

Required fields are shown with yellow backgrounds and asterisks.

Page 1 of \*       SECURITIES AND EXCHANGE COMMISSION      File No.\* SR -  - \*   
 WASHINGTON, D.C. 20549      Form 19b-4      Amendment No. (req. for Amendments \*)

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

<b>Initial *</b>	<b>Amendment *</b>	<b>Withdrawal</b>	<b>Section 19(b)(2) *</b>	<b>Section 19(b)(3)(A) *</b>	<b>Section 19(b)(3)(B) *</b>
<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
			Rule		
<b>Pilot</b>	<b>Extension of Time Period for Commission Action *</b>	<b>Date Expires *</b>	<input type="checkbox"/> 19b-4(f)(1)	<input type="checkbox"/> 19b-4(f)(4)	
<input type="checkbox"/>	<input type="checkbox"/>	<input type="text"/>	<input type="checkbox"/> 19b-4(f)(2)	<input type="checkbox"/> 19b-4(f)(5)	
			<input type="checkbox"/> 19b-4(f)(3)	<input type="checkbox"/> 19b-4(f)(6)	

<b>Notice of proposed change pursuant to the Payment, Clearing, and Settlement Act of 2010</b>	<b>Security-Based Swap Submission pursuant to the Securities Exchange Act of 1934</b>
<b>Section 806(e)(1) *</b>	<b>Section 806(e)(2) *</b>
<input type="checkbox"/>	<input type="checkbox"/>
	<b>Section 3C(b)(2) *</b>
	<input type="checkbox"/>

<b>Exhibit 2 Sent As Paper Document</b>	<b>Exhibit 3 Sent As Paper Document</b>
<input type="checkbox"/>	<input type="checkbox"/>

**Description**

Provide a brief description of the action (limit 250 characters, required when Initial is checked \*).

Proposal to amend FINRA Rule 12214 and 13214 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

**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 action.

First Name \*       Last Name \*   
 Title \*   
 E-mail \*   
 Telephone \*       Fax

**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.

(Title \*)

Date       Senior Vice President - FINRA Office of Dispute Resolution

By       Resolution

(Name \*)

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.

SECURITIES AND EXCHANGE COMMISSION  
WASHINGTON, D.C. 20549

For complete Form 19b-4 instructions please refer to the EFFF 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 1A- Notice of Proposed Rule Change, Security-Based Swap Submission, or Advance Notice by Clearing Agencies \***

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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, security-based swap submission, or advance notice 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

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

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 the Proposed Rule Change**

(a) Pursuant to the provisions of Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),<sup>1</sup> Financial Industry Regulatory Authority, Inc. (“FINRA”) is filing with the Securities and Exchange Commission (“SEC” or “Commission”) a proposed rule change to amend FINRA Rule 12214(c) of the Code of Arbitration Procedure for Customer Disputes (“Customer Code”) and FINRA Rule 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.

The text of the proposed rule change is attached as Exhibit 5.

(b) Not applicable.

(c) Not applicable.

**2. Procedures of the Self-Regulatory Organization**

At its meeting on March 7, 2018, the FINRA Board of Governors authorized the filing of the proposed rule change with the SEC. No other action by FINRA is necessary for the filing of the proposed rule change.

If the Commission approves the proposed rule change, 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 no later than 30 days following publication of the Regulatory Notice announcing Commission approval.

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

Questions regarding this rule filing may be directed to Mignon McLemore, Assistant Chief Counsel, Office of Dispute Resolution, at (202) 728-8151.

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

(a) Purpose

**Introduction**

The proposed rule change would amend FINRA Rules 12214 and 13214 that govern the payments (referred to as honorarium) arbitrators receive for deciding contested requests to issue subpoenas and orders for production and appearance. 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.

**Background**

In arbitration, the parties exchange documents and information to prepare for the arbitration through the discovery process. The Codes require parties to cooperate with each other and exchange documents or information to expedite the arbitration.<sup>2</sup> If an individual or entity objects to a discovery request, the party seeking the documents or information may request that the arbitrator issue a subpoena<sup>3</sup> or an order.<sup>4</sup>

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<sup>2</sup> See FINRA Rules 12505 and 13505.

<sup>3</sup> See FINRA Rules 12512 and 13512.

<sup>4</sup> See FINRA Rules 12513 and 13513.

### Requests to Issue a Subpoena

Under the Codes, parties may request that the panel issue a subpoena to parties in an arbitration, non-parties, as well as entities and individuals who are not FINRA members.<sup>5</sup> If the subpoena will be served on a FINRA member, FINRA rules favor the use of orders rather than subpoenas, unless circumstances dictate otherwise.<sup>6</sup> A party's request (or motion) to issue a subpoena becomes a "contested subpoena request" if there is an objection raised to the scope or propriety of the subpoena.<sup>7</sup>

To decide a contested subpoena request, the arbitrator must review the motion requesting issuance of the subpoena, the draft subpoena, any written objections, and any other documents supporting a party's position.<sup>8</sup> When arbitrators decide these contested requests, they must review and consider all parties' objections and render their decision promptly on the issuance and scope of the subpoena.<sup>9</sup>

Currently, under FINRA Rule 12214(d),<sup>10</sup> each arbitrator who decides one or more contested subpoenas without a hearing session<sup>11</sup> receives a one-time honorarium of \$250 during the life of the arbitration case.<sup>12</sup> The rule caps the total amount that the parties could pay the arbitrators to decide a contested subpoena request in any one case at

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<sup>5</sup> See FINRA Rules 12512(a)(1) and 13512(a)(1).

<sup>6</sup> See FINRA Rules 12512(a)(2) and 13512(a)(2).

<sup>7</sup> See FINRA Rules 12512(c) and 13512(c).

<sup>8</sup> See FINRA Rules 12214(d)(2) and 13214(d)(2).

<sup>9</sup> See, e.g., FINRA Rules 12512(c) and 13512(c).

<sup>10</sup> See also FINRA Rule 13214(d).

<sup>11</sup> A hearing session is a meeting between the parties and arbitrators of four hours or less, including a hearing or prehearing conference. See FINRA Rules 12100(p) and 13100(p).

<sup>12</sup> See FINRA Rules 12214(d)(1) and 13214(d)(1).

\$750.<sup>13</sup> This means that regardless of the number of contested subpoena requests that arbitrators decide without a hearing session in an arbitration case, an arbitrator will receive one honorarium payment of \$250.<sup>14</sup> The panel allocates the cost of the honorarium to the parties in the award.<sup>15</sup>

If a party's request to issue a subpoena does not receive any objections, it remains unopposed, and arbitrators do not receive an honorarium for issuing an unopposed subpoena.

