

OMB APPROVAL

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SECURITIES AND EXCHANGE COMMISSION
 WASHINGTON, D.C. 20549
 Form 19b-4

File No. SR - 2008 - 051
 Amendment No.

Proposed Rule Change by Financial Industry Regulatory Authority
 Pursuant to Rule 19b-4 under the Securities Exchange Act of 1934

Initial ☒	Amendment ☐	Withdrawal ☐	Section 19(b)(2) ☒	Section 19(b)(3)(A) ☐	Section 19(b)(3)(B) ☐
			Rule		
Pilot ☐	Extension of Time Period for Commission Action ☐	Date Expires 	☐ 19b-4(f)(1)	☐ 19b-4(f)(4)	
			☐ 19b-4(f)(2)	☐ 19b-4(f)(5)	
			☐ 19b-4(f)(3)	☐ 19b-4(f)(6)	

Exhibit 2 Sent As Paper Document
☐

Exhibit 3 Sent As Paper Document
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Description

Provide a brief description of the proposed rule change (limit 250 characters).

Proposed rule change to amend Rules 12214, 12514 and 12904 of the Code of Arbitration Procedure for Customer Disputes and Rules 13214, 13514 and 13904 of the Code of Arbitration Procedure for Industry Disputes to require arbitrators to provide an explained decision upon the joint request of the parties.

Contact Information

Provide the name, telephone number and e-mail address of the person on the staff of the self-regulatory organization prepared to respond to questions and comments on the proposed rule change.

First Name Margo Last Name Hassan
 Title Counsel
 E-mail margo.hassan@finra.org
 Telephone (212) 858-4481 Fax (301) 527-4761

Signature

Pursuant to the requirements of the Securities Exchange Act of 1934,

has duly caused this filing to be signed on its behalf by the undersigned thereunto duly authorized officer.

Date 10/14/2008

By Jean I. Feeney
 (Name)

Vice President and Chief Counsel,
 FINRA Dispute Resolution

(Title)

NOTE: Clicking the button at right will digitally sign and lock this form. A digital signature is as legally binding as a physical signature, and once signed, this form cannot be changed.

Jean Feeney, jean.feeney@nasd.com

SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

For complete Form 19b-4 instructions please refer to the EDFS website.

Form 19b-4 Information

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The self-regulatory organization must provide all required information, presented in a clear and comprehensible manner, to enable the public to provide meaningful comment on the proposal and for the Commission to determine whether the proposal is consistent with the Act and applicable rules and regulations under the Act.

Exhibit 1 - Notice of Proposed Rule Change

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The Notice section of this Form 19b-4 must comply with the guidelines for publication in the Federal Register as well as any requirements for electronic filing as published by the Commission (if applicable). The Office of the Federal Register (OFR) offers guidance on Federal Register publication requirements in the Federal Register Document Drafting Handbook, October 1998 Revision. For example, all references to the federal securities laws must include the corresponding cite to the United States Code in a footnote. All references to SEC rules must include the corresponding cite to the Code of Federal Regulations in a footnote. All references to Securities Exchange Act Releases must include the release number, release date, Federal Register cite, Federal Register date, and corresponding file number (e.g., SR-[SRO]-xx-xx). A material failure to comply with these guidelines will result in the proposed rule change being deemed not properly filed. See also Rule 0-3 under the Act (17 CFR 240.0-3)

Exhibit 2 - Notices, Written Comments, Transcripts, Other Communications

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Exhibit Sent As Paper Document

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Copies of notices, written comments, transcripts, other communications. If such documents cannot be filed electronically in accordance with Instruction F, they shall be filed in accordance with Instruction G.

Exhibit 3 - Form, Report, or Questionnaire

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Exhibit Sent As Paper Document

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Copies of any form, report, or questionnaire that the self-regulatory organization proposes to use to help implement or operate the proposed rule change, or that is referred to by the proposed rule change.

Exhibit 4 - Marked Copies

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The full text shall be marked, in any convenient manner, to indicate additions to and deletions from the immediately preceding filing. The purpose of Exhibit 4 is to permit the staff to identify immediately the changes made from the text of the rule with which it has been working.

