the objectives of Section 6(b)(4) of the Act [9] in that it is designed to provide for the equitable allocation of reasonable dues, fees, and other charges among CBOE members and other persons using its facilities.

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

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

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

The Exchange neither solicited nor received comments on the proposal.

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

Because the foregoing proposed rule change constitutes a stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of an existing rule, it has become effective pursuant to Section 19(b)(3)(A)(i) of the Act [10] and Rule 19b 4(f)(1) thereunder.[11] 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–CBOE–2008–27 on the subject line.

Paper Comments

• Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–CBOE–2008–27. 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 inspection and copying 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 CBOE. 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–CBOE–2008–27 and should be submitted on or before April 10, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[12]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E8–5590 Filed 3–19–08; 8:45 am]

BILLING CODE 8011–01–P

[9] 15 U.S.C. 78f(b)(4).

[10] 15 U.S.C. 78s(b)(3)(A)(i).

[11] 17 CFR 240.19b–4(f)(1).

[12] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–57497; File No. SR–FINRA–2007–021]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of Proposed Rule Change and Amendment No. 1 Relating to Amendments to the Code of Arbitration Procedure for Customer Disputes and the Code of Arbitration Procedure for Industry Disputes To Address Motions To Dismiss and To Amend the Eligibility Rule Related to Dismissals

March 14, 2008.

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 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'') on November 2, 2007, and amended on February 13, 2008 (Amendment No. 1), the proposed rule change as described in Items I, II, and III below, which Items have been substantially prepared by FINRA Dispute Resolution. The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

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

FINRA Dispute Resolution is proposing to amend NASD Rules 12206 and 12504 of the Code of Arbitration Procedure for Customer Disputes (''Customer Code'') and NASD Rules 13206 and 13504 of the Code of Arbitration Procedure for Industry Disputes (''Industry Code'') by providing specific procedures that will govern motions to dismiss, and amending the provision of the eligibility rule related to dismissals. Below is the text of the proposed rule change. Proposed new language is in italics; proposed deletions are in brackets.

* * * * *

12206. Time Limits

(a) No change.

(b) Dismissal under Rule

Dismissal of a claim under this rule does not prohibit a party from pursuing the claim in court. By filing a motion to

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

[2] 17 CFR 240.19b–4.

dismiss a claim under this rule, the moving party agrees that if the panel dismisses a claim under this rule, the non-moving party may withdraw any remaining related claims without prejudice and may pursue all of the claims in court.

(1) Motions under this rule must be made in writing, and must be filed separately from the answer, and only after the answer is filed.

(2) Unless the parties agree or the panel determines otherwise, parties must serve motions under this rule at least 90 days before a scheduled hearing, and parties have 30 days to respond to the motion.

(3) Motions under this rule will be decided by the full panel.

(4) The panel may not grant a motion under this rule unless an in-person or telephonic prehearing conference on the motion is held or waived by the parties. Prehearing conferences to consider motions under this rule will be recorded as set forth in Rule 12606.

(5) If the panel grants a motion under this rule (in whole or part), the decision must be unanimous, and must be accompanied by a written explanation.

(6) If the panel denies a motion under this rule, a party may not re-file the denied motion, unless specifically permitted by panel order.

(7) If the party moves to dismiss on multiple grounds including eligibility, the panel must decide eligibility first.

- *If the panel grants the motion to dismiss the case on eligibility grounds on all claims, it shall not rule on any other grounds for the motion to dismiss.*
- *If the panel grants the motion to dismiss on eligibility grounds on some, but not all claims, and the party against whom the motion was granted elects to move the case to court, the panel shall not rule on any other ground for dismissal for 15 days from the date of service of the panel's decision to grant the motion to dismiss on eligibility grounds.*
- *If a panel dismisses any claim on eligibility grounds, the panel must record the dismissal on eligibility grounds on the face of its order and any subsequent award the panel may issue.*
- *If the panel denies the motion to dismiss on eligibility grounds, it shall rule on the other bases for the motion to dismiss the remaining claims in accordance with the procedures set forth in Rule 12504(a).*

(8) If the panel denies a motion under this rule, the panel must assess forum fees associated with hearings on the motion against the moving party.

(9) If the panel deems frivolous a motion filed under this rule, the panel must also award reasonable costs and attorneys' fees to any party that opposed the motion.

(10) The panel also may issue other sanctions under Rule 12212 if it determines that a party filed a motion under this rule in bad faith.

(c)–(d) No change.