#### Request to Issue an Order for Production or Appearance

If a party is seeking documents or information, or the appearance of a witness from a FINRA member, the Codes direct the parties to request the issuance of an order for production or appearance,<sup>16</sup> rather than a subpoena.<sup>17</sup> A party's motion to issue an

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<sup>13</sup> Id. The chairperson of a three-person panel will decide the contested subpoena request without a hearing session, for which the chairperson would be paid \$250. The honorarium for contested subpoena requests could increase in \$250 increments, if, for example, the chairperson recuses or withdraws from the panel and the replacement chairperson must decide another contested subpoena request without a hearing session. In this instance, the replacement chairperson would receive a \$250 honorarium for this work. In no event would the parties be charged more than \$750 per case.

<sup>14</sup> If a hearing session is required to decide the motion, each arbitrator who participates in the hearing session will receive a \$300 honorarium instead. See FINRA Rules 12214(a) and 13214(a).

<sup>15</sup> See FINRA Rules 12214(d)(3) and 13214(d)(3).

<sup>16</sup> FINRA Rules 12513(a) and 13513(a) provide that upon a motion of a party, the panel may order the appearance of any employee or associated person of a FINRA member or the production of any documents in the possession or control of such persons or members, without the use of subpoenas.

<sup>17</sup> See FINRA Rules 12512(a)(2) and 13512(a)(2).

order becomes a “contested order request” if a party objects to the scope or propriety of the order.<sup>18</sup>

An arbitrator would decide a contested order request by reviewing the motion requesting issuance of the order,<sup>19</sup> the draft order,<sup>20</sup> and any written objections from the party receiving the motion.<sup>21</sup> Further, when arbitrators decide these contested order requests, they must review and consider all parties’ objections and render their decision promptly on the issuance and scope of the order.<sup>22</sup> Thus, arbitrators review similar documents and follow the same process when deciding contested order requests as they do when deciding contested subpoena requests.

The Codes do not expressly provide an honorarium for arbitrators who decide requests for such orders without a hearing session. Thus, FINRA categorizes requests to issue orders for production as discovery-related motions<sup>23</sup> rather than requests to issue subpoenas and, thus, FINRA pays the \$200 honorarium for each. FINRA pays the \$200 honorarium for an order for production, whether contested or unopposed. FINRA does not pay the honorarium, however, for an order for appearance, regardless of whether it is contested or unopposed.

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18 See FINRA Rules 12513(c) and 13513(c).

19 See FINRA Rules 12513(b) and 13513(b).

20 Id.

21 See FINRA Rules 12513(c) and 13513(c).

22 See, e.g., FINRA Rules 12513(c) and 13513(c).

23 FINRA Rules 12214(c) and 13214(c) provide that FINRA will pay each arbitrator an honorarium of \$200 to decide a discovery-related motion without a hearing session.

Concerns about Current Subpoena and Order Honorarium Structure

Parties label requests for subpoenas or orders interchangeably, which is understandable given the similarities of the requests and the work arbitrators do to decide them without a hearing session. However, the Codes treat the two discovery mechanisms differently. As noted, the Codes favor the use of orders over subpoenas when a party seeks documents or witnesses from a FINRA member.<sup>24</sup> If a request to issue a subpoena should have been a request to issue an order, a change in the labelling of the document can result in the arbitrators receiving a reduced honorarium (*i.e.*, \$200 for an order versus \$250 for a contested subpoena or no payment at all if the change is to an order of appearance).

The Codes also impose a per-case honorarium cap of \$250 that each arbitrator who decides a contested subpoena request without a hearing session may receive.<sup>25</sup> Arbitrators do not receive an honorarium for deciding an unopposed subpoena request. There is no per-case cap on deciding requests to issue orders of production however. Moreover, arbitrators receive an honorarium for deciding such requests, whether they are contested or unopposed.

**Proposed Rule Change**

FINRA believes that the subpoena or order label on a discovery-related motion should not dictate the amount of honorarium that arbitrators receive or the frequency with which they are paid. The honoraria that arbitrators receive should reflect the time and effort they spend in deciding requests without a hearing session and fairly compensate

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<sup>24</sup> See FINRA Rules 12512(a)(2) and 13512(a)(2).

<sup>25</sup> See FINRA Rules 12214(d)(1) and 13214(d)(1).



them for this work. Accordingly, FINRA is proposing to amend FINRA Rules 12214(c) and 13214(c) to provide that FINRA would pay each arbitrator an honorarium of \$200 to decide, without a hearing session: (i) a discovery-related motion;<sup>26</sup> (ii) a motion that contains one or more contested subpoena requests<sup>27</sup> or contested orders for production or appearance; or (iii) a motion that contains one or more contested subpoena requests and contested orders for production or appearance. FINRA believes that unifying the honorarium structure for these discovery mechanisms would remove inconsistencies from FINRA's rules and make them more transparent as well as eliminate confusion for parties, arbitrators and staff that can occur when a discovery request is mislabeled.

#### Contested Subpoena Requests

The proposed rule change would reduce the honorarium that an arbitrator receives to decide a contested subpoena request from \$250 to \$200; however, it would also remove the per-case cap on these payments. Thus, under the proposed rule change, an arbitrator would receive a \$200 honorarium for each contested subpoena request that he or she decides.<sup>28</sup>

FINRA recognizes that removing the per-case cap on contested subpoena requests could result in an increase in fees for the parties. In response to this concern, the proposed rule change would permit a party or parties to use one motion to request the

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<sup>26</sup> Under the proposed rule change, FINRA would add a contested subpoena request and a contested order for production or appearance to the discovery-related motions rule; however, FINRA would not change the rule language explaining what constitutes a discovery-related motion.

<sup>27</sup> The proposal would retain what constitutes a contested subpoena by moving the description from FINRA Rule 12214(d)(2) to FINRA Rule 12214(c)(2)(ii).

<sup>28</sup> As is current practice, arbitrators would not receive an honorarium for an unopposed subpoena request.

issuance of one or more subpoenas.<sup>29</sup> FINRA is proposing to include this current practice in the rule, so that parties may mitigate their costs. Thus, under the proposed rule change, if parties request one or more subpoenas in one motion, for example, and one or all of the subpoena requests become contested, each arbitrator who decides the motion would receive one honorarium payment of \$200. In addition to helping to minimize costs, requesting multiple subpoenas in one motion helps expedite the arbitration, which benefits parties and arbitrators.

FINRA believes that reducing the honorarium for contested subpoena requests and removing the per-case cap on these payments would provide consistency and fairness to the arbitrator payment rules by ensuring that the payment arbitrators receive for deciding these requests is commensurate with the time and effort spent on each motion.

