

Prehearing Conference Late Cancellation Fee and Arbitrator Honorarium

SEC Approves Amendments to the Codes of Arbitration Procedure to Establish a Per-Arbitrator Fee and Honorarium for Late Cancellation of Prehearing Conferences

Effective Date: October 29, 2018

Summary

The Securities and Exchange Commission (SEC) approved¹ amendments to FINRA's customer and industry arbitration rules to charge parties who request cancellation of a prehearing conference within three business days a \$100 per-arbitrator fee. The amendment also provides for a \$100 honorarium to each arbitrator scheduled to attend the cancelled prehearing conference.

The amendments are effective for cases filed on or after October 29, 2018.

Questions concerning this *Notice* should be directed to:

- ▶ David Carey, Associate Director, FINRA Office of Dispute Resolution, at (212) 858-4333 or david.carey@finra.org; or
- ▶ Mignon McLemore, Assistant Chief Counsel, FINRA Office of Dispute Resolution, at (202) 728-8151 or mignon.mclemore@finra.org.

Background & Discussion

In arbitration proceedings, prehearing conferences are typically scheduled before the hearing on the merits. For example, after the parties select arbitrators and a panel is appointed,² the Director³ will schedule an Initial Prehearing Conference (IPHC) with the panel.⁴ During these conferences, the arbitrator or panel meets with the parties, generally by telephone, to set deadlines, schedule the hearing and consider other preliminary matters.⁵ Prehearing conferences may also address other matters, such as discovery disputes or substantive motions (*e.g.*, motions to dismiss or motions to amend).⁶

September 28, 2018

Notice Type

- ▶ Rule Amendment

Suggested Routing

- ▶ Compliance
- ▶ Legal

Key Topics

- ▶ Arbitration
- ▶ Codes of Arbitration Procedure
- ▶ Initial Prehearing Conference
- ▶ Other Prehearing Conferences
- ▶ Payment of Arbitrators

Referenced Rules & Notices

- ▶ FINRA Rule 12214
- ▶ FINRA Rule 12500
- ▶ FINRA Rule 12501
- ▶ FINRA Rule 13214
- ▶ FINRA Rule 13500
- ▶ FINRA Rule 13501

Prior to the amendments, parties could cancel prehearing conferences up to and including on the same day without penalty (unlike postponements of arbitration hearings).⁷ Considerable preparation by arbitrators and logistical work by FINRA staff is required prior to prehearing conferences. Cancellations of prehearing conferences that occur within three or fewer business days of a prehearing conference (late cancellations) often result in scheduling inconvenience for arbitrators, uncompensated work and an operational challenge for FINRA staff who must quickly notify arbitrators about the cancellation.

Late Cancellation Fee to Parties

FINRA has amended FINRA Rules 12500 and 12501 of the Customer Code and FINRA Rules 13500 and 13501 of the Industry Code to provide that if a cancellation request is agreed to by the parties or requested by one or more parties within three business days before a scheduled prehearing conference and is granted, the party or parties shall be charged a fee of \$100 per arbitrator scheduled to attend the prehearing conference. In the event that an extraordinary circumstance prevents a party or parties from making a timely cancellation request, the arbitrator(s) may use their discretion to waive the fee, provided a written explanation of such circumstance is received.

Arbitrator Honorarium for Late Cancellations

FINRA has also amended FINRA Rules 12214(a) and 13214(a) to pay a \$100 honorarium to each arbitrator who is scheduled to attend a prehearing conference that is cancelled within three business days.

Example of How the Rules Will Be Applied

The following examples illustrate how the rule will work. The Director schedules an IPHC for Wednesday, February 20, 2019, and three arbitrators⁸ are scheduled to attend. A FINRA holiday falls on Monday, February 18, 2019. The parties notify the Director of their agreement to cancel⁹ the IPHC¹⁰ on Wednesday, February 13, 2019. They will not be charged the fee because they will have provided notice¹¹ four business days before the scheduled prehearing conference.¹² If the parties notify the Director of the cancellation on Thursday, February 14, 2019, they will be assessed a \$100 per-arbitrator fee (or \$300),¹³ because they will have provided the cancellation notice within three business days before the scheduled prehearing conference. If the parties do not agree to a fee allocation, the arbitrator(s) will have the discretion, under the amendments, to allocate the fee among the parties.