* * * * *

Rule 12504. [Reserved] *Motions to Dismiss*

(a) *Motions to Dismiss Prior to Conclusion of Case in Chief*

(1) *Motions to dismiss a claim prior to the conclusion of a party's case in chief are discouraged in arbitration.*

(2) *Motions under this rule must be made in writing, and must be filed separately from the answer, and only after the answer is filed.*

(3) *Unless the parties agree or the panel determines otherwise, parties must serve motions under this rule at least 60 days before a scheduled hearing, and parties have 45 days to respond to the motion.*

(4) *Motions under this rule will be decided by the full panel.*

(5) *The panel may not grant a motion under this rule unless an in-person or telephonic prehearing conference on the motion is held or waived by the parties. Prehearing conferences to consider motions under this rule will be recorded as set forth in Rule 12606.*

(6) *The panel cannot act upon a motion to dismiss a party or claim under paragraph (a) of this rule, unless the panel determines that:*

(A) *the non-moving party previously released the claim(s) in dispute by a signed settlement agreement and/or written release; or*

(B) *the moving party was not associated with the account(s), security(ies), or conduct at issue.*

(7) *If the panel grants a motion under this rule (in whole or part), the decision must be unanimous, and must be accompanied by a written explanation.*

(8) *If the panel denies a motion under this rule, the moving party may not re-file the denied motion, unless specifically permitted by panel order.*

(9) *If the panel denies a motion under this rule, the panel must assess forum fees associated with hearings on the motion against the moving party.*

(10) *If the panel deems frivolous a motion filed under this rule, the panel must also award reasonable costs and attorneys' fees to any party that opposed the motion.*

(11) *The panel also may issue other sanctions under Rule 12212 if it determines that a party filed a motion under this rule in bad faith.*

(b) *Motions to Dismiss After Conclusion of Case in Chief*

A motion to dismiss made after the conclusion of a party's case in chief is not subject to the procedures set forth in subparagraph (a).

(c) Motions to Dismiss Based on Eligibility

A motion to dismiss based on eligibility filed under Rule 12206 will be governed by that rule.

(d) Motions to Dismiss Based on Failure to Comply with Code or Panel Order

A motion to dismiss based on failure to comply with any provision in the Code, or any order of the panel or single arbitrator filed under Rule 12212 will be governed by that rule.

(e) Motions to Dismiss Based on Discovery Abuse

A motion to dismiss based on discovery abuse filed under Rule 12511 will be governed by that rule.

* * * * *

13206. Time Limits

(a) No change.

(b) Dismissal under Rule

Dismissal of a claim under this rule does not prohibit a party from pursuing the claim in court. By filing a motion to dismiss a claim under this rule, the moving party agrees that if the panel dismisses a claim under this rule, the non-moving party may withdraw any remaining related claims without prejudice and may pursue all of the claims in court.

(1) Motions under this rule must be made in writing, and must be filed separately from the answer, and only after the answer is filed.

(2) Unless the parties agree or the panel determines otherwise, parties must serve motions under this rule at least 90 days before a scheduled hearing, and parties have 30 days to respond to the motion.

(3) Motions under this rule will be decided by the full panel.

(4) The panel may not grant a motion under this rule unless an in-person or telephonic prehearing conference on the motion is held or waived by the parties. Prehearing conferences to consider motions under this rule will be recorded as set forth in Rule 13606.

(5) If the panel grants a motion under this rule (in whole or part), the decision must be unanimous, and must be accompanied by a written explanation.

(6) If the panel denies a motion under this rule, a party may not re-file the denied motion, unless specifically permitted by panel order.

(7) If the party moves to dismiss on multiple grounds including eligibility, the panel must decide eligibility first.

- *If the panel grants the motion to dismiss the case on eligibility grounds* *on all claims, it shall not rule on any other grounds for the motion to dismiss.*

- *If the panel grants the motion to dismiss on eligibility grounds on some, but not all claims, and the party against whom the motion was granted elects to move the case to court, the panel shall not rule on any other ground for dismissal for 15 days from the date of service of the panel's decision to grant the motion to dismiss on eligibility grounds.*
- *If a panel dismisses any claim on eligibility grounds, the panel must record the dismissal on eligibility grounds on the face of its order and any subsequent award the panel may issue.*
- *If the panel denies the motion to dismiss on eligibility grounds, it shall rule on the other bases for the motion to dismiss the remaining claims in accordance with the procedures set forth in Rule 13504(a).*

(8) If the panel denies a motion under this rule, the panel must assess forum fees associated with hearings on the motion against the moving party.

(9) If the panel deems frivolous a motion filed under this rule, the panel must also award reasonable costs and attorneys' fees to any party that opposed the motion.

(10) The panel also may issue other sanctions under Rule 13212 if it determines that a party filed a motion under this rule in bad faith.

(c)–(d) No change.

* * * * *

13504. [Reserved] *Motions to Dismiss*

(a) Motions to Dismiss Prior to Conclusion of Case in Chief

(1) Motions to dismiss a claim prior to the conclusion of a party's case in chief are discouraged in arbitration.

(2) Motions under this rule must be made in writing, and must be filed separately from the answer, and only after the answer is filed.

(3) Unless the parties agree or the panel determines otherwise, parties must serve motions under this rule at least 60 days before a scheduled hearing, and parties have 45 days to respond to the motion.