#### Contested Orders for Production or Appearance

FINRA would amend Rule 12214(c) to provide a \$200 honorarium for deciding a contested order for production or appearance without a hearing session. This means that arbitrators would receive an honorarium for deciding without a hearing session, a contested arbitrator order for appearance as well as for production. Under the proposed rule change, arbitrators would no longer receive an honorarium for unopposed requests to issue an order for production as these requests do not require the amount of time and effort needed to resolve contested requests.

The proposed rule change would describe what constitutes a contested order for production or appearance by modeling the description on that of a contested subpoena

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<sup>29</sup> The proposed rule change would also permit parties to request the issuance of one or more orders in the same motion or a combination of subpoena and order requests.

request. Thus, proposed FINRA Rule 12214(c)(2)(iii) would provide that a contested order for production or appearance shall include a motion requesting the issuance of an order for production or appearance, a written objection from the party opposing the issuance of the order, and any other documents supporting a party's position.

Moreover, like a contested subpoena request, a party would be permitted to request the issuance of one or more orders in one motion,<sup>30</sup> and if one or all of the arbitrator orders become contested, each arbitrator who decides the motion would receive one honorarium payment of \$200. In addition to helping to minimize costs, requesting multiple orders in one motion helps expedite the arbitration, which benefits parties and arbitrators.

FINRA believes that adding contested orders for production or appearance to its honorarium rules would make the rules more transparent, so that parties and arbitrators understand how and when the honorarium and fees are assessed for contested orders. Moreover, FINRA believes that limiting honorarium to contested orders makes the honorarium rules more consistent and more equitable to the parties, as the fees FINRA would assess for arbitrators to decide contested orders for production or appearance would be proportionate with the time and effort that they spend deciding such orders.

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<sup>30</sup> The proposed rule change would also permit parties to request the issuance of one or more subpoenas in the same motion or a combination of subpoena and order requests.

Nonsubstantive changes

In addition to the amendments discussed above to simplify the honorarium structure for contested subpoenas requests and contested orders for production and appearance, the proposed rule change would also amend Rules 12214(a) and 13214(a) to make a few nonsubstantive changes.

As noted in Item 2 of this filing, if the Commission approves the proposed rule change, 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 no later than 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,<sup>31</sup> 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, and Section 15A(b)(5) of the Act,<sup>32</sup> which requires, among other things, that FINRA rules provide for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility or system that FINRA operates or controls.

FINRA believes that the proposed rule change would simplify the structure of arbitrator honorarium for deciding contested subpoena requests and contested orders for

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<sup>31</sup> 15 U.S.C. 78o-3(b)(6).

<sup>32</sup> 15 U.S.C. 78o-3(b)(5).

production or appearance without a hearing session by making the honorarium amount the same (\$200) for each request. Further, the proposed rule change makes the honorarium structure more transparent by including expressly the current practice of paying arbitrators for deciding contested orders for production without a hearing session in the Codes' payment rules. For consistency and fairness, the proposed rule change would also extend the honorarium to include contested orders for appearance without a hearing session. These changes, FINRA believes, make the arbitrator honorarium structure easier to understand for parties and arbitrators and easier for FINRA to apply, and, therefore, will help parties, arbitrators and staff conserve resources that they might otherwise spend in trying to interpret the rules and understand the honorarium structure.

Further, FINRA believes structuring the arbitrator honorarium rules so that arbitrators receive an honorarium for each contested subpoena request or contested order for production or appearance they decide without a hearing session ensures that the honoraria arbitrators receive are proportionate with the time and effort they spend deciding such requests and the fees parties are assessed are equitable in relation to the services that they receive. Last, the proposed rule change allows parties to combine multiple requests for subpoenas or orders into one motion as a way to minimize costs and expedite the discovery process. For these reasons, FINRA believes that the proposed rule change is an equitable allocation of a reasonable fee to use the forum.

Moreover, FINRA believes that the proposed rule change would protect investors and the public interest by ensuring that arbitrators are compensated equitably for the services that they provide, which would enhance FINRA's ability to retain qualified arbitrators willing to devote the time and effort necessary to consider thoroughly the

discovery issues presented. Retaining qualified arbitrators is an essential element, FINRA believes, in maintaining its ability to operate an effective arbitration forum for the purposes of investor protection and market integrity.

**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. A discussion of the economic impacts of the proposed rule change follows.

Economic Impact Assessment

(a) Regulatory Need

The existing structure for payments to arbitrators for deciding requests to issue subpoenas or orders without a hearing session has been difficult for parties and arbitrators to understand due to the differences between when and under what circumstances arbitrators will receive payments.<sup>33</sup> Parties can incur different fees, and arbitrators can receive different honorarium, for contested and unopposed requests to issue subpoenas and orders. The existing structure can also make it confusing for FINRA to apply. Under the proposed amendments, the payments arbitrators receive would be more commensurate with their time and effort to consider the requests. The proposed amendments would also simplify the structure of the payments.

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<sup>33</sup> For example, arbitrators raised issues with FINRA concerning the inconsistencies in the existing honorarium structure for requests to issue subpoenas or orders without a hearing session.

(b) Economic Baseline

The economic baseline for the proposal is the current rules under the Codes that address the payments to arbitrators for deciding discovery-related motions and requests to issue subpoenas or orders. The proposal is expected to affect the parties to an arbitration, their counsel, and FINRA arbitrators.

The existing fee structure for payments to arbitrators for deciding requests to issue subpoenas or orders without a hearing session has led to confusion and uncertainty with respect to the amount of fees that parties incur. As a result, parties and their counsel may incur time and other expenses to interpret the rules and understand the payment structure, as well as the possible time and expense to communicate and receive clarification from FINRA.

Arbitrators incur more costs to decide contested requests to issue subpoenas or orders without a hearing session than unopposed requests. The costs to arbitrators for deciding contested requests include the time to review the materials and the effort to make a decision. Alternatively, arbitrators spend less time and effort to review unopposed requests.<sup>34</sup>

The honorarium that arbitrators receive, and the fees parties incur, may not be commensurate with the effort expended by arbitrators to decide the requests. The existing fee structure can result in instances where arbitrators do not receive an honorarium for their time and effort to consider a contested request (*i.e.*, contested orders of appearance decided without a hearing session). Arbitrators also do not receive additional honorarium to decide multiple contested requests for subpoenas. In general,

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<sup>34</sup> For most unopposed requests, arbitrators can resolve them by signing the subpoena or order that accompanies the request.

the absence of an honorarium when arbitrators decide certain contested requests may serve as a disincentive for arbitrators to give their best efforts or the time necessary to make a decision. The existing fee structure can also result in instances where arbitrators receive an honorarium even though they incur little time or effort to decide a request (e.g., unopposed orders of production).