Under the scenario above, if one party requests cancellation and notifies the Director on Thursday, February 14, 2019,¹⁴ the arbitrators will allocate the \$300 fee to that party. However, the arbitrator(s) will have the discretion, under the amendments, to allocate the fee to the non-requesting party or parties if the arbitrator(s) determine that the non-requesting party or parties caused or contributed to the need for the cancellation.¹⁵

Effective Date

The amendments are effective for cases filed on or after October 29, 2018.

Endnotes

1. See Securities Exchange Act Release No. 83752 (July 31, 2018), 83 *Federal Register* 38327 (August 6, 2018) (Order Approving File No. SR-FINRA-2018-019).
2. See generally Part IV (Appointment, Disqualification, and Authority of Arbitrators) of the FINRA Rule 12000 Series and the FINRA Rule 13000 Series.
3. The term “Director” means the Director of the Office of Dispute Resolution. Unless the Code provides that the Director may not delegate a specific function, the term includes FINRA staff to whom the Director has delegated authority. See FINRA Rules 12100(m) and 13100(m).
4. See FINRA Rules 12500(a) and 13500(a). Parties may agree to forego the IPHC only if they jointly provide the Director, in writing, with the information listed in subparagraphs (1) through (6) of FINRA Rules 12500(c) and 13500(c).
5. See FINRA Rules 12500(c) and 13500(c).
6. See FINRA Rules 12501(b) and 13501(b).
7. Under the Code of Arbitration Procedure for Customer Disputes (Customer Code) and the Code of Arbitration Procedure for Industry Disputes (Industry Code) (together, Codes), a party or parties that make postponement requests within 10 days before a scheduled hearing session are required to pay a \$600 per-arbitrator late cancellation fee. See FINRA Rules 12601(b)(2) and 13601(b)(2).
8. If the amount of the claim is more than \$100,000, the panel will consist of three arbitrators, unless the parties agree in writing to one arbitrator. See FINRA Rules 12401(c) and 13401(c).
9. References to cancellations of prehearing conferences include postponements of such conferences.
10. See *supra* note 4.
11. The date of the party or party’s cancellation request will control whether the fee is assessed, not the date of the arbitrators’ decision on such a request. A decision would be required if only one party requests that the prehearing conference be cancelled.
12. The intent of the rule is to ensure that arbitrators receive three full business days’ notice of the cancellation, excluding the day of the prehearing conference. Therefore, weekend days and FINRA holidays would be excluded in determining the three-business-day window outside of which a party or parties would be required to provide notice of cancellation. In the example, therefore, the parties must provide notice on Wednesday, February 13 (or four business days, excluding the weekend and the FINRA holiday, before the scheduled prehearing conference) to avoid the late cancellation fee.
13. In this instance, the parties will be charged \$300 because the three arbitrators are scheduled to attend the IPHC.

©2018. FINRA. All rights reserved. Regulatory Notices attempt to present information to readers in a format that is easily understandable. However, please be aware that, in case of any misunderstanding, the rule language prevails.

14. If an extraordinary circumstance (*e.g.*, a serious car accident) causes a party to miss the deadline, to avoid the late cancellation fee, the party may provide a written explanation before the case closes for the arbitrators to consider waiving the fee. If the arbitrators waive the fee, FINRA will pay the \$100 per-arbitrator honorarium to those arbitrators scheduled to attend the conference. If the fee is waived, the party or parties' obligation to pay the fee is eliminated. Absent such a waiver, the \$100 per-arbitrator fee will be charged to the party as a fee assessment at the time the case is closed.
15. If the arbitrators cancel a prehearing conference on their own, the parties will not be charged.