Exhibit 5 - Proposed Rule Text

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The self-regulatory organization may choose to attach as Exhibit 5 proposed changes to rule text in place of providing it in Item I and which may otherwise be more easily readable if provided separately from Form 19b-4. Exhibit 5 shall be considered part of the proposed rule change.

Partial Amendment

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If the self-regulatory organization is amending only part of the text of a lengthy proposed rule change, it may, with the Commission's permission, file only those portions of the text of the proposed rule change in which changes are being made if the filing (i.e. partial amendment) is clearly understandable on its face. Such partial amendment shall be clearly identified and marked to show deletions and additions.

1. Text of Proposed Rule Change

(a) Pursuant to the provisions of Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),¹ the Financial Industry Regulatory Authority, Inc. (“FINRA”) (f/k/a National Association of Securities Dealers, Inc. (“NASD”)) is filing with the Securities and Exchange Commission (“SEC” or “Commission”) a proposed rule change to amend NASD Rules 12214, 12514 and 12904 of Code of Arbitration Procedure for Customer Disputes (“Customer Code”) and NASD Rules 13214, 13514 and 13904 of the Code of Arbitration Procedure for Industry Disputes (“Industry Code”) to require arbitrators to provide an explained decision upon the joint request of the parties.

Below is the text of the proposed rule change. Proposed new language is underlined; proposed deletions are in brackets.

* * * * *

Customer Code

12214. Payment of Arbitrators

(a) – (d) No change.

(e) Payment for Explained Decisions

(1) The chairperson who is responsible for writing an explained decision pursuant to Rule 12904(g) will receive an additional honorarium of \$400. The panel will allocate the cost of the honorarium under Rule 12904(g) to the parties.

(2) If the panel decides on its own to write an explained decision, then no panel member will receive the additional honorarium of \$400.

* * * * *

¹ 15 U.S.C. 78s(b)(1).

**12514. Pre-hearing Exchange of Documents and Witness Lists [Before Hearing],
and Explained Decision Requests**

(a) – (c) No change.

(d) Explained Decision Request

At least 20 days before the first scheduled hearing date, all parties
must submit to the panel any joint request for an explained decision under Rule 12904(g).

* * * * *

12904. Awards

(a) – (f) No change.

(g) Explained Decisions

(1) This paragraph (g) applies only when all parties jointly request an
explained decision.

(2) An explained decision is a fact-based award stating the general reasons(s)
for the arbitrators' decision. Inclusion of legal authorities and damage calculations is not
required.

(3) Parties must make any request for an explained decision no later than the
time for the pre-hearing exchange of documents and witness lists under Rule 12514(d).

(4) The chairperson of the panel will be responsible for writing the explained
decision.

(5) The chairperson will receive an additional honorarium of \$400 for writing
the explained decision, as required by this paragraph (g). The panel will allocate the cost
of the chairperson's honorarium to the parties as part of the final award.

(6) This paragraph (g) will not apply to simplified cases decided without a hearing under Rules 12800 or to default cases conducted under Rule 12801.

(g) – (i) Renumbered as (h) – (j).

* * * * *

Industry Code

13214. Payment of Arbitrators

(a) – (d) No change.

(e) Payment for Explained Decisions

(1) The chairperson who is responsible for writing an explained decision pursuant to Rule 13904(g) will receive an additional honorarium of \$400. The panel will allocate the cost of the honorarium under Rule 13904(g) to the parties.

(2) If the panel decides on its own to write an explained decision, then no panel member will receive the additional honorarium of \$400.

* * * * *

13514. Pre-hearing Exchange of Documents and Witness Lists [Before Hearing], and Explained Decision Requests

(a) – (c) No change.

(d) Explained Decision Request

At least 20 days before the first scheduled hearing date, all parties must submit to the panel any joint request for an explained decision under Rule 13904(g).

* * * * *

13904. Awards

(a) – (f) No change.

(g) Explained Decisions

(1) This paragraph (g) applies only when all parties jointly request an explained decision.

(2) An explained decision is a fact-based award stating the general reasons(s) for the arbitrators' decision. Inclusion of legal authorities and damage calculations is not required.

(3) Parties must make any request for an explained decision no later than the time for the pre-hearing exchange of documents and witness lists under Rule 13514(d).