There were 7,370 arbitration cases closed in 2016 and 2017. Among the 7,370 cases, there were 497 cases (6.7 percent) with contested requests for subpoenas, 1,210 cases (16.4 percent) with unopposed requests for subpoenas, and 1,334 cases (18.1 percent) with requests for orders. The information available does not distinguish between contested and unopposed requests for orders of production and appearance. We are therefore not able to estimate the potential change to the fees parties would incur and the honorarium that arbitrators would receive as a result of the proposed amendments.

Although the majority of the cases with contested subpoenas (454 or 91.3 percent) have three arbitrators, in the experience of FINRA staff, typically only one arbitrator decides contested subpoenas without a hearing session. Thus, although parties could currently incur fees of \$750 for contested subpoenas if three arbitrators decide the requests without a hearing session, the typical fee parties currently incur is \$250.

(c) Economic Impact

The proposed amendments would simplify and make uniform the structure for payments to arbitrators for deciding requests to issue subpoenas or orders without a hearing session. The benefits of the proposed amendments include a decrease in the time and expense parties would incur to understand the payment structure, an increase in the incentives of arbitrators to decide contested subpoenas and orders, and an increase in the



efficiency of the forum. Depending on the composition and timing of the requests, however, the fees parties incur could either increase or decrease. The honorarium payments arbitrators receive could also increase or decrease. The benefits and costs of the proposed amendments, including the changes to the fees parties incur and the honorarium arbitrators receive, are discussed in further detail below.

A benefit of the proposed amendments is the reduction in the complexity of the fee schedule. Parties and their counsel would be more certain with respect to the assessment of fees, and would therefore incur less time and expense to interpret the fee schedule. Parties and their counsel would also be less likely to incur the time and expense from requesting clarification from FINRA.

Another benefit of the proposed amendments is that the honorarium arbitrators receive would be more commensurate with their time and effort to decide requests to issue subpoenas or orders. Arbitrators would receive an honorarium to decide all contested requests to issue subpoenas or orders without a hearing session. Arbitrators would therefore have more incentive to devote the time and effort necessary to decide these requests. Arbitrators would also receive no honorarium to decide unopposed requests to issue subpoenas or orders, which reflects the minimal time and effort needed to review such requests.

The changes to the fee schedule would also increase the efficiency of the arbitration process. Parties and their counsel could minimize the amount of fees assessed by filing a request to issue multiple subpoenas or orders in one motion instead of several separate motions. This could also increase the arbitrators' efficiency by having them decide at the same time requests to issue multiple subpoenas or orders that are based

largely on the same facts or arguments. The filing of one motion that requests the issuance of multiple subpoenas or orders could also expedite the discovery process, and decrease the amount of time to an arbitration decision.

The proposed amendments would also benefit the parties that incur fewer fees and the arbitrators who receive additional honorarium, but would impose costs on the parties that incur additional fees and the arbitrators who receive less honorarium. A decrease in the fees that parties incur would correspond to a decrease in the honorarium that arbitrators receive, and an increase in the fees that parties incur would correspond to an increase in the honorarium that arbitrators receive.

The total fees parties incur, and the total honorarium that arbitrators receive, could either increase or decrease depending on the composition and timing of the requests. For example, parties would be subject to fees for contested requests to issue orders of appearance without a hearing session, but would not be subject to fees for unopposed requests to issue orders of production. In addition, the fees for submitting contested requests to issue subpoenas without a hearing session would decrease from \$250 to \$200 per arbitrator. The per-case cap on these payments, however, would be removed. Therefore, parties would be assessed additional fees if they submit multiple contested requests for subpoenas.

Among the 497 cases with contested subpoenas, 399 cases (or 80.3 percent) had only one contested request for subpoenas, whereas 98 cases (or 19.7 percent) had more than one contested request for subpoenas. For the cases with two or more contested requests for subpoenas, the median number of days between requests is less than two months. This suggests that contested requests for subpoenas are often submitted within

short periods of time, and that counsel could reasonably anticipate these requests and submit the requests at one time. The potential additional fees to parties from submitting multiple contested requests for subpoenas from the removal of the per-case cap, therefore, is likely to be minimal.

If parties file a contested request to issue one or more subpoenas or orders at one time and these are not based on the same facts or arguments (*i.e.*, unrelated), then arbitrators may not receive honorarium payments commensurate with their time and effort to decide the request. This could serve as a disincentive for arbitrators to give their best efforts or the time necessary to make decisions on these requests. The Director, however, could separate the motions and pay the arbitrators accordingly, thereby mitigating these potential effects.

(d) Alternatives Considered

Arbitrators raised issues with FINRA concerning the inconsistencies in the existing honorarium structure for requests to issue subpoenas or orders without a hearing session. Along with the proposed amendments, FINRA considered other changes to the existing honorarium structure. Other changes would have included an increase in the honorarium that arbitrators receive to decide discovery-related motions, contested subpoena requests, and requests for contested orders for production or appearance. The honorarium payments would have been similar to the honorarium that arbitrators receive for currently deciding contested subpoenas (\$250) or for deciding motions in discovery prehearings (\$300).

FINRA believes that the fee structure under the proposed amendments would provide arbitrators with honoraria that are commensurate with their efforts to decide these requests. FINRA also believes that the proposed amendments provide incentives for parties to combine their requests for submission simultaneously to minimize their costs.

**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.<sup>35</sup>

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

Not applicable.

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

Not applicable.

**9. Security-Based Swap Submissions Filed Pursuant to Section 3C of the Act**

Not applicable.

**10. Advance Notices Filed Pursuant to Section 806(e) of the Payment, Clearing and Settlement Supervision Act**

Not applicable.

**11. Exhibits**

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

Exhibit 5. Text of the proposed rule change.

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<sup>35</sup> 15 U.S.C. 78s(b)(2).

**EXHIBIT 1**

**SECURITIES AND EXCHANGE COMMISSION**

(Release No. 34- ; File No. SR-FINRA-2018-026)

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of a 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

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on July 13, 2018, Financial Industry Regulatory Authority, Inc. (“FINRA”) 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 FINRA Rule 12214(c) of the Code of Arbitration Procedure for Customer Disputes (“Customer Code”) and FINRA Rule 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.

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

The text of the proposed rule change is available on FINRA's website at <http://www.finra.org>, at the principal office of FINRA and at the Commission's Public Reference Room.

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

**Introduction**

The proposed rule change would amend FINRA Rules 12214 and 13214 that govern the payments (referred to as honorarium) arbitrators receive for deciding contested requests to issue subpoenas and orders for production and appearance. 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.

