previously released the claim(s) in dispute by a signed settlement agreement and/or written release,' and the proposed

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1 See Securities Exchange Act Release No. 78553 (August 11, 2016), 81 FR 54888 (August 17, 2016) (File No. SR-FINRA-2016-030).

2 See Letter from Steven B. Caruso, Esq., Maddox Hargett & Caruso, P.C., dated August 11, 2016 ("Caruso"); Letter from David T. Bellaire, Esq., Financial Services Institute, dated September 7, 2016 ("FSI"); Letter from William A. Jacobson, Clinical Professor of Law, Cornell Law School, and Director, Cornell Securities Law Clinic, dated September 7, 2016 ("Cornell"); and Letter from Hugh D. Berkson, Esq., President, Public Investors Arbitration Bar Association, dated September 7, 2016 ("PIABA").

3 See Caruso and FSI.

additional language are in line with the same reasoning: that a final, enforceable resolution has already been reached." However, PIABA indicated that it is wary of any expansion of the rule in light of previous abuse and stated that any change to these rules should be narrow. Cornell opposed the proposed rule change. Three of the commenters raised concerns about the proposed rule change.[4] FINRA addresses these concerns below.

Summary Judgment

Caruso raised a concern that while the Codes provide for motions to dismiss, they do not provide for claimants' motions for summary judgment. Caruso suggested that FINRA address the disparity. FINRA adopted the limitations relating to motions to dismiss because FINRA believed that some respondents were filing prehearing motions routinely and repetitively in an effort to delay scheduled hearing sessions on the merits, increase investors' costs, and intimidate less sophisticated investors. The rules were designed to deter inappropriate use of dispositive motions, not to provide respondents with a new vehicle to seek early dismissal of a claimant's claims. Given FINRA's goal of limiting dispositive motions that curtail the opportunity for parties to fully present their cases, FINRA declines to amend the Codes as suggested by the commenter.

Demonstrated Need for the Proposed Rule Change

Cornell stated that FINRA has not provided statistics on the frequency of parties bringing repeat claims at the forum and should demonstrate a compelling need for the proposed rule change. Cornell also asserted that the courts should handle parties' issues concerning repeat filings, noting that numerous courts have held that bringing duplicative claims is an unlawful collateral attack on an award, and have stayed or enjoined arbitrations. The commenter stated that given that determinations as to what constitutes adjudication of a prior claim may involve legal concepts of res judicata and collateral estoppel, and interpretation of the Federal Arbitration Act, FINRA failed to demonstrate that the court remedy is less effective and fair to all parties. FINRA disagrees with the commenter's views.

FINRA believes that it has demonstrated a need for the proposed rule change. The proposed rule change is consistent with the philosophy of the current rule, and FINRA believes it is appropriate to allow an argument on this new ground to be raised at an earlier time in the proceeding. Based on statistics concerning the current grounds for motions to dismiss, FINRA expects the proposed rule change to impact a small number of cases.[5] When arbitrators have sufficient information to determine the finding with respect to a motion to dismiss prior to hearing the non-moving party's case, the proposed rule change would reduce both parties' costs where the motion is granted. Moreover, the proposed rule change would continue to permit the non-moving party to present evidence and testimony to the arbitrators concerning the merits of the motion prior to the decision on the motion, and thus would limit the risk that the arbitrators might act on incomplete or insufficient information. FINRA believes that the benefit of the cost savings to the impacted parties outweighs the concern raised by the commenter.

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4 See Caruso, Cornell and PIABA.

5 See SR-FINRA-2016-030 at page 9. FINRA staff provided the Task Force with statistics for 2013 and 2014.

Concerning the commenter's suggestion that parties use the courts to address the issue of repeat filings, FINRA believes that parties would be better served by having issues relating to the earlier adjudication of a dispute resolved in the forum where the claimant chose to initiate the arbitration proceeding. The moving party should not have to seek a remedy in a separate court proceeding, and the non-moving party should not be subject to additional litigation costs outside of the arbitration forum to resolve these issues. This is especially important for *pro se* investors. These parties may not be in the position to argue the law in court without counsel, and forcing them into a court proceeding might preclude them from pursuing their claims.

Scope of the Proposed Rule Change

PIABA stated that amendments to the motions to dismiss rules should be narrow, and that FINRA should emphasize that the rules apply "to adjudications on the merits where the non-moving parties have had a full and fair opportunity to argue their claims." PIABA also stated that FINRA should apply the term "same party" only to a specific party named in a previous arbitration.

FINRA drafted the new ground in the motions to dismiss rules narrowly because it continues to adhere to the principle that motions to dismiss a claim prior to the conclusion of a party's case in chief are discouraged in arbitration. FINRA would not reject a claim initiated against a related, but previously unnamed party. It would be a moving party's responsibility to demonstrate to the arbitrators that such a party is the "same party." If the Commission approves the proposed rule change, FINRA will train its arbitrators on the new rule, emphasizing that the moving party must demonstrate that the non-moving party brought the same dispute against the same party and that the non-moving party had a full opportunity to present its claims in the earlier proceeding.

Conclusion

FINRA believes that the foregoing responds to the issues raised by the commenters to the rule filing and that the proposed rule change should be approved as filed. If you have any questions, please contact me at (212) 858-4481, email: margo.hassan@finra.org.

Sincerely,

/s/ Margo A. Hassan

Margo A. Hassan
Associate Chief Counsel