

January 29, 2010

Ms. Elizabeth M. Murphy
Secretary
U. S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549

Re: File No. SR-FINRA-2009-075 – Proposed Rule Change to Amend the Postponement Fee and Hearing Session Fee Rules of the Codes of Arbitration Procedure; Response to Comments

Dear Ms. Murphy:

The Financial Industry Regulatory Authority, Inc. (FINRA) (formerly known as the National Association of Securities Dealers, Inc. (NASD)) hereby responds to the comment letters received by the Securities and Exchange Commission (SEC) with respect to the above rule filing. In this rule filing, FINRA is proposing to amend Rules 12601 and 12902 of the Code of Arbitration Procedure for Customer Disputes (Customer Code) and Rules 13601 and 13902 of the Code of Arbitration Procedure for Industry Disputes (Industry Code) (together, the Codes) to clarify the applicability of the fee waiver provision of the postponement rule and to codify the fee for hearing sessions with one arbitrator in claims of unspecified damages.¹

Specifically, the proposed revisions to Rules 12601(b)(3) and 13601(b)(3) of the Codes, hereinafter referred to as the fee waiver provision of the postponement rule, would clarify that the late postponement fee will not be waived if parties request a postponement within three business days before the scheduled hearing session. Further, the proposed revisions to Rules 12902(a)(1) and 13902(a)(1) of the Codes would codify FINRA's current practice of charging, in unspecified damages claims, \$450 per hearing session heard by one arbitrator.²

The SEC received two letters on the proposal.³ One commenter supports the amendment,⁴ and one opposes it.⁵ The commenter who supports the proposal

¹ See Securities Exchange Act Rel. No. 61057 (November 24, 2009), 74 FR 62855 (December 1, 2009) (File No. SR-FINRA-2009-075).

² To simplify the explanation, the discussion will focus on the proposed amendments to the Customer Code. However, the explanation and rationale apply to the same rules of the Industry Code, which, in this case, are identical to the rules of the Customer Code.

³ Comment letters were submitted by William A. Jacobson, Esq. and Kelly Cardin, December 16, 2009, Cornell University, Cornell Securities Law Clinic (Cornell Letter), and Scott R. Shewan, President, Public Investors Arbitration Bar Association, December 21, 2009 (PIABA Letter).

⁴ Cornell Letter.

understands that arbitrators often structure their schedules around hearings and, therefore, should be compensated for their time and any inconvenience resulting from a late hearing postponement.⁶ Thus, the commenter agrees that the proposal could provide parties with an incentive to resolve or settle their disputes earlier in the process, rather than at the last minute.⁷ The commenter further believes that the amendment to the fee waiver provision of the postponement rule appears fair to the parties because the \$100 postponement fee will not be imposed if the request for postponement is timely.⁸ The commenter also supports the amendment to correct the fee schedule to reflect the fee charged for sessions with one arbitrator in unspecified damage claims. The commenter indicated that the session fee of \$450 is reasonable and should assist customers in understanding the forum's fee structure prior to filing a claim.⁹

The commenter, who opposes the proposal,¹⁰ does so for several reasons.

First, the commenter believes that rules, such as the fee waiver provision of the postponement rule, should not "create a direct connection between the amounts the arbitrators are paid and whether the [parties] comply with FINRA timelines."¹¹ The commenter states further that FINRA should not impose an impediment to resolving an arbitration by penalizing parties for settling the case at the last minute.¹²

FINRA believes, like the commenter, that it is reasonable for arbitrators to receive a fair payment for their service and for restructuring their schedules to accommodate the parties' availability for hearings.¹³ Unlike the commenter however, FINRA believes, and the SEC has agreed, that it is fair and reasonable for arbitrators to receive some compensation in the event that a scheduled hearing is postponed at the last minute, thereby disrupting the time the arbitrators set aside to assist the parties.¹⁴ In 2004, when the SEC approved the late postponement fee rule, the purpose of the rule was to curtail delays in arbitration proceedings by minimizing late postponement requests. To accomplish this goal, FINRA believed the best approach was to assess the parties an additional fee if their request for postponement was made and granted within three

⁵ PIABA Letter.

⁶ Cornell Letter, p. 2.

⁷ Id.

⁸ Id.

⁹ Id.

¹⁰ PIABA Letter.

¹¹ Id. at p. 1.

¹² Id. at p. 2.

¹³ Id. at p. 1.