(4) Motions under this rule will be decided by the full panel.

(5) The panel may not grant a motion under this rule unless an in-person or telephonic prehearing conference on the motion is held or waived by the parties. Prehearing conferences to consider motions under this rule will be recorded as set forth in Rule 13606.

(6) The panel cannot act upon a motion to dismiss a party or claim under paragraph (a) of this rule, unless the panel determines that:

(A) the non-moving party previously released the claim(s) in dispute by a signed settlement agreement and/or written release; or

(B) the moving party was not associated with the account(s), security(ies), or conduct at issue.

(7) If the panel grants a motion under this rule (in whole or part), the decision must be unanimous, and must be accompanied by a written explanation.

(8) If the panel denies a motion under this rule, the moving party may not re-file the denied motion, unless specifically permitted by panel order.

(9) If the panel denies a motion under this rule, the panel must assess forum fees associated with hearings on the motion against the moving party.

(10) If the panel deems frivolous a motion filed under this rule, the panel must also award reasonable costs and attorneys' fees to any party that opposed the motion.

(11) The panel also may issue other sanctions under Rule 13212 if it determines that a party filed a motion under this rule in bad faith.

(b) Motions to Dismiss After Conclusion of Case in Chief

A motion to dismiss made after the conclusion of a party's case in chief is not subject to the procedures set forth in subparagraph (a).

(c) Motions to Dismiss Based on Eligibility

A motion to dismiss based on eligibility filed under Rule 13206 will be governed by that rule.

(d) Motions to Dismiss Based on Failure to Comply with Code or Panel Order

A motion to dismiss based on failure to comply with any provision in the Code, or any order of the panel or single arbitrator filed under Rule 13212 will be governed by that rule.

(e) Motions to Dismiss Based on Discovery Abuse

A motion to dismiss based on discovery abuse filed under Rule 13511 will be governed by that rule.

* * * * *

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

FINRA [3] proposes to provide specific procedures to govern motions to dismiss, and to amend the provision of the eligibility rule related to dismissals. The proposal is designed to ensure that parties would have their claims heard in arbitration, by significantly limiting the grounds for filing motions to dismiss prior to the conclusion of a party's case in chief and by imposing stringent sanctions against parties for engaging in abusive practices under the rule.

Background

The Code of Arbitration Procedure that was in use prior to April 16, 2007, did not address motion practice.[4] Because motions were becoming increasingly common in arbitration, FINRA proposed to include in its revision of the entire Code of Arbitration Procedure (Code Revision) some guidance for parties and arbitrators with respect to motions practice.

The Code Revision, as initially filed with the SEC in 2003, contained a rule that would have permitted a panel to grant a motion to decide claims before a hearing on the merits (a ''dispositive motion'') only under extraordinary circumstances. FINRA proposed this rule in an attempt to address concerns raised by investors' counsel, SEC staff and other constituent groups about abusive and duplicative filing of dispositive motions. Specifically, FINRA received complaints that parties (typically respondent [5] firms) were filing dispositive motions routinely and repetitively in an apparent effort to delay scheduled hearing sessions on the merits, increase investors' costs (typically claimants [6]), and intimidate less sophisticated parties.[7] In some

[3] Although some of the events referenced in this rule filing occurred prior to the formation of FINRA through consolidation of NASD and the member regulatory functions of NYSE Regulation, the rule filing refers to FINRA throughout for simplicity.

[4] The Customer and Industry Codes became effective on April 16, 2007, for claims filed on or after that date; the old Code continues to apply to pending cases until their conclusion.

[5] A respondent is a party against whom a statement of claim or third party claim has been filed.

[6] A claimant is a party that files the statement of claim and other documents that initiate an arbitration.

[7] For example, the Securities Arbitration Commentator published a study in Fall 2006 on motions to dismiss in customer cases, which concludes that, in the universe of cases that went

Continued

cases, if a party did not receive a favorable ruling on a dispositive motion filed at a particular stage in an arbitration proceeding, that party would re-file the same or a similar dispositive motion at a later time, which often served only to increase investors' costs and delay the hearing and the issuance of any award. Moreover, FINRA learned through various constituent and focus groups that some respondents' attorneys were being counseled by their law firms that an acceptable and useful tactic was to file multiple dispositive motions at various stages of an arbitration proceeding.

When the Code Revision was published for comment in the **Federal Register**, commenters opposed the dispositive motion rule for a variety of reasons. Therefore, FINRA removed the rule from the Code Revision and re-filed it separately.[8] The SEC then approved the Code Revision without the dispositive motion rule.[9]

Prior Dispositive Motion Proposal

As re-filed with the SEC, the dispositive motion proposal would have permitted a panel to grant a dispositive motion prior to an evidentiary hearing only under extraordinary circumstances. [10] The SEC published the proposal for public comment on August 31, 2006, and received over 60 comment letters,[11] the majority of which opposed the proposal. The comments and FINRA's response are discussed in Section 5 below.