(4) The chairperson of the panel will be responsible for writing the explained decision.

(5) The chairperson will receive an additional honorarium of \$400 for writing the explained decision, as required by this paragraph (g). The panel will allocate the cost of the chairperson's honorarium to the parties as part of the final award.

(6) This paragraph (g) will not apply to simplified cases decided without a hearing under Rules 13800 or to default cases conducted under Rule 13801.

(g) – (i) Renumbered as (h) – (j).

* * * * *

(b) Not applicable.

(c) Not applicable.

2. Procedures of the Self-Regulatory Organization

At its meeting on September 16, 2008, the FINRA Board of Governors authorized the filing of the rule change with the SEC.

FINRA will announce the effective date of the proposed rule change in a Regulatory Notice to be published no later than 60 days following Commission approval. The effective date will be 30 days following publication of the Regulatory Notice announcing Commission approval.

Questions regarding this rule filing may be directed to Margo Hassan, Counsel, FINRA Dispute Resolution, at (212) 858-4481.

3. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

(a) Purpose

FINRA is proposing to amend its Customer Code and Industry Code to require arbitrators to provide an explained decision upon the joint request of the parties. The explained decision would be a fact-based award stating the general reason(s) for the arbitrators' decision; it would not be required to include legal authorities and/or damage calculations. Under the proposed rule change, parties would be required to submit any joint request for an explained decision at least 20 days before the first scheduled hearing date.² The chairperson would: 1) be required to write the explained decision; and 2) receive an additional honorarium of \$400 for writing the decision. The panel would allocate the cost of the additional honorarium to the parties as part of the final award.

² The term "hearing" means the hearing of an arbitration under Rules 12600 and 13600 (see Rules 12100(m) and 13100(m)).

The arbitrators would not be required to provide an explained decision in cases resolved without a hearing under simplified arbitration Rules 12800 and 13800 or in default cases conducted under Rules 12801 and 13801.

FINRA is not proposing to amend Rules 12904(f) and 13904(f), which provide that an award may contain an underlying rationale. This means that arbitrators would continue to be permitted to decide, on their own, to write an explained decision. Under the proposed rule change, if the panel decides on its own to write an explained decision, FINRA would not pay an additional honorarium to any panel member.

Background

The absence of explanations in awards is a common complaint of non-prevailing parties in the FINRA forum, especially customers and associated persons. In order to address these complaints and increase investor confidence in the fairness of the arbitration process, in March 2005, FINRA filed a proposed rule change with the SEC to require arbitrators to provide explained decisions upon the request of customers, or of associated persons in industry controversies. The proposal was published for comment in July 2005.³ The SEC received almost two hundred comment letters in response to the proposal, many of them critical.

While FINRA was considering its next steps, there have been several new developments related to explained decisions in other contexts. FINRA submitted dispositive motions⁴ and expungement procedures⁵ proposals, which would require

³ See Securities Exchange Act Release No. 52009 (July 11, 2005); 70 FR 41065 (July 15, 2005)(File No. SR-NASD-2005-032).

⁴ FINRA filed the proposed dispositive motion rule on November 2, 2007 (SR-FINRA-2007-021). The proposal was published for comment on March 20, 2008

arbitrators to write an explanation for granting relief. In addition, the Securities Industry Conference on Arbitration (SICA) conducted a “Perceptions of Fairness” arbitration survey of participants in securities arbitration proceedings.⁶ The survey results, released in February 2008, indicate that 55.5% of customers who responded to the survey would be “more satisfied if they had an explanation in the award.” In light of the comments, and these recent developments, FINRA has withdrawn the proposal as filed in SR-NASD-2005-032 and is filing a new proposed rule change. Key provisions of the proposed rule change are discussed in more detail below, together with related comments from the original proposal.

Parties Must Jointly Request an Explained Decision

The original proposal permitted a customer, or an associated person in an intra-industry controversy, to require an explained decision. Many commenters objected to the one-sided nature of that provision. Under the proposed rule change, all parties to a case must agree to an explained decision. While the arbitrators will be resolving the entire matter and the explained decision would normally address all the claims asserted by the

(see Securities Exchange Act Release No. 57497 (March 14, 2008); 73 FR 15019). FINRA submitted a Response to Comments on September 15, 2008.

