

Collective Action Claims

SEC Approves Amendments to Rule 13204 of the Industry Code to Preclude Collective Action Claims from Being Arbitrated Under the Code

Effective Date: July 9, 2012

Executive Summary

The SEC approved amendments to FINRA Rule 13204 of the Code of Arbitration Procedure for Industry Disputes (Industry Code) to preclude collective action claims by employees of FINRA member firms under the Fair Labor Standards Act (FLSA),¹ the Age Discrimination in Employment Act (ADEA)² or the Equal Pay Act of 1963 (EPA)³ from being arbitrated under the Industry Code.⁴

The amendments are effective on July 9, 2012, for any claims that are part of a certified or putative collective action under the FLSA, ADEA or EPA. The text of the amendments is set forth in Attachment A.

Questions concerning this *Notice* should be directed to:

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Background and Discussion

The Code of Arbitration Procedure for Customer Disputes (Customer Code) and the Industry Code (together, Codes) prohibit a claim that is part of a class action from being arbitrated in FINRA's Dispute Resolution forum.⁵ Specifically, the class action rules provide that any claim that is based upon the same facts and law, and involves the same defendants as in a court-certified class action or a putative class action, shall not be arbitrated, unless the party bringing the claim files with FINRA one of the following:

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Notice Type

- ▶ Rule Amendment

Suggested Routing

- ▶ Compliance
- ▶ Legal
- ▶ Registered Representatives

Key Topics

- ▶ Arbitration
- ▶ Code of Arbitration Procedure
- ▶ Collective Action
- ▶ Industry Code

Referenced Rules & Notices

- ▶ Rule 13204

- ▶ a copy of a notice filed with the court in which the class action is pending that the party will not participate in the class action or in any recovery that may result from the class action, or has withdrawn from the class according to any conditions set by the court; or
- ▶ a notice that the party will not participate in the class action or in any recovery that may result from the class action.⁶

FINRA issued an interpretive letter (FINRA letter) in 1999 that stated that its class action rules should include collective action claims brought under the FLSA and, thus, considered these claims ineligible for arbitration in its forum.⁷ Despite that interpretation, a district court decision found that an FLSA collective action is not a class action for purposes of Rule 13204 of the Industry Code and compelled arbitration of the claim in FINRA's dispute resolution forum.⁸ FINRA is, therefore, amending Rule 13204 of the Industry Code to preclude expressly collective actions from being arbitrated in its dispute resolution forum.⁹

Under the amendments, Rule 13204(b)(1) provides that collective action claims under the FLSA, the ADEA or the EPA may not be arbitrated under the Code.

Second, Rule 13204(b)(2) states that any claim that involves similarly-situated¹⁰ plaintiffs against the same defendants, such as a court-certified collective action or a putative collective action,¹¹ or that is ordered by a court for collective action at a forum not sponsored by a self-regulatory organization, shall not be arbitrated under the Code, if the party bringing the claim has opted-in to the collective action. Thus, under the rule, if an associated person opts in to a collective action, that person would be precluded from arbitrating the same claims in FINRA's arbitration forum.

Third, Rule 13204(b)(3) provides that the director will refer to a panel any dispute as to whether a claim is part of a collective action, unless a party asks the court or other forum hearing the collective action to resolve the dispute within 10 days of receiving notice that the director has decided to refer the dispute to a panel. The rule gives arbitrators the authority to decide disputes about whether a claim is part of a collective action, unless a court or other forum resolves the dispute.

Finally, Rule 13204(b)(4) prohibits a member firm or associated person from enforcing an agreement to arbitrate in this forum against a member of a certified or putative collective action with respect to any claim that is the subject of the certified or putative collective action until either the collective certification is denied or the group is decertified. This rule clarifies that the existence of a certified or putative collective action nullifies any pre-dispute arbitration agreements with respect to claims involving that collective action. If, however, a court denies a plaintiff's request to certify a collective action or the court decertifies the collective action, the pre-dispute arbitration agreement would be enforceable.

Effective Date Provisions

The amendments are effective on July 9, 2012, for any claims that are part of a certified or putative collective action under the FLSA, ADEA or EPA.