Based on the comments, FINRA recognized that the proposal did not provide effective guidance on how dispositive motions would be handled in the forum. Because the comments indicated that various issues involving dispositive motions required more guidance, FINRA withdrew the dispositive motion proposal, and filed a new proposed rule change to provide specific procedures that would govern motions to dismiss. FINRA also proposes to amend the separate rule governing dismissals made on eligibility grounds.

Motions To Dismiss on Other Than Eligibility Grounds

FINRA filed the proposed rule change to provide specific procedures that would govern motions to dismiss. Generally, FINRA believes that parties have the right to a hearing in arbitration. In certain very limited circumstances, however, it would be unfair to require a party to proceed to a hearing. The proposal is designed to balance these competing interests. The proposal should ensure that parties [12] have their claims heard in arbitration, by significantly limiting the grounds for filing motions to dismiss prior to conclusion of a party's case in chief and by imposing stringent sanctions against parties for engaging in abusive practices under the rule. The proposal would permit parties to file a motion to dismiss at the conclusion of a party's case in chief, based on any theory of law.

The proposed rule change would govern motions to dismiss filed prior to the conclusion of a party's case in chief (under the Customer Code or Industry Code, as applicable), as discussed in further detail below.

Discourage Motions To Dismiss a Claim Prior to a Party's Case in Chief

The proposed rule change would clarify that motions to dismiss a claim prior to a party's case in chief are discouraged in arbitration. FINRA believes that parties have the right to a hearing in arbitration, and only in certain very limited circumstances should that right be challenged. This provision would not apply to motions filed on the basis of eligibility grounds, as discussed below.

Require That Motions To Dismiss Be Filed in Writing, Separately From the Answer, and After the Answer Is Filed

FINRA believes that requiring a party to file a motion to dismiss in writing separately from the answer and only after the answer is filed would deter parties from filing these motions routinely in lieu of an answer, and would prevent parties from combining a motion to dismiss with an answer. This provision should ensure that parties receive an answer that responds directly to the statement of claim.

Filing Deadlines

The proposed rule change would require parties to serve motions under this provision at least 60 days before a scheduled hearing and would provide 45 days to respond to a motion unless the parties agree or the panel determines otherwise. FINRA believes that requiring a motion to dismiss to be served at least 60 days before a scheduled hearing and providing 45 days for a party to respond to such a motion would prevent the moving party from filing a motion shortly before a hearing as a surprise tactic to force a delay in the arbitration process.

Require the Full Panel To Decide Motions To Dismiss

The proposal would require the full panel to decide motions to dismiss. Given the ramifications of granting a motion to dismiss, FINRA believes that each member of the panel should be required to hear the parties' arguments, so that each panel member may make an informed decision when ruling on the motion.

Require an Evidentiary Hearing

Under the proposal, the panel may not grant a motion to dismiss prior to the conclusion of a party's case in chief unless the panel holds an in-person or telephonic prehearing conference on the motion that is recorded in accordance with Rule 12606 or Rule 13206, unless such conference is waived by the parties. FINRA believes this requirement would ensure that the panel holds a hearing on the motion and that the panel has sufficient information to make a ruling.

Limited Grounds on Which a Motion May Be Granted

FINRA proposes to limit the grounds on which a panel may act upon a motion to dismiss prior to the conclusion of the party's case in chief. The proposal states that a panel may act upon a motion to dismiss only after the party rests its case in chief unless the panel determines that:

- The non-moving party previously released the claim(s) in dispute by a signed settlement agreement and/or written release; or
- the moving party was not associated with the account(s), security(ies), or conduct at issue.[13]

FINRA believes that limiting the grounds on which a motion to dismiss may be granted prior to the conclusion

to award, there were motions to dismiss in 28% of the cases in 2006 as compared to 10% in 2004. Securities Arbitration Commentator, Nov. 2006 (Vol. 2006, No. 5), at 3.

[8] See Securities Exchange Act Release No. 54360 (August 24, 2006); 71 FR 51879 (August 31, 2006) (SR–NASD–2006–088) (notice).

[9] See Securities Exchange Act Release No. 55158 (January 24, 2007); 72 FR 4574 (January 31, 2007) (SR–NASD–2003–158 and SR–NASD–2004–011) (approval order).

[10] See note 8.

[11] See Comments on File No. SR–NASD–2006–088, Notice of Filing of Proposed Rule Change Relating to Motions to Decide Claims Before a Hearing on the Merits, available at *http://www.sec.gov/comments/sr–nasd–2006–088/nasd2006088.shtml* (last visited October 5, 2007).

[12] For purposes of the proposal, a party could be an initial claimant, respondent, counterclaimant, cross claimant, or third party claimant and his or her motion to dismiss would be subject to Rules 12206 and 12504 of the Customer Code or Rules 13206 and 13504 of the Industry Code.