⁵ On March 13, 2008, FINRA filed an expungement procedures proposal (SR-FINRA-2008-010). This rule would establish procedures arbitrators must follow when considering requests for expungement relief under Conduct Rule 2130. The proposal was published for comment on April 3, 2008 (see Securities Exchange Act Release No. 57572 (March 27, 2008); 73 FR 18308). FINRA submitted a Response to Comments on June 11, 2008, and a Supplemental Response to Comments on September 3, 2008.

⁶ Jill I. Gross and Barbara Black, Perceptions of Fairness of Securities Arbitration: An Empirical Study, (February 6, 2008). The report can be downloaded at <http://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1477&context=lawfaculty>.

parties, the parties may request that an explained decision address only certain claims.

Requiring the parties' joint agreement to an explained decision is consistent with

FINRA's general policy to accommodate a joint request of the parties.

Parties Must Submit any Request for an Explained Decisions 20 Days before the first scheduled hearing date

The proposed rule change provides that parties must submit any joint request for an explained decision no later than 20 days prior to the first scheduled hearing date. This deadline coincides with the time that parties must exchange documents and identify witnesses they intend to present at the hearing. This approach establishes a clear deadline, gives the parties sufficient time to request an explained decision, and provides notice to the arbitrators that an explained decision will be required before the hearing begins.

The Chairperson Must Write the Explained Decision

The proposed rule change would require that the chairperson write the explained decision. The original proposal contemplated that any of the arbitrators, or all of them, might draft the decision. Many commenters on the original proposal were concerned that poorly written decisions might harm the public's perception of arbitration, or increase the likelihood of a party successfully vacating an award. To address these concerns, the rule would require that the chairperson write the decision.

Under the Codes, arbitrators must meet specific experience and training criteria to serve as chairpersons in arbitrations.⁷ Therefore, chairpersons may be more experienced

⁷ Pursuant to Rules 12400 and 13400, arbitrators are eligible for the chairperson roster if they have completed FINRA chairperson training and:

than non-chairpersons and should be better able to produce higher quality explained decisions. Further, assigning this responsibility to the chairperson would eliminate any confusion over who would be responsible for drafting the decision and would streamline the decision writing process. Having one arbitrator draft the decision after all the arbitrators have been consulted would reduce the time required to complete the decision. Once the decision was drafted, the arbitrators still would be required to sign the decision as provided in Rules 12904(a) and 13904(a).⁸

The Explained Decision Must Be Fact-Based

Under the proposed rule change, the explained decision is a fact-based award stating the general reason(s) for the arbitrators' decision.⁹ The award need not include

-
- Have a law degree and are a member of a bar of at least one jurisdiction and have served as an arbitrator through award on at least two arbitrations administered by a self-regulatory organization in which hearings were held; or
 - Have served as an arbitrator through award on at least three arbitrations administered by a self-regulatory organization in which hearings were held.

On June 23, 2008, the SEC approved a proposal to eliminate the Code provision allowing arbitrators to serve as Chairpersons provided they have "substantially equivalent training or experience" in lieu of completing FINRA Dispute Resolution's Chairperson training course (see Securities Exchange Act Release No. 58004 (June 23, 2008); 73 FR 36579 (June 27, 2008) (File No. SR-FINRA-2008-009). This rule became effective on September 22, 2008.

⁸ Rules 12904(a) and 13904(a) require all awards to be in writing and signed by a majority of the arbitrators or as required by applicable law.

⁹ While Rules 12604 and 13604 provide that the panel decides what evidence to admit and is not required to follow state or federal rules of evidence, FINRA intends that, as with current arbitration awards, explained decisions will have no precedential value in other cases. Thus, arbitrators will not be required to follow any findings or determinations that are set forth in prior explained decisions. In order to ensure that users of the forum are aware of the non-precedential nature of explained awards, FINRA plans to revise the template for all awards to include the following sentence: "If the arbitrators have provided an explanation of their decision in this award, the explanation is for the information of the parties only and is not precedential in nature."

legal authorities and damage calculations. FINRA believes that requiring only fact-based reasons in explained decisions will reduce the potential for misstatements in an award, thereby decreasing the possibility of a subsequent vacatur, modification or remand of an award and ensuring the continued finality of a FINRA award. FINRA believes the proposed rule change will provide the parties with the information they want while simultaneously maintaining the expediency, flexibility, and finality of arbitration.