Attachment A

Customer Code

12214. Payment of Arbitrators

(a) Except as provided in paragraph (b) and in Rule 12800, FINRA will pay the panel an honorarium, as follows:

[•] (1) \$300 to each arbitrator for each hearing session in which he or she participates;

[•] (2) an additional \$125 per day to the chairperson for each hearing on the merits;

[•] (3) \$50 to each arbitrator for travel to a hearing session that is postponed pursuant to Rule 12601; [and]

[•] (4) \$600 [for] to each arbitrator if a hearing session other than a prehearing conference is postponed within 10 days before a scheduled hearing session pursuant to Rules 12601(a)(2) and (b)(2); and

(5) \$100 to each arbitrator scheduled to attend a prehearing conference that is cancelled within three business days of the prehearing conference by agreement of the parties or is requested by one or more parties within three business days of the prehearing conference and granted, pursuant to Rules 12500(d) and 12501(d).

(b) - (e) No change.

12500. Initial Prehearing Conference

(a) - (b) No change.

(c) At the Initial Prehearing Conference, the panel will set discovery, briefing, and motions deadlines, schedule subsequent hearing sessions, and address other preliminary matters. The parties may agree to forgo the Initial Prehearing Conference only if they jointly provide the Director with the following information, in writing, with additional copies for each arbitrator, before the Initial Prehearing Conference is scheduled to be held:

[•] (1) A statement that the parties accept the panel;

[•] (2) Whether any other prehearing conferences will be held, and if so, for each prehearing conference, a minimum of four mutually agreeable dates and times, and whether the chairperson or the full panel will preside;

- [•] (3) A minimum of four sets of mutually agreeable hearing dates;
- [•] (4) A discovery schedule;
- [•] (5) A list of all anticipated motions, with filing and response due dates; and
- [•] (6) A determination regarding whether briefs will be submitted, and, if so, the due date for the briefs and any reply briefs.

(d) If a cancellation request is agreed to by the parties or requested by one or more parties within three business days before a scheduled prehearing conference and granted, the party or parties shall be charged a fee of \$100 per arbitrator scheduled to attend the prehearing conference. If more than one party requests the cancellation, the arbitrator(s) may allocate the \$100 per-arbitrator fee between or among the requesting parties. If one party requests the cancellation, the arbitrator(s) shall allocate the fee to that party; provided, however, the arbitrator(s) may allocate all or a portion of the \$100 per-arbitrator fee to the non-requesting party or parties if the arbitrator(s) determine that the non-requesting party or parties caused or contributed to the need for the cancellation. In the event that an extraordinary circumstance prevents a party or parties from making a timely cancellation request, the arbitrator(s) may use their discretion to waive the fee, provided a written explanation of such circumstance is received.

12501. Other Prehearing Conferences

- (a) No change.
- (b) At a party's request, or at the discretion of the panel, the panel may schedule one or more additional prehearing conferences regarding any outstanding preliminary matters, including:
 - [•] (1) Discovery disputes;
 - [•] (2) Motions;
 - [•] (3) Witness lists and subpoenas;
 - [•] (4) Stipulations of fact;
 - [•] (5) Unresolved scheduling issues;
 - [•] (6) Contested issues on which the parties will submit briefs; and
 - [•] (7) Any other matter that will simplify or expedite the arbitration.

(c) No change.

(d) If a cancellation request is agreed to by the parties or requested by one or more parties within three business days before a scheduled prehearing conference and granted, the party or parties shall be charged a fee of \$100 per arbitrator scheduled to attend the prehearing conference. If more than one party requests the cancellation, the arbitrator(s) may allocate the \$100 per-arbitrator fee between or among the requesting parties. If one party requests the cancellation, the arbitrator(s) shall allocate the fee to that party; provided, however, the arbitrator(s) may allocate all or a portion of the \$100 per-arbitrator fee to the non-requesting party or parties if the arbitrator(s) determine that the non-requesting party or parties caused or contributed to the need for the cancellation. In the event that an extraordinary circumstance prevents a party or parties from making a timely cancellation request, the arbitrator(s) may use their discretion to waive the fee, provided a written explanation of such circumstance is received.