**Background**

In arbitration, the parties exchange documents and information to prepare for the arbitration through the discovery process. The Codes require parties to cooperate with

each other and exchange documents or information to expedite the arbitration.<sup>3</sup> If an individual or entity objects to a discovery request, the party seeking the documents or information may request that the arbitrator issue a subpoena<sup>4</sup> or an order.<sup>5</sup>

### Requests to Issue a Subpoena

Under the Codes, parties may request that the panel issue a subpoena to parties in an arbitration, non-parties, as well as entities and individuals who are not FINRA members.<sup>6</sup> If the subpoena will be served on a FINRA member, FINRA rules favor the use of orders rather than subpoenas, unless circumstances dictate otherwise.<sup>7</sup> A party's request (or motion) to issue a subpoena becomes a "contested subpoena request" if there is an objection raised to the scope or propriety of the subpoena.<sup>8</sup>

To decide a contested subpoena request, the arbitrator must review the motion requesting issuance of the subpoena, the draft subpoena, any written objections, and any other documents supporting a party's position.<sup>9</sup> When arbitrators decide these contested requests, they must review and consider all parties' objections and render their decision promptly on the issuance and scope of the subpoena.<sup>10</sup>

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<sup>3</sup> See FINRA Rules 12505 and 13505.

<sup>4</sup> See FINRA Rules 12512 and 13512.

<sup>5</sup> See FINRA Rules 12513 and 13513.

<sup>6</sup> See FINRA Rules 12512(a)(1) and 13512(a)(1).

<sup>7</sup> See FINRA Rules 12512(a)(2) and 13512(a)(2).

<sup>8</sup> See FINRA Rules 12512(c) and 13512(c).

<sup>9</sup> See FINRA Rules 12214(d)(2) and 13214(d)(2).

<sup>10</sup> See, e.g., FINRA Rules 12512(c) and 13512(c).

Currently, under FINRA Rule 12214(d),<sup>11</sup> each arbitrator who decides one or more contested subpoenas without a hearing session<sup>12</sup> receives a one-time honorarium of \$250 during the life of the arbitration case.<sup>13</sup> The rule caps the total amount that the parties could pay the arbitrators to decide a contested subpoena request in any one case at \$750.<sup>14</sup> This means that regardless of the number of contested subpoena requests that arbitrators decide without a hearing session in an arbitration case, an arbitrator will receive one honorarium payment of \$250.<sup>15</sup> The panel allocates the cost of the honorarium to the parties in the award.<sup>16</sup>

If a party's request to issue a subpoena does not receive any objections, it remains unopposed, and arbitrators do not receive an honorarium for issuing an unopposed subpoena.

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<sup>11</sup> See also FINRA Rule 13214(d).

<sup>12</sup> A hearing session is a meeting between the parties and arbitrators of four hours or less, including a hearing or prehearing conference. See FINRA Rules 12100(p) and 13100(p).

<sup>13</sup> See FINRA Rules 12214(d)(1) and 13214(d)(1).

<sup>14</sup> Id. The chairperson of a three-person panel will decide the contested subpoena request without a hearing session, for which the chairperson would be paid \$250. The honorarium for contested subpoena requests could increase in \$250 increments, if, for example, the chairperson recuses or withdraws from the panel and the replacement chairperson must decide another contested subpoena request without a hearing session. In this instance, the replacement chairperson would receive a \$250 honorarium for this work. In no event would the parties be charged more than \$750 per case.

<sup>15</sup> If a hearing session is required to decide the motion, each arbitrator who participates in the hearing session will receive a \$300 honorarium instead. See FINRA Rules 12214(a) and 13214(a).

<sup>16</sup> See FINRA Rules 12214(d)(3) and 13214(d)(3).



Request to Issue an Order for Production or Appearance

If a party is seeking documents or information, or the appearance of a witness from a FINRA member, the Codes direct the parties to request the issuance of an order for production or appearance,<sup>17</sup> rather than a subpoena.<sup>18</sup> A party's motion to issue an order becomes a "contested order request" if a party objects to the scope or propriety of the order.<sup>19</sup>

An arbitrator would decide a contested order request by reviewing the motion requesting issuance of the order,<sup>20</sup> the draft order,<sup>21</sup> and any written objections from the party receiving the motion.<sup>22</sup> Further, when arbitrators decide these contested order requests, they must review and consider all parties' objections and render their decision promptly on the issuance and scope of the order.<sup>23</sup> Thus, arbitrators review similar documents and follow the same process when deciding contested order requests as they do when deciding contested subpoena requests.

The Codes do not expressly provide an honorarium for arbitrators who decide requests for such orders without a hearing session. Thus, FINRA categorizes requests to

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<sup>17</sup> FINRA Rules 12513(a) and 13513(a) provide that upon a motion of a party, the panel may order the appearance of any employee or associated person of a FINRA member or the production of any documents in the possession or control of such persons or members, without the use of subpoenas.

<sup>18</sup> See FINRA Rules 12512(a)(2) and 13512(a)(2).

<sup>19</sup> See FINRA Rules 12513(c) and 13513(c).

<sup>20</sup> See FINRA Rules 12513(b) and 13513(b).

<sup>21</sup> Id.

<sup>22</sup> See FINRA Rules 12513(c) and 13513(c).

<sup>23</sup> See, e.g., FINRA Rules 12513(c) and 13513(c).

issue orders for production as discovery-related motions<sup>24</sup> rather than requests to issue subpoenas and, thus, FINRA pays the \$200 honorarium for each. FINRA pays the \$200 honorarium for an order for production, whether contested or unopposed. FINRA does not pay the honorarium, however, for an order for appearance, regardless of whether it is contested or unopposed.

#### Concerns about Current Subpoena and Order Honorarium Structure

Parties label requests for subpoenas or orders interchangeably, which is understandable given the similarities of the requests and the work arbitrators do to decide them without a hearing session. However, the Codes treat the two discovery mechanisms differently. As noted, the Codes favor the use of orders over subpoenas when a party seeks documents or witnesses from a FINRA member.<sup>25</sup> If a request to issue a subpoena should have been a request to issue an order, a change in the labelling of the document can result in the arbitrators receiving a reduced honorarium (*i.e.*, \$200 for an order versus \$250 for a contested subpoena or no payment at all if the change is to an order of appearance).

The Codes also impose a per-case honorarium cap of \$250 that each arbitrator who decides a contested subpoena request without a hearing session may receive.<sup>26</sup> Arbitrators do not receive an honorarium for deciding an unopposed subpoena request. There is no per-case cap on deciding requests to issue orders of production however.

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<sup>24</sup> FINRA Rules 12214(c) and 13214(c) provide that FINRA will pay each arbitrator an honorarium of \$200 to decide a discovery-related motion without a hearing session.