Only the Chairperson Will Be Compensated for an Explained Decision

The original proposal did not address who was responsible for preparing the explained decision and provided that each arbitrator would be paid an additional \$200 honorarium for cases in which an explained decision was required. Under the proposed rule change, only the chairperson would write the decision, and only the chairperson would be paid an additional honorarium. The additional honorarium paid to the chairperson would reflect the increased effort involved in drafting an explained decision. The panel may allocate the cost of the honorarium to one party, or may allocate it between or among all parties.¹⁰

¹⁰ Under the Customer and Industry Codes, the panel has the authority to assess fees in connection with discovery-related motions, contested subpoena requests, and hearing session fees to one party, or may split the fees between or among all parties.

Parties May Not Require Explained Decisions in Some Cases

Parties would not be able to require explained decisions in two types of arbitration proceedings. The first is simplified arbitrations that are decided solely upon the pleadings and evidence filed by the parties, as described in Rules 12800 and 13800. The second is arbitrations that are conducted under the default procedures provided for in Rules 12801 and 13801. Explained decisions would not be appropriate in either of these situations because of the abbreviated nature of these arbitration proceedings.

Arbitrators May Choose to Write Explained Decisions in Other Circumstances

Under the proposed rule change, arbitrators would continue to be permitted to decide, on their own or upon the motion of one party, to write an explained decision. Arbitrators would not receive an additional honorarium if the panel issues an explained decision that is not required under the proposed rules. The proposed rule change would not affect the current rule that permits arbitrators to include a rationale in an award, even if the parties have not requested it, but would not encourage arbitrators to write an explained decision when they are not asked to do so by all the parties.

As noted in Item 2 of this filing, FINRA will announce the effective date of the proposed rule change in a Regulatory Notice to be published no later than 60 days following Commission approval. The effective date will be 30 days following publication of the Regulatory Notice announcing Commission approval.

(b) Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,¹¹ 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. The proposed rule change would increase investor confidence in the fairness of the arbitration process by allowing parties jointly to require arbitrators to write an explained decision.

4. **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 Act.

5. **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.

6. **Extension of Time Period for Commission Action**

FINRA does not consent at this time to an extension of the time period for Commission action specified in Section 19(b)(2) of the Act.¹²

7. **Basis for Summary Effectiveness Pursuant to Section 19(b)(3) or for Accelerated Effectiveness Pursuant to Section 19(b)(2)**

Not applicable.

¹¹ 15 U.S.C. 78o-3(b)(6).

¹² 15 U.S.C. 78s(b)(2).

8. Proposed Rule Change Based on Rules of Another Self-Regulatory Organization or of the Commission

Not applicable.

9. Exhibits

Exhibit 1. Completed notice of proposed rule change for publication in the Federal Register.

EXHIBIT 1

SECURITIES AND EXCHANGE COMMISSION

(Release No. 34- ; File No. SR-FINRA-2008-051)

Self-Regulatory Organizations: Financial Industry Regulatory Authority, Inc.; Notice of Filing of Proposed Rule Change Relating to Amendments to the Codes of Arbitration Procedure to Require Arbitrators to Provide an Explained Decision upon the Joint Request of the Parties

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 on October 14, 2008, 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”) 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 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 NASD Rules 12214, 12514 and 12904 of Code of Arbitration Procedure for Customer Disputes (“Customer Code”) and NASD Rules 13214, 13514 and 13904 of the Code of Arbitration Procedure for Industry Disputes (“Industry Code”) to require arbitrators to provide an explained decision upon the joint request of the parties. Below is the text of the proposed rule change. Proposed new language is underlined; proposed deletions are in brackets.

* * * * *

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

Customer Code

12214. Payment of Arbitrators

(a) – (d) No change.

(e) Payment for Explained Decisions

(1) The chairperson who is responsible for writing an explained decision pursuant to Rule 12904(g) will receive an additional honorarium of \$400. The panel will allocate the cost of the honorarium under Rule 12904(g) to the parties.

(2) If the panel decides on its own to write an explained decision, then no panel member will receive the additional honorarium of \$400.