* * * * *

Industry Code

13214. Payment of Arbitrators

(a) Except as provided in paragraph (b), Rule 13800, and Rule 13806(f), FINRA will pay the panel an honorarium, as follows:

[•] (1) \$300 to each arbitrator for each hearing session in which he or she participates;

[•] (2) an additional \$125 per day to the chairperson for each hearing on the merits;

[•] (3) \$50 to each arbitrator for travel to a hearing session that is postponed pursuant to Rule 13601; [and]

[•] (4) \$600 [for] to each arbitrator if a hearing session other than a prehearing conference is postponed within 10 days before a scheduled hearing session pursuant to Rules 13601(a)(2) and (b)(2); and

(5) \$100 to each arbitrator scheduled to attend a prehearing conference that is cancelled within three business days of the prehearing conference by agreement of the parties or is requested by one or more parties within three business days of the prehearing conference and granted, pursuant to Rules 13500(d) and 13501(d).

(b) - (e) No change.

* * * * *

13500. Initial Prehearing Conference

(a) - (b) No change.

(b) At the Initial Prehearing Conference, the panel will set discovery, briefing, and motions deadlines, schedule subsequent hearing sessions, and address other preliminary matters. The parties may agree to forgo the Initial Prehearing Conference only if they jointly provide the Director with the following information, in writing, with additional copies for each arbitrator, before the Initial Prehearing Conference is scheduled to be held:

[•] (1) A statement that the parties accept the panel;

[•] (2) Whether any other prehearing conferences will be held, and if so, for each prehearing conference, a minimum of four mutually agreeable dates and times, and whether the chairperson or the full panel will preside;

[•] (3) A minimum of four sets of mutually agreeable hearing dates;

[•] (4) A discovery schedule;

[•] (5) A list of all anticipated motions, with filing and response due dates; and

[•] (6) A determination regarding whether briefs will be submitted, and, if so, the due date for the briefs and any reply briefs.

(c) If a cancellation request is agreed to by the parties or requested by one or more parties within three business days before a scheduled prehearing conference and granted, the party or parties shall be charged a fee of \$100 per arbitrator scheduled to attend the prehearing conference. If more than one party requests the cancellation, the arbitrator(s) may allocate the \$100 per-arbitrator fee between or among the requesting parties. If one party requests the cancellation, the arbitrator(s) shall allocate the fee to that party; provided, however, the arbitrator(s) may allocate all or a portion of the \$100 per-arbitrator fee to the non-requesting party or parties if the arbitrator(s) determine that the non-requesting party or parties caused or contributed to the need for the cancellation. In the event that an extraordinary circumstance prevents a party or parties from making a timely cancellation request, the arbitrator(s) may use their discretion to waive the fee, provided a written explanation of such circumstance is received.

13501. Other Prehearing Conferences

(a) No change.

(b) At a party's request, or at the discretion of the panel, the panel may schedule one or more additional prehearing conferences regarding any outstanding preliminary matters, including:

[•] (1) Discovery disputes;

[•] (2) Motions;

[•] (3) Witness lists and subpoenas;

[•] (4) Stipulations of fact;

[•] (5) Unresolved scheduling issues;

[•] (6) Contested issues on which the parties will submit briefs; and

[•] (7) Any other matter that will simplify or expedite the arbitration.

(c) No change.

(d) If a cancellation request is agreed to by the parties or requested by one or more parties within three business days before a scheduled prehearing conference and granted, the party or parties shall be charged a fee of \$100 per arbitrator scheduled to attend the prehearing conference. If more than one party requests the cancellation, the arbitrator(s) may allocate the \$100 per-arbitrator fee between or among the requesting parties. If one party requests the cancellation, the arbitrator(s) shall allocate the fee to that party; provided, however, the arbitrator(s) may allocate all or a portion of the \$100 per-arbitrator fee to the non-requesting party or parties if the arbitrator(s) determine that the non-requesting party or parties caused or contributed to the need for the cancellation. In the event that an extraordinary circumstance prevents a party or parties from making a timely cancellation request, the arbitrator(s) may use their discretion to waive the fee, provided a written explanation of such circumstance is received.