Endnotes

1. See 29 U.S.C. § 201 *et seq.*
2. See 29 U.S.C. §§ 621 *et seq.* The relief provisions of the ADEA incorporate Section 16 of the FLSA, which outlines the penalties for violations of the statute, and state that the ADEA shall be enforced by the “powers, remedies and procedures” of the FLSA. See 29 U.S.C. § 626(b).
3. See 29 U.S.C. § 206(d). The EPA, which is part of FLSA as amended, is administered and enforced by the United States Equal Employment Opportunity Commission. The relief provisions of the EPA also incorporate Section 16 of the FLSA.
4. See Securities Exchange Act Rel. No. 66774 (April 9, 2012), 77 FR 22374 (April 13, 2012) (Notice of Filing of Amendment No. 1 and Order Granting Accelerated Approval of a Proposed Rule Change as Modified by Amendment No. 1, Amending Rule 13024 of the Code of Arbitration Procedure for Industry Disputes To Preclude Collective Action Claims From Being Arbitrated) (File No. SR-FINRA-2011-075).
5. See Rule 12204 of the Customer Code and Rule 13204 of the Industry Code (class action rules).
6. In its April 2012 Approval Order, the SEC states that “Rule 13204 of the Industry Code generally provides that any claim that is based upon the same facts and law, and involves the same defendants as in a court-certified class action or a putative class action, shall not be arbitrated.” See *supra* note 4 at p. 22374. FINRA notes that, under its class action rules, claims based on the same facts and law and involving the same defendants may be arbitrated in FINRA’s forum provided that the party bringing the claims meets certain criteria. See *supra* note 5.
7. See, e.g., [*FINRA Interpretive Letter to Cliff Palefsky, Esq.*](#), dated Sept. 21, 1999.
8. *Hugo Gomez et al. v. Brill Securities, Inc. et al.*, No. 10 Civ. 3503, 2010 U.S. Dist. LEXIS 118162 (S.D.N.Y. Nov. 2, 2010); see also *Velez v. Perrin Holden & Davenport Capital Corp., Nelson Braff, Jody Eisenman and Perter Hoffman*, No. 10 Civ. 3735, 2011 U.S. Dist. LEXIS 16678 (S.D.N.Y. Feb. 3, 2011).
9. The Customer Code would not be amended because, for the FLSA, ADEA or EPA to apply, there must be an employment relationship between an employer and employee. See U.S. Department of Labor, “[What does the Fair Labor Standards Act require?](#)”, elaws—Fair Labor Standards Act Advisor.
10. The FLSA statute uses the term “similarly-situated” to describe the type of plaintiffs who file a collective action claim. See 29 U.S.C. § 216(b).
11. Before a collective action is certified, courts often refer to the case as a *putative* collective action.

ATTACHMENT A

New language is underlined; deleted language is in brackets.

Code of Arbitration Procedure for Industry Disputes

Industry Code

13204. Class Action & Collective Action Claims

(a) Class Actions

(1) Class action claims may not be arbitrated under the Code.

(2) Any claim that is based upon the same facts and law, and involves the same defendants as in a court-certified class action or a putative class action, or that is ordered by a court for class-wide arbitration at a forum not sponsored by a self-regulatory organization, shall not be arbitrated under the Code, unless the party bringing the claim files with FINRA one of the following:

(i) a copy of a notice filed with the court in which the class action is pending that the party will not participate in the class action or in any recovery that may result from the class action, or has withdrawn from the class according to any conditions set by the court; or

(ii) a notice that the party will not participate in the class action or in any recovery that may result from the class action.

(3) The Director will refer to a panel any dispute as to whether a claim is part of a class action, unless a party asks the court hearing the class action to resolve the dispute within 10 days of receiving notice that the Director has decided to refer the dispute to a panel.

(4) A member or associated person may not enforce any arbitration agreement against a member of a certified or putative class action with respect to any claim that is the subject of the certified or putative class action until:

- The class certification is denied;
- The class is decertified;
- The member of the certified or putative class is excluded from the class by the court; or
- The member of the certified or putative class elects not to participate in the class or withdraws from the class according to conditions set by the court, if any.

(b) Collective Actions

(1) Collective action claims under the Fair Labor Standards Act, the Age Discrimination in Employment Act, or the Equal Pay Act of 1963 may not be arbitrated under the Code.

(2) Any claim that involves plaintiffs who are similarly-situated against the same defendants as in a court-certified collective action or a putative collective action, or that is ordered by a court for collective action at a forum not sponsored by a self-regulatory organization, shall not be arbitrated under the Code, if the party bringing the claim has opted-in to the collective action.

(3) The Director will refer to a panel any dispute as to whether a claim is part of a collective action, unless a party asks the court or other forum hearing the collective action to resolve the dispute within 10 days of receiving notice that the Director has decided to refer the dispute to a panel.

(4) A member or associated person may not enforce an agreement to arbitrate in this forum against a member of a certified or putative collective action with respect to any claim that is the subject of the certified or putative collective action until the collective action certification is denied or the collective action is decertified.

[This] These subparagraphs do[es] not otherwise affect the enforceability of any rights under the Code or any other agreement.