¹⁴ See Securities Exchange Act Rel. No. 49716 (May 17, 2004), 69 FR 29342 (May 21, 2004) (File No. SR-NASD-2003-164, Order Approving Proposed Rule Change and Amendment Nos. 1 and 2 by National Association of Securities Dealers, Inc. Relating to the Adjournment of an Arbitration Hearing Within Three Business Days of the First Scheduled Hearing Session). The proposal amended IM-10104, Rule 10306, and Rule 10319 of the Code of Arbitration Procedure ("old Code"). The old Code used the term "adjournment" to describe postponements and cancellations of hearings. The Codes use the term "postponements" to describe cancellations of hearings.

business days before a scheduled hearing.¹⁵ FINRA believed that the rule change was necessary to provide arbitrators with some compensation in the event that a scheduled hearing is postponed at the last minute and to encourage parties, when appropriate, to settle their disputes earlier to avoid additional fees.¹⁶

The proposed amendment to the fee waiver provision incorporates the late postponement fee rule by requiring parties to pay an additional fee for a request to mediate through FINRA that is granted within three business days of a scheduled hearing session. FINRA believes that the proposal is necessary to provide arbitrators with some compensation if the parties' request to mediate through FINRA is granted within three business days of a scheduled hearing. FINRA also believes that the additional fee would serve to encourage parties to consider mediating their dispute earlier, rather than at the last minute, which could delay the arbitration process and cause arbitrators to lose not only the time spent preparing for the arbitration hearing and the honoraria from the postponed hearing (or series of hearings), but also other income they could have earned on the reserved dates.

Second, the commenter suggests that if FINRA continues to assess the late postponement fees, it should assess them against the industry respondent, because the respondent could have settled earlier and avoided the inconvenience to the panel.¹⁷

FINRA notes that Rule 12601(b)(2) permits arbitrators to allocate all or portion of the late postponement fee to the non-requesting party or parties, if they determine that the non-requesting party or parties caused or contributed to the need for the postponement.¹⁸ FINRA believes that arbitrators would be in the best position to determine how the late postponement fee should be allocated, and the rule gives them the authority to make this determination, and assess the fee accordingly. For this reason and the reasons stated above, FINRA does not intend to amend the proposal at this time.

Third, the commenter also opposes amending the hearing session fee for unspecified damages claims heard by one arbitrator from "not applicable" to \$450, because the charge does not seem to be fair or reasonable when compared to the charge for three arbitrators in an unspecified damages claim.¹⁹

FINRA notes first that, in unspecified damage claims, hearing sessions with a single arbitrator can occur. Therefore, the chart of fees should not reflect that this scenario is "not applicable." Second, the hearing session fees that are assessed to parties by FINRA for an arbitration proceeding are reasonable for a hearing session with a single arbitrator in unspecified damage claims. The hearing session fee is not used solely to cover arbitrator honoraria. In scheduling a hearing session, FINRA incurs a

¹⁵ See Securities Exchange Act Rel. No. 49545 (April 8, 2004), 69 FR 19887 (April 14, 2004) (File No. SR-NASD-2003-164, Notice of Filing), p. 19888.

¹⁶ Id.

¹⁷ PIABA Letter, p. 2.

¹⁸ See also Rule 13601(b)(2).

¹⁹ PIABA Letter, p. 2.

number of fixed costs²⁰ regardless of the amount in dispute or the number of arbitrators involved; thus, FINRA has determined that the \$450 hearing session fee is the amount necessary to cover its expenses. Third, FINRA currently charges parties \$450 for hearing sessions heard by one arbitrator in which parties request damages ranging from \$10,000.01 to over \$500,000, which provides case administration with a uniform fee structure that is easy to apply. Finally, Rule 12902(a)(2) authorizes the Director to determine whether the hearing session fee for an unspecified damages claim should be more or less than the amount specified in the fee schedule of Rule 12902(a)(1). Thus, the proposal would not change FINRA's practice of reducing or waiving its fees in documented cases of financial hardship.

Finally, the commenter asserts that the proposed rules would result in higher fees to customers in FINRA arbitration proceedings.

FINRA notes that the amendment to the fee waiver provision of the postponement rule clarifies that the late postponement fee would apply if the parties' request to submit the matter to mediation through FINRA is made late. FINRA intended the late postponement fee to apply in this situation, and the proposal makes this clear. This change alters the current rules only in instances where the parties voluntarily agree to mediate their dispute. Under the proposal, parties could be assessed this fee, but FINRA believes that the amendment notifies parties expressly of relevant deadlines that should be met, so that they have the option to avoid additional fees. With respect to the proposed amendment to the hearing session fee for unspecified damages claims heard by one arbitrator, FINRA notes that this is a clarification of a fee that FINRA charges currently. While these amendments could result in additional fees to parties, the fees are not new and they do not represent an increase to fees charged currently by the forum. FINRA believes these fees are fair and reasonable, and that the proposal should be approved as drafted.²¹

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If you have any questions, please contact me on (202) 728-8151 or at mignon.mclemore@finra.org.

Very truly yours,

Mignon McLemore
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FINRA Dispute Resolution

²⁰ Some of FINRA's fixed costs include but are not limited to, staff costs, hotel room charges, where applicable and conference calling fees.

²¹ See also Cornell Letter, p. 2.