[13] A motion to dismiss on eligibility grounds would be governed by Rules 12206 and 13206 of the Customer and Industry Code, respectively; the amendments to those rules are discussed below.

of the party's case in chief would minimize the potential for abusive practices and ensure that most parties' claims would be heard in the forum.

Require a Unanimous, Explained, Written Decision To Grant a Motion To Dismiss

The proposal would require a unanimous decision by the panel to grant a motion to dismiss as well as a written explanation of the decision in the award. Under the proposal, each member of the panel must agree to grant a motion to dismiss. FINRA believes that because these decisions are an integral part of the arbitration process, all panel members should agree to dismiss a claim; otherwise the case should continue. Moreover, the provision that requires the panel to provide a written explanation of its decision would help parties understand the panel's rationale for its decision.

Require Permission From the Arbitrators To Re-File a Denied Motion To Dismiss

Under the proposal, a party would be prohibited from re-filing a denied motion to dismiss, unless specifically permitted by a panel order. FINRA believes this limitation would serve to expedite the arbitration process and minimize parties' costs.

Require Arbitrators To Award Fees Associated With Denied Motions To Dismiss and To Award Fees and Costs Associated With Frivolously Filed Motions To Dismiss

The proposal would also require that the panel assess forum fees associated with hearings on the motion to dismiss against the party filing the motion to dismiss, if the panel denies the motion. Further, if the panel deems frivolous a motion filed under this rule, the panel must award reasonable costs and attorneys' fees to a party that opposed the motion. FINRA believes that imposing monetary penalties would minimize abusive practices involving motions to dismiss and would deter parties from filing such motions frivolously.

Permit Sanctions for Motion To Dismiss Filed in Bad Faith

If the panel determines that a party filed a motion under this rule in bad faith, the panel also may issue sanctions under Rule 12212 or Rule 13212. FINRA believes that these stringent sanction requirements would provide panels with additional enforcement mechanisms to address abusive practices involving motions to dismiss if other deterrents prove ineffective.

When a moving party (governed by the Customer Code or Industry Code, as applicable) files a motion to dismiss at the conclusion of a party's case in chief, the provisions governing motions to dismiss filed prior to the conclusion of a party's case in chief discussed above would not apply. Thus, a moving party could file a motion to dismiss at the conclusion of a party's case in chief, based on any theory of law. The rule, however, would not preclude the panel under this scenario from issuing an explanation of its decision if it grants the motion, or awarding costs or fees to the party that opposed the motion if it denies the motion.

FINRA believes that permitting a moving party to file a motion to dismiss at the conclusion of a party's case in chief should balance the goal of ensuring that non-moving parties have their claims heard by a panel against the rights of moving parties to challenge a claim they believe lacks merit or has not been proved. Moreover, FINRA believes that arbitrators should be permitted to entertain and act upon a motion to dismiss at this stage of a hearing to minimize the moving parties' incurring unnecessary additional attorneys' fees and forum fees. If a claimant has presented its case in chief and clearly failed to present sufficient evidence to support a claim, then the moving party should not be forced to incur the additional expenses and costs associated with unnecessary hearings.

The proposal provides that motions to dismiss based on failure to comply with code or panel order under Rule 12212 or 13212, as applicable, would be governed by that rule. Further, the proposal provides that motions to dismiss based on discovery abuse filed under Rule 12511 or 13511, as applicable, would be governed by that rule.

Amendments to the Dismissal Provision of the Eligibility Rule

FINRA proposes to amend Rules 12206(b) and 13206(b) of the Customer and Industry Codes, respectively, to address motions to dismiss made on eligibility grounds. Under this proposal, a party may file a motion to dismiss on eligibility grounds at any stage of the proceeding (after the answer is filed), except that a party may not file this motion any later than 90 days before the scheduled hearing on the merits. FINRA is also proposing to amend the rule to address the *res judicata* defense claimants could encounter when they attempt to pursue in court a claim dismissed in arbitration, when the grounds for the dismissal are unclear.

The first issue FINRA addresses with the proposal is amending Rules 12206(b) and 13206(b) to establish procedures for motions to dismiss made on eligibility grounds. In light of the new motions to dismiss proposal, FINRA believes that similar changes should be incorporated into the existing eligibility rule to provide procedures and guidance for dealing with motions to dismiss made on eligibility grounds. The proposed changes to the eligibility rule contain most of the same provisions as those contained in the proposed motions to dismiss rule (discussed above), except for those criteria that are not applicable to eligibility motions, that is, the two other grounds on which a panel may grant a motion to dismiss before a party has presented its case in chief (*i.e.*, signed settlement and written release and factual impossibility).