* * * * *

12514. Pre-hearing Exchange of Documents and Witness Lists [Before Hearing], and Explained Decision Requests

(a) – (c) No change.

(d) Explained Decision Request

At least 20 days before the first scheduled hearing date, all parties must submit to the panel any joint request for an explained decision under Rule 12904(g).

* * * * *

12904. Awards

(a) – (f) No change.

(g) Explained Decisions

(1) This paragraph (g) applies only when all parties jointly request an explained decision.

(2) An explained decision is a fact-based award stating the general reasons(s) for the arbitrators' decision. Inclusion of legal authorities and damage calculations is not required.

(3) Parties must make any request for an explained decision no later than the time for the pre-hearing exchange of documents and witness lists under Rule 12514(d).

(4) The chairperson of the panel will be responsible for writing the explained decision.

(5) The chairperson will receive an additional honorarium of \$400 for writing the explained decision, as required by this paragraph (g). The panel will allocate the cost of the chairperson's honorarium to the parties as part of the final award.

(6) This paragraph (g) will not apply to simplified cases decided without a hearing under Rules 12800 or to default cases conducted under Rule 12801.

(g) – (i) Renumbered as (h) – (j).

* * * * *

Industry Code

13214. Payment of Arbitrators

(a) – (d) No change.

(e) Payment for Explained Decisions

(1) The chairperson who is responsible for writing an explained decision pursuant to Rule 13904(g) will receive an additional honorarium of \$400. The panel will allocate the cost of the honorarium under Rule 13904(g) to the parties.

(2) If the panel decides on its own to write an explained decision, then no panel member will receive the additional honorarium of \$400.

* * * * *

13514. Pre-hearing Exchange of Documents and Witness Lists [Before Hearing], and Explained Decision Requests

(a) – (c) No change.

(d) Explained Decision Request

At least 20 days before the first scheduled hearing date, all parties must submit to the panel any joint request for an explained decision under Rule 13904(g).

* * * * *

13904. Awards

(a) – (f) No change.

(g) Explained Decisions

(1) This paragraph (g) applies only when all parties jointly request an explained decision.

(2) An explained decision is a fact-based award stating the general reasons(s) for the arbitrators' decision. Inclusion of legal authorities and damage calculations is not required.

(3) Parties must make any request for an explained decision no later than the time for the pre-hearing exchange of documents and witness lists under Rule 13514(d).

(4) The chairperson of the panel will be responsible for writing the explained decision.

(5) The chairperson will receive an additional honorarium of \$400 for writing the explained decision, as required by this paragraph (g). The panel will allocate the cost of the chairperson's honorarium to the parties as part of the final award.

(6) This paragraph (g) will not apply to simplified cases decided without a hearing under Rules 13800 or to default cases conducted under Rule 13801.

(g) – (i) Renumbered as (h) – (j).

* * * * *

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 is proposing to amend its Customer Code and Industry Code to require arbitrators to provide an explained decision upon the joint request of the parties. The explained decision would be a fact-based award stating the general reason(s) for the arbitrators’ decision; it would not be required to include legal authorities and/or damage calculations. Under the proposed rule change, parties would be required to submit any joint request for an explained decision at least 20 days before the first scheduled hearing date.³ The chairperson would: 1) be required to write the explained decision; and 2)

³ The term “hearing” means the hearing of an arbitration under Rules 12600 and 13600 (see Rules 12100(m) and 13100(m)).

receive an additional honorarium of \$400 for writing the decision. The panel would allocate the cost of the additional honorarium to the parties as part of the final award.

The arbitrators would not be required to provide an explained decision in cases resolved without a hearing under simplified arbitration Rules 12800 and 13800 or in default cases conducted under Rules 12801 and 13801.

FINRA is not proposing to amend Rules 12904(f) and 13904(f), which provide that an award may contain an underlying rationale. This means that arbitrators would continue to be permitted to decide, on their own, to write an explained decision. Under the proposed rule change, if the panel decides on its own to write an explained decision, FINRA would not pay an additional honorarium to any panel member.