<sup>25</sup> See FINRA Rules 12512(a)(2) and 13512(a)(2).

<sup>26</sup> See FINRA Rules 12214(d)(1) and 13214(d)(1).

Moreover, arbitrators receive an honorarium for deciding such requests, whether they are contested or unopposed.

### **Proposed Rule Change**

FINRA believes that the subpoena or order label on a discovery-related motion should not dictate the amount of honorarium that arbitrators receive or the frequency with which they are paid. The honoraria that arbitrators receive should reflect the time and effort they spend in deciding requests without a hearing session and fairly compensate them for this work. Accordingly, FINRA is proposing to amend FINRA Rules 12214(c) and 13214(c) to provide that FINRA would pay each arbitrator an honorarium of \$200 to decide, without a hearing session: (i) a discovery-related motion;<sup>27</sup> (ii) a motion that contains one or more contested subpoena requests<sup>28</sup> or contested orders for production or appearance; or (iii) a motion that contains one or more contested subpoena requests and contested orders for production or appearance. FINRA believes that unifying the honorarium structure for these discovery mechanisms would remove inconsistencies from FINRA's rules and make them more transparent as well as eliminate confusion for parties, arbitrators and staff that can occur when a discovery request is mislabeled.

### Contested Subpoena Requests

The proposed rule change would reduce the honorarium that an arbitrator receives to decide a contested subpoena request from \$250 to \$200; however, it would also

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<sup>27</sup> Under the proposed rule change, FINRA would add a contested subpoena request and a contested order for production or appearance to the discovery-related motions rule; however, FINRA would not change the rule language explaining what constitutes a discovery-related motion.

<sup>28</sup> The proposal would retain what constitutes a contested subpoena by moving the description from FINRA Rule 12214(d)(2) to FINRA Rule 12214(c)(2)(ii).

remove the per-case cap on these payments. Thus, under the proposed rule change, an arbitrator would receive a \$200 honorarium for each contested subpoena request that he or she decides.<sup>29</sup>

FINRA recognizes that removing the per-case cap on contested subpoena requests could result in an increase in fees for the parties. In response to this concern, the proposed rule change would permit a party or parties to use one motion to request the issuance of one or more subpoenas.<sup>30</sup> FINRA is proposing to include this current practice in the rule, so that parties may mitigate their costs. Thus, under the proposed rule change, if parties request one or more subpoenas in one motion, for example, and one or all of the subpoena requests become contested, each arbitrator who decides the motion would receive one honorarium payment of \$200. In addition to helping to minimize costs, requesting multiple subpoenas in one motion helps expedite the arbitration, which benefits parties and arbitrators.

FINRA believes that reducing the honorarium for contested subpoena requests and removing the per-case cap on these payments would provide consistency and fairness to the arbitrator payment rules by ensuring that the payment arbitrators receive for deciding these requests is commensurate with the time and effort spent on each motion.

#### Contested Orders for Production or Appearance

FINRA would amend Rule 12214(c) to provide a \$200 honorarium for deciding a contested order for production or appearance without a hearing session. This means that

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<sup>29</sup> As is current practice, arbitrators would not receive an honorarium for an unopposed subpoena request.

<sup>30</sup> The proposed rule change would also permit parties to request the issuance of one or more orders in the same motion or a combination of subpoena and order requests.

arbitrators would receive an honorarium for deciding without a hearing session, a contested arbitrator order for appearance as well as for production. Under the proposed rule change, arbitrators would no longer receive an honorarium for unopposed requests to issue an order for production as these requests do not require the amount of time and effort needed to resolve contested requests.

The proposed rule change would describe what constitutes a contested order for production or appearance by modeling the description on that of a contested subpoena request. Thus, proposed FINRA Rule 12214(c)(2)(iii) would provide that a contested order for production or appearance shall include a motion requesting the issuance of an order for production or appearance, a written objection from the party opposing the issuance of the order, and any other documents supporting a party's position.

Moreover, like a contested subpoena request, a party would be permitted to request the issuance of one or more orders in one motion,<sup>31</sup> and if one or all of the arbitrator orders become contested, each arbitrator who decides the motion would receive one honorarium payment of \$200. In addition to helping to minimize costs, requesting multiple orders in one motion helps expedite the arbitration, which benefits parties and arbitrators.

FINRA believes that adding contested orders for production or appearance to its honorarium rules would make the rules more transparent, so that parties and arbitrators understand how and when the honorarium and fees are assessed for contested orders. Moreover, FINRA believes that limiting honorarium to contested orders makes the

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<sup>31</sup> The proposed rule change would also permit parties to request the issuance of one or more subpoenas in the same motion or a combination of subpoena and order requests.

honorarium rules more consistent and more equitable to the parties, as the fees FINRA would assess for arbitrators to decide contested orders for production or appearance would be proportionate with the time and effort that they spend deciding such orders.

Nonsubstantive changes

In addition to the amendments discussed above to simplify the honorarium structure for contested subpoenas requests and contested orders for production and appearance, the proposed rule change would also amend Rules 12214(a) and 13214(a) to make a few nonsubstantive changes.

As noted in Item 2 of this filing, if the Commission approves the proposed rule change, 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 no later than 30 days following publication of the Regulatory Notice announcing Commission approval.

2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,<sup>32</sup> 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, and Section 15A(b)(5) of the Act,<sup>33</sup> which requires, among other things, that FINRA rules provide for the equitable allocation of reasonable dues, fees and other

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<sup>32</sup> 15 U.S.C. 78o-3(b)(6).

<sup>33</sup> 15 U.S.C. 78o-3(b)(5).

charges among members and issuers and other persons using any facility or system that FINRA operates or controls.

FINRA believes that the proposed rule change would simplify the structure of arbitrator honorarium for deciding contested subpoena requests and contested orders for production or appearance without a hearing session by making the honorarium amount the same (\$200) for each request. Further, the proposed rule change makes the honorarium structure more transparent by including expressly the current practice of paying arbitrators for deciding contested orders for production without a hearing session in the Codes' payment rules. For consistency and fairness, the proposed rule change would also extend the honorarium to include contested orders for appearance without a hearing session. These changes, FINRA believes, make the arbitrator honorarium structure easier to understand for parties and arbitrators and easier for FINRA to apply, and, therefore, will help parties, arbitrators and staff conserve resources that they might otherwise spend in trying to interpret the rules and understand the honorarium structure.