In addition, the filing deadlines would be different from those in the motions to dismiss proposal. Under the proposed rule, a party may file a motion to dismiss on eligibility grounds at any stage of the proceeding (after the answer is filed), except that a party may not file this motion any later than 90 days before the scheduled hearing on the merits. FINRA believes that this requirement would encourage moving parties to determine in the early stages of the case whether to pursue their claims in court or to proceed with the arbitration. Further, FINRA believes that this requirement would prevent the moving party from filing this motion shortly before a hearing as a surprise tactic to force a delay in the arbitration process.

The proposal also would provide parties with 30 days to respond to an eligibility motion. If a panel grants a motion to dismiss a party's claim based on eligibility grounds, that party must re-file the claim in court to pursue its remedies, which could further delay resolution of the dispute. Therefore, FINRA is proposing the 30-day timeframe to respond to eligibility motions to expedite the process, so that the time between filing a claim and resolution of the dispute is shortened.

The second issue concerns potential problems in the implementation of the eligibility rule since it was last amended in 2005. Currently, the eligibility rule makes clear that dismissal of a claim on eligibility grounds in arbitration does not preclude a party from pursuing the claim in court; it provides that, by requesting dismissal of a claim under the rule, the requesting party is agreeing that the non-moving party may withdraw any remaining related claims without prejudice and may pursue all of the claims in court.[14]

In certain situations, when a claim is dismissed under the eligibility rule, FINRA understands that claimants have had difficulty proceeding with their claims in court, because respondents have asserted a *res judicata* defense when the panel's grounds for dismissing the arbitration claim were unclear. For example, if a respondent files a motion to dismiss based on several grounds, including eligibility, and the panel issues an order dismissing a claim, but without citing reasons, the claimants would not know whether or not they are afforded the right to pursue the claim in court, as provided by the rule. If the claimants proceed to file the dismissed claim in court, the respondents may argue that the panel's decision on the claim is the final decision, and that claimants are barred from having the court decide the same claim again. In such a case, claimants would be required to prove that the dismissal was based on eligibility, not the other grounds for dismissal that the respondents raised. This would be difficult or impossible if the arbitrator or panel did not explain the reasons for the dismissal.

FINRA proposes to amend the eligibility rule to address this issue. The rule would be amended to provide that, when a party files a motion to dismiss on multiple grounds, including eligibility, the panel must consider the threshold issue of eligibility first. First, the rule would be amended to require that if the panel grants the motion to dismiss on eligibility grounds on all claims, it shall not rule on any other grounds for the motion to dismiss. Second, the rule would be amended to require that if the panel grants the motion to dismiss on eligibility grounds, on some, but not all claims, and the non-moving party elects to move the case to court, the panel shall not rule on any other ground for dismissal for 15 days from the date of service of the panel's decision to grant the motion to dismiss on eligibility grounds. Third, the rule would be amended to require that, when arbitrators dismiss any claim on eligibility grounds, that fact must be stated on the face of their order and any subsequent award the panel may issue. And fourth, if the panel denies the motion to dismiss on the basis of eligibility, it shall rule on the other bases for the motion to dismiss the remaining claims in accordance with the motions to dismiss rule. FINRA believes that the proposed amendments will close a loophole that has resulted from implementing the rule by eliminating the *res judicata* defense that claimants could face when they attempt to pursue claims in court that were dismissed in arbitration on eligibility grounds.

2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act, 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 rule change would enhance investor confidence in the fairness and neutrality of FINRA's arbitration forum by ensuring that non-moving parties have their claims heard in arbitration, while preserving the moving parties' rights to challenge the necessity of a hearing in certain limited circumstances. Further, the proposed changes to the eligibility rule would help prevent manipulative practices by closing a loophole in the rule, so that parties may pursue their claims in court without facing an unintended legal impediment, in the event their claims are dismissed in arbitration on eligibility grounds.

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

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

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 by FINRA. The SEC received 63 comments on the prior dispositive motion proposal that was published for comment on August 31, 2006.[15] In general, most commenters

[14] Rule 12206(b) of the Customer Code and Rule 13206(b) of the Industry Code.