Background

The absence of explanations in awards is a common complaint of non-prevailing parties in the FINRA forum, especially customers and associated persons. In order to address these complaints and increase investor confidence in the fairness of the arbitration process, in March 2005, FINRA filed a proposed rule change with the SEC to require arbitrators to provide explained decisions upon the request of customers, or of associated persons in industry controversies. The proposal was published for comment in July 2005.⁴ The SEC received almost two hundred comment letters in response to the proposal, many of them critical.

While FINRA was considering its next steps, there have been several new developments related to explained decisions in other contexts. FINRA submitted

⁴ See Securities Exchange Act Release No. 52009 (July 11, 2005); 70 FR 41065 (July 15, 2005)(File No. SR-NASD-2005-032).

dispositive motions⁵ and expungement procedures⁶ proposals, which would require arbitrators to write an explanation for granting relief. In addition, the Securities Industry Conference on Arbitration (SICA) conducted a “Perceptions of Fairness” arbitration survey of participants in securities arbitration proceedings.⁷ The survey results, released in February 2008, indicate that 55.5% of customers who responded to the survey would be “more satisfied if they had an explanation in the award.” In light of the comments, and these recent developments, FINRA has withdrawn the proposal as filed in SR-NASD-2005-032 and is filing a new proposed rule change. Key provisions of the proposed rule change are discussed in more detail below, together with related comments from the original proposal.

Parties Must Jointly Request an Explained Decision

The original proposal permitted a customer, or an associated person in an intra-industry controversy, to require an explained decision. Many commenters objected to the one-sided nature of that provision. Under the proposed rule change, all parties to a case must agree to an explained decision. While the arbitrators will be resolving the entire

⁵ FINRA filed the proposed dispositive motion rule on November 2, 2007 (SR-FINRA-2007-021). The proposal was published for comment on March 20, 2008 (see Securities Exchange Act Release No. 57497 (March 14, 2008); 73 FR 15019). FINRA submitted a Response to Comments on September 15, 2008.

⁶ On March 13, 2008, FINRA filed an expungement procedures proposal (SR-FINRA-2008-010). This rule would establish procedures arbitrators must follow when considering requests for expungement relief under Conduct Rule 2130. The proposal was published for comment on April 3, 2008 (see Securities Exchange Act Release No. 57572 (March 27, 2008); 73 FR 18308). FINRA submitted a Response to Comments on June 11, 2008, and a Supplemental Response to Comments on September 3, 2008.

⁷ Jill I. Gross and Barbara Black, Perceptions of Fairness of Securities Arbitration: An Empirical Study, (February 6, 2008). The report can be downloaded at <http://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1477&context=lawfaculty>.

matter and the explained decision would normally address all the claims asserted by the parties, the parties may request that an explained decision address only certain claims. Requiring the parties' joint agreement to an explained decision is consistent with FINRA's general policy to accommodate a joint request of the parties.

Parties Must Submit any Request for an Explained Decisions 20 Days before the first scheduled hearing date

The proposed rule change provides that parties must submit any joint request for an explained decision no later than 20 days prior to the first scheduled hearing date. This deadline coincides with the time that parties must exchange documents and identify witnesses they intend to present at the hearing. This approach establishes a clear deadline, gives the parties sufficient time to request an explained decision, and provides notice to the arbitrators that an explained decision will be required before the hearing begins.

The Chairperson Must Write the Explained Decision

The proposed rule change would require that the chairperson write the explained decision. The original proposal contemplated that any of the arbitrators, or all of them, might draft the decision. Many commenters on the original proposal were concerned that poorly written decisions might harm the public's perception of arbitration, or increase the likelihood of a party successfully vacating an award. To address these concerns, the rule would require that the chairperson write the decision.

Under the Codes, arbitrators must meet specific experience and training criteria to serve as chairpersons in arbitrations.⁸ Therefore, chairpersons may be more experienced

⁸ Pursuant to Rules 12400 and 13400, arbitrators are eligible for the chairperson roster if they have completed FINRA chairperson training and:

than non-chairpersons and should be better able to produce higher quality explained decisions. Further, assigning this responsibility to the chairperson would eliminate any confusion over who would be responsible for drafting the decision and would streamline the decision writing process. Having one arbitrator draft the decision after all the arbitrators have been consulted would reduce the time required to complete the decision. Once the decision was drafted, the arbitrators still would be required to sign the decision as provided in Rules 12904(a) and 13904(a).⁹

The Explained Decision Must Be Fact-Based

Under the proposed rule change, the explained decision is a fact-based award stating the general reason(s) for the arbitrators' decision.¹⁰ The award need not include

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- Have a law degree and are a member of a bar of at least one jurisdiction and have served as an arbitrator through award on at least two arbitrations administered by a self-regulatory organization in which hearings were held; or
 - Have served as an arbitrator through award on at least three arbitrations administered by a self-regulatory organization in which hearings were held.