Further, FINRA believes structuring the arbitrator honorarium rules so that arbitrators receive an honorarium for each contested subpoena request or contested order for production or appearance they decide without a hearing session ensures that the honoraria arbitrators receive are proportionate with the time and effort they spend deciding such requests and the fees parties are assessed are equitable in relation to the services that they receive. Last, the proposed rule change allows parties to combine multiple requests for subpoenas or orders into one motion as a way to minimize costs and expedite the discovery process. For these reasons, FINRA believes that the proposed rule change is an equitable allocation of a reasonable fee to use the forum.

Moreover, FINRA believes that the proposed rule change would protect investors and the public interest by ensuring that arbitrators are compensated equitably for the services that they provide, which would enhance FINRA's ability to retain qualified arbitrators willing to devote the time and effort necessary to consider thoroughly the discovery issues presented. Retaining qualified arbitrators is an essential element, FINRA believes, in maintaining its ability to operate an effective arbitration forum for the purposes of investor protection and market integrity.

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. A discussion of the economic impacts of the proposed amendments follows.

(a) Need for the Rule

The existing structure for payments to arbitrators for deciding requests to issue subpoenas or orders without a hearing session has been difficult for parties and arbitrators to understand due to the differences between when and under what circumstances arbitrators will receive payments.<sup>34</sup> Parties can incur different fees, and arbitrators can receive different honorarium, for contested and unopposed requests to issue subpoenas and orders. The existing structure can also make it confusing for FINRA to apply. Under the proposed amendments, the payments arbitrators receive would be more commensurate with their time and effort to consider the requests. The proposed amendments would also simplify the structure of the payments.

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<sup>34</sup> For example, arbitrators raised issues with FINRA concerning the inconsistencies in the existing honorarium structure for requests to issue subpoenas or orders without a hearing session.



(b) Economic Baseline

The economic baseline for the proposal is the current rules under the Codes that address the payments to arbitrators for deciding discovery-related motions and requests to issue subpoenas or orders. The proposal is expected to affect the parties to an arbitration, their counsel, and FINRA arbitrators.

The existing fee structure for payments to arbitrators for deciding requests to issue subpoenas or orders without a hearing session has led to confusion and uncertainty with respect to the amount of fees that parties incur. As a result, parties and their counsel may incur time and other expenses to interpret the rules and understand the payment structure, as well as the possible time and expense to communicate and receive clarification from FINRA.

Arbitrators incur more costs to decide contested requests to issue subpoenas or orders without a hearing session than unopposed requests. The costs to arbitrators for deciding contested requests include the time to review the materials and the effort to make a decision. Alternatively, arbitrators spend less time and effort to review unopposed requests.<sup>35</sup>

The honorarium that arbitrators receive, and the fees parties incur, may not be commensurate with the effort expended by arbitrators to decide the requests. The existing fee structure can result in instances where arbitrators do not receive an honorarium for their time and effort to consider a contested request (*i.e.*, contested orders of appearance decided without a hearing session). Arbitrators also do not receive additional honorarium to decide multiple contested requests for subpoenas. In general,

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<sup>35</sup> For most unopposed requests, arbitrators can resolve them by signing the subpoena or order that accompanies the request.

the absence of an honorarium when arbitrators decide certain contested requests may serve as a disincentive for arbitrators to give their best efforts or the time necessary to make a decision. The existing fee structure can also result in instances where arbitrators receive an honorarium even though they incur little time or effort to decide a request (e.g., unopposed orders of production).

There were 7,370 arbitration cases closed in 2016 and 2017. Among the 7,370 cases, there were 497 cases (6.7 percent) with contested requests for subpoenas, 1,210 cases (16.4 percent) with unopposed requests for subpoenas, and 1,334 cases (18.1 percent) with requests for orders. The information available does not distinguish between contested and unopposed requests for orders of production and appearance. We are therefore not able to estimate the potential change to the fees parties would incur and the honorarium that arbitrators would receive as a result of the proposed amendments.

Although the majority of the cases with contested subpoenas (454 or 91.3 percent) have three arbitrators, in the experience of FINRA staff, typically only one arbitrator decides contested subpoenas without a hearing session. Thus, although parties could currently incur fees of \$750 for contested subpoenas if three arbitrators decide the requests without a hearing session, the typical fee parties currently incur is \$250.

(c) Economic Impact

The proposed amendments would simplify and make uniform the structure for payments to arbitrators for deciding requests to issue subpoenas or orders without a hearing session. The benefits of the proposed amendments include a decrease in the time and expense parties would incur to understand the payment structure, an increase in the incentives of arbitrators to decide contested subpoenas and orders, and an increase in the

efficiency of the forum. Depending on the composition and timing of the requests, however, the fees parties incur could either increase or decrease. The honorarium payments arbitrators receive could also increase or decrease. The benefits and costs of the proposed amendments, including the changes to the fees parties incur and the honorarium arbitrators receive, are discussed in further detail below.

A benefit of the proposed amendments is the reduction in the complexity of the fee schedule. Parties and their counsel would be more certain with respect to the assessment of fees, and would therefore incur less time and expense to interpret the fee schedule. Parties and their counsel would also be less likely to incur the time and expense from requesting clarification from FINRA.

Another benefit of the proposed amendments is that the honorarium arbitrators receive would be more commensurate with their time and effort to decide requests to issue subpoenas or orders. Arbitrators would receive an honorarium to decide all contested requests to issue subpoenas or orders without a hearing session. Arbitrators would therefore have more incentive to devote the time and effort necessary to decide these requests. Arbitrators would also receive no honorarium to decide unopposed requests to issue subpoenas or orders, which reflects the minimal time and effort needed to review such requests.

The changes to the fee schedule would also increase the efficiency of the arbitration process. Parties and their counsel could minimize the amount of fees assessed by filing a request to issue multiple subpoenas or orders in one motion instead of several separate motions. This could also increase the arbitrators' efficiency by having them decide at the same time requests to issue multiple subpoenas or orders that are based

largely on the same facts or arguments. The filing of one motion that requests the issuance of multiple subpoenas or orders could also expedite the discovery process, and decrease the amount of time to an arbitration decision.

The proposed amendments would also benefit the parties that incur fewer fees and the arbitrators who receive additional honorarium, but would impose costs on the parties that incur additional fees and the arbitrators who receive less honorarium. A decrease in the fees that parties incur would correspond to a decrease in the honorarium that arbitrators receive, and an increase in the fees that parties incur would correspond to an increase in the honorarium that arbitrators receive.

The total fees parties incur, and the total honorarium that arbitrators receive, could either increase or decrease depending on the composition and timing of the requests. For example, parties would be subject to fees for contested requests to issue orders of appearance without a hearing session, but would not be subject to fees for unopposed requests to issue orders of production. In addition, the fees for submitting contested requests to issue subpoenas without a hearing session would decrease from \$250 to \$200 per arbitrator. The per-case cap on these payments, however, would be removed. Therefore, parties would be assessed additional fees if they submit multiple contested requests for subpoenas.