[15] Comment letters were submitted by Paul R. Meyer, Esq., dated July 26, 2006 (''Meyer Letter''); Seth E. Lipner, Professor of Law, Zicklin School of Business, dated August 29, 2006 (''Lipner Letter''); Kevin Thomas Hoffman, Esq., dated September 8, 2006 (''Hoffman Letter''); Randall R. Heiner, Esq., dated September 12, 2006 (''Heiner Letter''); Joseph C. Korsak, Esq., dated September 13, 2006 (''Korsak Letter''); Philip M. Aidikoff, Esq., Aidikoff, Uhl Bakhtiari, dated September 13, 2006 (''Aidikoff Letter''); Barry D. Estell, Esq., dated September 13, 2006 (''Estell Letter''); Daniel A. Ball, Esq., Ball Associates, dated September 14, 2006 (''Ball Letter''); Stuart E. Finer, Esq., dated September 21, 2006 (''Finer Letter''); Barbara Black, Director, University of Cincinnati College of Law and Jill I. Gross, Director, Pace University School of Law, dated September 21, 2006 (''Black and Gross Letter''); Robert S. Banks, Jr., President, Public Investors Arbitration Bar Association, dated September 21, 2006 (''PIABA Letter''); Tim Canning, Esq., Law Offices of Timothy A. Canning, dated September 21, 2006 (''Canning Letter''); Gary Pieples, Director, Syracuse University Securities Arbitration and Consumer Clinic, dated September 22, 2006 (''Pieples Letter''); Scot D. Bernstein, Esq., dated September 24, 2006; Robert C. Port, Esq., Cohen Goldstein Port & Gottlieb, LLP, dated September 25, 2006 (''Port Letter''); William P. Torngren, Esq., dated September 25, 2006 (''Torngren Letter''); Laurence S. Schultz, Esq., Driggers Schultz and Herbst; dated September 25, 2006 (''Schultz Letter''); Al Van Kampen, Esq., Rohde & Van Kampen PLLC, dated September 25, 2006 (''Van Kampen Letter''); Allan J. Fedor, Esq., dated September 26, 2006 (''Fedor Letter''); A. Daniel Woska, Esq., Woska & Hayes, LLP, dated September 25, 2006 (''Woska Letter''); Cliff Palefsky, Co-Chair ADR Committee, National Employment Lawyers Association, dated September 26, 2006 (''Palefsky Letter''); Steven B. Caruso, Esq., Maddox Hargett Caruso, P.C., dated September 27, 2006 (''Caruso Letter''); Dale Ledbetter, Esq., Adorno & Yoss, dated September 27, 2006 (''Ledbetter Letter''); Noah H. Simpson, Esq., dated September 28, 2006 (''Simpson Letter I''); Stephen P. Meyer, Esq., PIABA, dated September 29, 2006 (''Meyer Letter''); Edward G. Turan, Chair, Arbitration and Litigation Committee, Securities Industry Association, dated September 29, 2006 (''SIA Letter''); Joseph Fogel, Esq., Fogel & Associates, dated September 30, 2006 (''Fogel Letter''); Henry Simpson, III, Simpson Woolley McConachie, L.L.P, dated October 2, 2006 (''Simpson Letter II''); Michael J. Willner, Esq., Miller Faucher and Cafferty LLP, dated October 3, 2006 (''Willner Letter''); T. Michael Kennedy, P.C., dated October 3, 2006 (''Kennedy Letter''); Richard A. Lewins, Burg Simpson Eldredge Hersh & Jardine P.C., dated October 3, 2006 (''Lewins Letter''); Val Hornstein, Esq., Hornstein Law Offices, dated October 3, 2006 (''Hornstein Letter''); Steve Buchwalter, Esq., Law Offices of Steve A. Buchwalter, P.C., dated October 3, 2006 (''Buchwalter Letter''); W. Scott Greco, Esq., Greco & Greco, P.C., dated October 3, 2006 (''Greco Letter''); Jeffrey B. Kaplan, Esq., dated October 3, 2006 (''Kaplan Letter''); Jan Graham, Esq., Graham Law Offices, dated October 3, 2006 (''Graham Letter''); Thomas C. Wagner, Esq., Van Deusen & Wagner, LLC, dated October 3, 2006 (''Wagner Letter''); Scott R. Shewan, Esq., Born, Pape & Shewan LLP, dated October 3, 2006 (''Shewan Letter''); Jeffrey S. Kruske, Esq., dated October 3, 2006 (''Kruske Letter''); Gail E. Boliver, Esq., Boliver Law Firm, dated October 3, 2006 (''Boliver Letter''); Sarah G. Anderson, dated October 3, 2006 (''Anderson Letter''); Rob Bleecher, Esq., Pecht & Associates, PC, dated October 4, 2006 (''Bleecher Letter''); Robert Goehring, Esq., dated October 4, 2006 (''Goehring Letter''); Herbert E. Pounds, Jr., Esq., dated October 4, 2006 (''Pounds Letter''); Leonard Steiner, Esq., Steiner & Libo, Professional Corporation, dated October 4, 2006 (''Steiner Letter''); Harry S. Miller, Esq., Burns & Levenson LLP, dated October 4, 2006 (''Miller Letter''); Jonathan W. Evans, Esq., Jonathan W. Evans & Associates, dated October 4, 2006 (''Evans Letter''); Henry Simpson, Esq., Simpson Woolley McConachie, LLP, dated October 4, 2006 (''Simpson Letter III''); Eliot Goldstein, Esq., Law Offices of Eliot Goldstein LLP, dated October 4, 2006 (''Goldstein Letter''); Kyle M. Kulzer, Esq., Alan L. Frank Law Associates, P.C., dated October 4, 2006 (''Kulzer Letter''); Adam S. Doner, Esq., dated October 4, 2006 (''Doner Letter''); Brian N. Smiley, Esq., Gard Smiley Bishop & Porter LLP, dated October 4, 2006 (''Smiley Letter''); Frederick W. Rosenberg JD, dated October 4, 2006 (''Rosenberg Letter''); Theodore M. Davis, Esq., dated October 5,

opposed the prior proposal and argued that it would, among other things, encourage, rather than discourage, the making of dispositive motions; have a chilling effect on the ability of investors to have all evidence judged and the credibility and veracity of witnesses weighed; and result in a loss of the major benefits of the arbitration process—cost effectiveness and expediency.