On June 23, 2008, the SEC approved a proposal to eliminate the Code provision allowing arbitrators to serve as Chairpersons provided they have “substantially equivalent training or experience” in lieu of completing FINRA Dispute Resolution’s Chairperson training course (see Securities Exchange Act Release No. 58004 (June 23, 2008); 73 FR 36579 (June 27, 2008) (File No. SR-FINRA-2008-009). This rule became effective on September 22, 2008.

⁹ Rules 12904(a) and 13904(a) require all awards to be in writing and signed by a majority of the arbitrators or as required by applicable law.

¹⁰ While Rules 12604 and 13604 provide that the panel decides what evidence to admit and is not required to follow state or federal rules of evidence, FINRA intends that, as with current arbitration awards, explained decisions will have no precedential value in other cases. Thus, arbitrators will not be required to follow any findings or determinations that are set forth in prior explained decisions. In order to ensure that users of the forum are aware of the non-precedential nature of explained awards, FINRA plans to revise the template for all awards to include the following sentence: “If the arbitrators have provided an explanation of their decision in this award, the explanation is for the information of the parties only and is not precedential in nature.”

legal authorities and damage calculations. FINRA believes that requiring only fact-based reasons in explained decisions will reduce the potential for misstatements in an award, thereby decreasing the possibility of a subsequent vacatur, modification or remand of an award and ensuring the continued finality of a FINRA award. FINRA believes the proposed rule change will provide the parties with the information they want while simultaneously maintaining the expediency, flexibility, and finality of arbitration.

Only the Chairperson Will Be Compensated for an Explained Decision

The original proposal did not address who was responsible for preparing the explained decision and provided that each arbitrator would be paid an additional \$200 honorarium for cases in which an explained decision was required. Under the proposed rule change, only the chairperson would write the decision, and only the chairperson would be paid an additional honorarium. The additional honorarium paid to the chairperson would reflect the increased effort involved in drafting an explained decision. The panel may allocate the cost of the honorarium to one party, or may allocate it between or among all parties.¹¹

Parties May Not Require Explained Decisions in Some Cases

Parties would not be able to require explained decisions in two types of arbitration proceedings. The first is simplified arbitrations that are decided solely upon the pleadings and evidence filed by the parties, as described in Rules 12800 and 13800. The second is arbitrations that are conducted under the default procedures provided for in Rules 12801

¹¹ Under the Customer and Industry Codes, the panel has the authority to assess fees in connection with discovery-related motions, contested subpoena requests, and hearing session fees to one party, or may split the fees between or among all parties.

and 13801. Explained decisions would not be appropriate in either of these situations because of the abbreviated nature of these arbitration proceedings.

Arbitrators May Choose to Write Explained Decisions in Other Circumstances

Under the proposed rule change, arbitrators would continue to be permitted to decide, on their own or upon the motion of one party, to write an explained decision. Arbitrators would not receive an additional honorarium if the panel issues an explained decision that is not required under the proposed rules. The proposed rule change would not affect the current rule that permits arbitrators to include a rationale in an award, even if the parties have not requested it, but would not encourage arbitrators to write an explained decision when they are not asked to do so by all the parties.

2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,¹² 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. The proposed rule change would increase investor confidence in the fairness of the arbitration process by allowing parties jointly to require arbitrators to write an explained decision.

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 Act.

¹² 15 U.S.C. 78o-3(b)(6).

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 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-2008-051 on the subject line.

Paper Comments:

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

All submissions should refer to File Number SR-FINRA-2008-051. 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. 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-2008-051 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹³

Florence Harmon
Acting Secretary

¹³ 17 CFR 200.30-3(a)(12).