Among the 497 cases with contested subpoenas, 399 cases (or 80.3 percent) had only one contested request for subpoenas, whereas 98 cases (or 19.7 percent) had more than one contested request for subpoenas. For the cases with two or more contested requests for subpoenas, the median number of days between requests is less than two months. This suggests that contested requests for subpoenas are often submitted within

short periods of time, and that counsel could reasonably anticipate these requests and submit the requests at one time. The potential additional fees to parties from submitting multiple contested requests for subpoenas from the removal of the per-case cap, therefore, is likely to be minimal.

If parties file a contested request to issue one or more subpoenas or orders at one time and these are not based on the same facts or arguments (*i.e.*, unrelated), then arbitrators may not receive honorarium payments commensurate with their time and effort to decide the request. This could serve as a disincentive for arbitrators to give their best efforts or the time necessary to make decisions on these requests. The Director, however, could separate the motions and pay the arbitrators accordingly, thereby mitigating these potential effects.

(d) Alternatives Considered

Arbitrators raised issues with FINRA concerning the inconsistencies in the existing honorarium structure for requests to issue subpoenas or orders without a hearing session. Along with the proposed amendments, FINRA considered other changes to the existing honorarium structure. Other changes would have included an increase in the honorarium that arbitrators receive to decide discovery-related motions, contested subpoena requests, and requests for contested orders for production or appearance. The honorarium payments would have been similar to the honorarium that arbitrators receive for currently deciding contested subpoenas (\$250) or for deciding motions in discovery prehearings (\$300).

FINRA believes that the fee structure under the proposed amendments would provide arbitrators with honoraria that are commensurate with their efforts to decide these

requests. FINRA also believes that the proposed amendments provide incentives for parties to combine their requests for submission simultaneously to minimize their costs.

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 45 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 or disapprove 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](mailto:rule-comments@sec.gov). Please include File Number SR-FINRA-2018-026 on the subject line.

Paper Comments:

- Send paper comments in triplicate to Robert W. Errett, Deputy Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-FINRA-2018-026. 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 website (<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 website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. 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. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-FINRA-2018-026 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.<sup>36</sup>

Robert W. Errett  
Deputy Secretary

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<sup>36</sup> 17 CFR 200.30-3(a)(12).



## Exhibit 5

Proposed new language is underlined; deletions are in brackets.

### 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 for travel to a hearing session that is postponed pursuant to Rule 12601; and
- [•] (4) \$600 for 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).

(b) No change.

(c) Payment for Deciding Discovery-Related Motions [Without a Hearing Session], Contested Subpoena Requests, and Contested Orders for Production or Appearance without a Hearing Session

(1) FINRA will pay each arbitrator an honorarium of \$200 to decide without a hearing session: (i) a discovery-related motion [without a hearing session], (ii) a motion that contains one or more contested subpoena requests or contested orders for production or appearance; or (iii) a motion that contains one or more contested subpoena requests and contested orders for production or appearance. This paragraph does not apply to cases administered under Rule 12800.

(2) For purposes of paragraph (c)(1):

- i. a discovery-related motion and any replies or other correspondence relating to the motion shall be considered to be a single motion;
- ii. a contested motion requesting the issuance of one or more subpoenas shall include the motion, the draft subpoena(s), a written objection from the party opposing the motion, and any other documents supporting a party's position; and
- iii. a contested motion requesting the issuance of one or more orders for production or appearance shall include the motion, the draft order(s), a

written objection from the party opposing the motion, and any other documents supporting a party's position.

(3) No change.

(d) [Payment for Deciding Contested Subpoena Requests Without a Hearing Session]

[(1) The honorarium for deciding one or more contested motions requesting the issuance of a subpoena without a hearing session shall be \$250. The honorarium shall be paid on a per case basis to each arbitrator who decides the contested motion(s). The parties shall not be assessed more than \$750 in fees under this paragraph in any arbitration proceeding. The honorarium shall not be paid for cases administered under Rule 12800.]

[(2) For purposes of paragraph (d)(1), a contested motion requesting the issuance of a subpoena shall include a motion requesting the issuance of a subpoena, the draft subpoena, a written objection from the party opposing the issuance of the subpoena, and any other documents supporting a party's position.]

[(3) The panel will allocate the cost of the honorarium under paragraph (d)(1) to the parties pursuant to Rule 12902(c).]

[(e)] Payment for Explained Decisions

(1) No change.

(2) No change.

\* \* \* \* \*

**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 for travel to a hearing session that is postponed pursuant to Rule 13601; and

[•] (4) \$600 for 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).

(b) No change.

(c) Payment for Deciding Discovery-Related Motions [Without a Hearing Session], Contested Subpoena Requests, and Contested Orders for Production or Appearance without a Hearing Session

(1) FINRA will pay each arbitrator an honorarium of \$200 to decide without a hearing session: (i) a discovery-related motion [without a hearing session], (ii) a motion that contains one or more contested subpoena requests or contested orders for production or appearance; or (iii) a motion that contains one or more contested subpoena requests and contested orders for production or appearance. This paragraph does not apply to cases administered under Rule 13800 or pursuant to Rule 13806(d)(1).

(2) For purposes of paragraph (c)(1):

- i. a discovery-related motion and any replies or other correspondence relating to the motion shall be considered to be a single motion;
- ii. a contested motion requesting the issuance of one or more subpoenas shall include the motion, the draft subpoena(s), a written objection from the party opposing the motion, and any other documents supporting a party's position; and
- iii. a contested motion requesting the issuance of one or more orders for production or appearance shall include the motion, the draft order(s), a written objection from the party opposing the motion, and any other documents supporting a party's position.

(3) No change.

(d) [Payment for Deciding Contested Subpoena Requests Without a Hearing Session]

[(1) The honorarium for deciding one or more contested motions requesting the issuance of a subpoena without a hearing session shall be \$250. The honorarium shall be paid on a per case basis to each arbitrator who decides the contested motion(s). The parties shall not be assessed more than \$750 in fees under this paragraph in any arbitration proceeding. The honorarium shall not be paid for cases administered under Rule 13800 or pursuant to Rule 13806(d)(1).]

[(2) For purposes of paragraph (d)(1), a contested motion requesting the issuance of a subpoena shall include a motion requesting the issuance of a subpoena, the draft subpoena, a written objection from the party opposing the issuance of the subpoena, and any other documents supporting a party's position.]

[(3) The panel will allocate the cost of the honorarium under paragraph (d)(1) to the parties pursuant to Rule 13902(c).]

[(e)] Payment for Explained Decisions

(1) No change.

(2) No change.