

Mignon McLemore
Assistant Chief Counsel

October 5, 2018

Mr. Brent J. Fields
Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090

RE: Proposed Rule Change to Amend the Arbitrator Payment Rule to Pay Each Arbitrator a \$200 Honorarium to Decide Without a Hearing Session a Contested Subpoena Request or a Contested Order for Production or Appearance (File No. SR-FINRA-2018-026); Response to Comments

Dear Mr. Fields:

This letter responds to comments submitted to the U.S. Securities and Exchange Commission (“SEC” or “Commission”) regarding the above-referenced filing. In this filing, the Financial Industry Regulatory Authority, Inc. (“FINRA”) is proposing to amend FINRA Rules 12214(c) through (e) of the Code of Arbitration Procedure for Customer Disputes (“Customer Code”) and FINRA Rules 13214(c) through (e) of the Code of Arbitration Procedure for Industry Disputes (“Industry Code” and together, “Codes”), to provide that FINRA will pay each arbitrator a \$200 honorarium to decide without a hearing session a contested subpoena request or a contested order for production or appearance.¹

The SEC received four comment letters on the proposed rule change.² The commenters support the proposed rule change. In urging its approval, the commenters believe that the proposed rule change would ensure that the payment arbitrators receive for deciding these requests is commensurate with the time and effort that they spend on each motion.³ Further, Caruso suggests that the proposed rule change “would provide uniformity regarding when and how much arbitrators receive when deciding contested subpoenas and orders for production and appearance without a hearing session.”

¹ See Securities Exchange Act Rel. No. 83699 (July 24, 2018), 83 FR 36647 (July 30, 2018) (File No. SR-FINRA-2018-026).

² See Letter from Steven B. Caruso, Maddox Hargett Caruso, P.C., July 25, 2018 (“Caruso”); Letter from Ryan K. Bakhtiari, Aidikoff, Uhl and Bakhtiari, July 31, 2018 (“Bakhtiari”); Letter from Glenn S. Gitomer, McCausland Keen + Buckman, August 1, 2018 (“Gitomer”); and Letter from Andrew Stoltmann, President, Public Investors Arbitration Bar Association, August 15, 2018 (“PIABA”). With regard to Gitomer, the reference to the current year in this footnote corrects a typographical error in the letter.

³ Id.

Two commenters suggest that the proposed rule change would help FINRA enhance its arbitrator rosters. Bakhtiari suggests that the proposed rule change would help FINRA maintain its chairperson roster “by compensating arbitrators for work that they perform.” PIABA suggests that the proposed rule change would “encourage qualified arbitrators to serve on cases and as Chair.”

Clarify That Arbitrators Have Discretion When Assessing Fees

PIABA suggests that FINRA clarify its guidance to arbitrators to make clear that arbitrators can and should consider assessing 100 percent of the FINRA motion fees to parties who unsuccessfully oppose motions for subpoenas or orders to appear or produce. PIABA comments that FINRA “should informally advise arbitrators to consider assessing all fees to the non-prevailing party on contested discovery motions, where in the arbitrators’ view the non-prevailing party’s position lacked merit.” PIABA also states that no particular assessment of FINRA fees should be mandated by FINRA rules as is currently the case, but rather, the division of fees should remain within the sole discretion of the arbitrators.

FINRA Rules 12902(c) and 13902(c) state that in its award, the panel must also determine the amount of any costs and expenses incurred by the parties under the Code or that are within the scope of the agreement of the parties, and which party or parties will pay those costs and expenses. Under these rules, if the parties do not agree on the allocation of costs and expenses, arbitrators have the discretion to determine how such costs and expenses should be allocated at the award stage. Parties may argue their positions regarding the appropriate assessment of fees and expenses in their motion papers or responses thereto. FINRA believes informal guidance on the arbitrators’ authority is unnecessary.

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FINRA believes that the foregoing responds to the issues raised by the commenters. If you have any questions, please contact me on 202-728-8151 or mignon.mclmore@finra.org.

Sincerely,

/MM/

Mignon McLemore
Assistant Chief Counsel
Office of Dispute Resolution