Some commenters who opposed the prior proposal argued that FINRA should adopt a rule that would prohibit all dispositive motions in arbitration. These commenters contended that the prior proposal would establish a procedure that would deprive investors of their fundamental right to a hearing in arbitration—a policy, they believe, is antithetical to the goals of arbitration.[16] Another group of commenters indicated that they would support a modified version of the prior proposal if it included some safeguards. Some of the safeguards suggested by these commenters included prohibiting a panel from deciding a claim before a hearing until all documents have been produced by the parties; requiring a panel to deny a dispositive motion if there are disputed facts; requiring a panel to award costs and attorneys' fees to the party defending a dispositive motion if it is denied; and requiring a written explanation from the panel if the dispositive motion is granted.[17]

Based on the concerns raised by the commenters, FINRA realized that the prior proposal did not convey its position on dispositive motions effectively; and did not provide guidance on how the dispositive motion rule and noncompliance with the rule should be handled in its arbitration forum. Because the comments indicated that these positions were unclear, FINRA withdrew the prior proposal and filed this new proposal to replace it.

2006 (''Davis Letter''); James D. Keeney, Esq., James D. Keeney, P.A., dated October 5, 2006 (''Keeney Letter''); Jorge A. Lopez, Esq., dated October 5, 2006 (''Lopez Letter''); Michael B. Lynch, Esq., Levin Papantonio Thomas Mitchell Echsner & Proctor P.A., dated October 5, 2006 (''Lynch Letter''); John Miller, Esq., dated October 10, 2006 (''Miller Letter''); Jenice L. Malecki, Esq., dated October 11, 2006 (''Malecki Letter''); Stuart Meissner, Esq., The Law Offices of Stuart D. Meissner LLC, dated October 13, 2006 (''Meissner Letter''); Howard Rosenfield, Esq., Law Offices of Howard M Rosenfield, dated December 12, 2006 (''Rosenfield Letter''); Richard P. Ryder, Esq., Securities Arbitration Commentator, dated June 16, 2007 (''Ryder Letter''); and Bryan Lantagne, Chair, North American Securities Administrators Association, Inc. Broker-Dealer Arbitration Project Group, dated July 19, 2006 (''NASAA Letter'')(submitted as comment on SR–NASD–2003–158).

[16] *See, e.g.*, Estell, Finer, and Woska Letters.

[17] *See, e.g.*, Ledbetter, Schultz and Torngren Letters.

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

Within 35 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 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 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–2007–021 on the subject line.

Paper Comments

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

All submissions should refer to File Number SR–FINRA–2007–021. 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 inspection and copying 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 the File Number SR–INRA–2007–021 and should be submitted on or before April 10, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[18]

Florence E. Harmon.

Deputy Secretary.

[FR Doc. E8–5571 Filed 3–19–08; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–57492; File No. SR–NASD–2007–021]

Self-Regulatory Organizations; National Association of Securities Dealers, Inc. (n/k/a Financial Industry Regulatory Authority, Inc.); Order Approving Proposed Rule Change To Amend the Definition of Public Arbitrator

March 13, 2008.

On March 12, 2007, the National Association of Securities Dealers, Inc. (''NASD''), through its wholly owned subsidiary, NASD Dispute Resolution, Inc. (n/k/a FINRA Dispute Resolution, Inc.) filed with the Securities and Exchange Commission (''Commission'') pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend the definition of ''public arbitrator'' in the NASD's Code of Arbitration Procedure for Customer Disputes (''Customer Code'') and Code of Arbitration Procedure for Industry Disputes (''Industry Code'').[3] The proposed rule change was published for comment in the **Federal Register** on July 17,

[18] 17 CFR 200.30–3(a)(12).

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

[2] 17 CFR 240.19b–4.

[3] On July 26, 2007, the Commission approved a proposed rule change filed by NASD to amend NASD's Certificate of Incorporation to reflect its name change to Financial Industry Regulatory Authority Inc., or FINRA, in connection with the consolidation of the member firm regulatory functions of NASD and NYSE Regulation, Inc. *See* Securities Exchange Act Release No. 56146 (July 26, 2007). In connection with this name change, NASD Dispute Resolution became FINRA Dispute Resolution, Inc. (''FINRA Dispute Resolution'').