

Motions to Dismiss in Arbitration

SEC Approves Amendments to the Codes of Arbitration Procedure Regarding Motions to Dismiss

Effective Date: January 23, 2017

Summary

The Securities and Exchange Commission (SEC) approved¹ amendments to FINRA Rules 12504 and 13504 (Motions to Dismiss) of the Customer and Industry Codes of Arbitration Procedure (Codes) to add an additional ground for arbitrators to act on motions to dismiss prior to the conclusion of the claimant's case in chief. The new ground provides that arbitrators may act upon a motion to dismiss a party or claim prior to the conclusion of a party's case in chief if the arbitrators determine that the non-moving party previously brought a claim regarding the same dispute against the same party, and the dispute was fully and finally adjudicated on the merits and memorialized in an order, judgment, award or decision.

The amendments are effective for motions to dismiss filed on or after January 23, 2017.

The text of the amendments is set forth in Attachment A.

Questions concerning this *Notice* should be directed to:

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- ▶ Margo Hassan, Associate Chief Counsel, FINRA Office of Dispute Resolution, at (212) 858-4481 or margo.hassan@finra.org.

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Notice Type

- ▶ Rule Amendment

Suggested Routing

- ▶ Compliance
- ▶ Legal
- ▶ Registered Representatives
- ▶ Senior Management

Key Topics

- ▶ Arbitration
- ▶ Codes of Arbitration Procedure
- ▶ Motions to Dismiss

Referenced Rules & Notices

- ▶ FINRA Rule 12504
- ▶ FINRA Rule 13504

Background & Discussion

FINRA Rules 12504 and 13504 specify procedures that limit the use of motions to dismiss in arbitration. Under the Codes, arbitrators cannot act upon a motion to dismiss prior to the conclusion of the non-moving party's case in chief unless the arbitrators determine that: (1) the non-moving party previously released the claim in dispute by a signed settlement or written release,² (2) the moving party was not associated with the account, security or conduct at issue,³ or (3) a claim is not eligible for arbitration because it does not meet the six-year time limit for submitting a claim.⁴ In addition, parties must file prehearing motions to dismiss in writing, separately from the answer, and only after they file the answer. The full panel of arbitrators must decide a motion to dismiss, and the panel must hold a hearing on the motion unless the parties waive the hearing. If a panel grants a motion to dismiss, the decision must be unanimous, and must be accompanied by a written explanation.

FINRA has amended the Codes to add an additional ground for arbitrators to act on motions to dismiss prior to the conclusion of the claimant's case in chief. The new ground provides that arbitrators can also act upon a motion to dismiss a party or claim if they determine that the non-moving party previously brought a claim regarding the same dispute⁵ against the same party that was fully and finally adjudicated on the merits and memorialized in an order, judgment, award or decision.

The amendments allow arbitrators to grant a motion to dismiss relating to a particular controversy if they believe the matter was adjudicated fully even in instances where a claimant adds a new cause of action or adds additional facts. In order for the arbitrators to grant the motion, the moving party must demonstrate that the non-moving party brought the same dispute against the same party and that the non-moving party had a full opportunity to present its claims in the earlier proceeding.

Effective Date

The amendments are effective for motions to dismiss filed on or after January 23, 2017.

Endnotes

1. See Securities Exchange Act Release No. 79285 (November 10, 2016), 81 FR 81213 (November 17, 2016) (Order Approving File No. SR-FINRA-2016-030).
2. See FINRA Rules 12504(a)(6)(A) and 13504(a)(6)(A).
3. See FINRA Rules 12504(a)(6)(B) and 13504(a)(6)(B).
4. See FINRA Rules 12206 and 13206 (Time Limits), which provide that no claim shall be eligible for submission to arbitration where six years have elapsed from the occurrence or event giving rise to the claim.
5. FINRA Rules 12100 and 13100 provide that “dispute” means a dispute, claim or controversy, and that it may consist of one or more claims.

Attachment A

Customer Code

12504. 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. Moving parties may reply to responses to motions. Any such reply must be made within 5 days of receipt of a response.

(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; or.]

(C) The non-moving party previously brought a claim regarding the same dispute against the same party that was fully and finally adjudicated on the merits and memorialized in an order, judgment, award, or decision.

(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) – (e) No change.

Industry Code

13504. Motions to Dismiss

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

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(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. Moving parties may reply to responses to motions. Any such reply must be made within 5 days of receipt of a response.

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(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; or[.]

(C) The non-moving party previously brought a claim regarding the same dispute against the same party that was fully and finally adjudicated on the merits and memorialized in an order, judgment, award, or decision.

(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.

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(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) – (e) No change.