



December 15, 2008

Florence Harmon  
Acting Secretary  
U. S. Securities and Exchange Commission  
100 F Street, N.E.  
Washington, D.C. 20549

**Re: File No. SR-FINRA-2008-051 – Proposed Rule Change to Amend Rules 12214, 12514 and 12904 of the Code of Arbitration Procedure for Customer Disputes and Rules 13214, 13514 and 13904 of the Code of Arbitration Procedure for Industry Disputes to Require Arbitrators to Provide an Explained Decision Upon the Joint Request of the Parties; Response to Comments**

Dear Ms. Harmon:

The Financial Industry Regulatory Authority, Inc. (“FINRA”) hereby responds to the comment letters received by the Securities and Exchange Commission (“SEC”) with respect to the above rule filing. In this rule filing, FINRA is proposing to amend Rules 12214, 12514 and 12904 of the Code of Arbitration Procedure for Customer Disputes and Rules 13214, 13514 and 13904 of the Code of Arbitration Procedure for Industry Disputes (“Codes”) to require arbitrators to provide an explained decision upon the joint request of the parties.<sup>1</sup> An explained decision would be a fact-based award stating the general reasons for the arbitrators’ decision. The panel chairperson would be required to write the explained decision and would be paid an additional honorarium of \$400 for doing so.

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<sup>1</sup> See Securities Exchange Act Rel. No. 58862 (October 27, 2008), 73 FR 64995 (October 31, 2008) (File No. SR-FINRA-2008-051, Notice of Filing of Proposed Rule Change Relating to Amendments to the Codes of Arbitration Procedure to Require Arbitrators to Provide an Explained Decision Upon the Joint Request of the Parties).

The SEC received five comment letters.<sup>2</sup> Three commenters support the proposal<sup>3</sup> and two oppose it.<sup>4</sup>

One commenter supports the proposal, but asserts that every panel should provide a brief explanation for each award.<sup>5</sup> Another commenter supports the proposal but expresses concerns that if an investor requests an explained decision but the industry party does not agree to the request, and the investor is unhappy with the outcome of the hearing, his or her perception concerning the unfairness of the arbitration process will increase.<sup>6</sup> One commenter argues that only the investor should be able to request an explained decision.<sup>7</sup>

In a prior rule filing, FINRA proposed to require arbitrators to provide explained decisions upon the request of customers, or of associated persons in industry disputes.<sup>8</sup> Many commenters on that proposal objected to the one-sided nature of the proposal. In addition, a number of commenters were concerned that the proposal would lead to an increase in motions to vacate based on the arbitrators' explanations. FINRA subsequently withdrew that rule filing.

One of the benefits of arbitration is that it is final and binding, and courts rarely vacate awards. FINRA believes that any risks that may be associated with explained decisions should be borne by the parties only after they have agreed jointly to request an explained decision. For these reasons, FINRA declines to amend the provision that requires joint agreement of the parties.

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<sup>2</sup> Comment letters were submitted by Kevin Thomas Hoffman, dated November 10, 2008 ("Hoffman letter"); Barbara Black, Director, Corporate Law Center, University of Cincinnati College of Law, Jill I. Gross, Director, Pace Investor Rights Clinic, Pace University School of Law, and Deborah Sommers, Student Intern, submitted November 20, 2008 ("Black and Gross letter"); Barry D. Estell, dated November 20, 2008 ("Estell letter"); Scott R. Shewan, Vice-President, Public Investors Arbitration Bar Association, dated November 21, 2008 ("PIABA letter"); and Theodore M. Davis, submitted November 21, 2008 ("Davis letter").

<sup>3</sup> See Hoffman, Black and Gross, and Davis letters. The Davis letter supports the proposed rule change with the caveat that the SEC re-visit FINRA's chair eligibility rules. FINRA is not proposing to amend the chair eligibility rules in this proposal (see Rules 12400(c) and 13400(c)). Therefore, the chair eligibility issue is outside the scope of the rule proposal and FINRA will not address it herein.

<sup>4</sup> See Estell and PIABA letters. The concerns raised by the Estell letter are outside the scope of the rule proposal. Therefore, FINRA will not address them herein.

<sup>5</sup> See Hoffman letter.

<sup>6</sup> See Black and Gross letter.

<sup>7</sup> See PIABA letter.

<sup>8</sup> See File No. SR-NASD-2005-032.

One commenter stated that the proposal does not provide sufficient guidance to arbitrators. The commenter asserts that the rule is ambiguous concerning the extent of the fact-based detail sufficient to constitute an explanation.<sup>9</sup> The proposed rule text specifies that a fact-based decision includes the general reasons for the arbitrators' decision. It also states that arbitrators do not have to include legal authorities or damage calculations. FINRA believes that the proposal, as filed, gives the arbitrators the flexibility they need to tailor each award to the specific case being decided. Moreover, the proposal requires the chairperson of the panel to write the explained decision. Because chairpersons have completed chairperson training and have served as arbitrators through award on at least two arbitrations,<sup>10</sup> FINRA believes that requiring the chairperson to write the explained decision will ensure that parties are provided with the information called for in the proposed rule change. Therefore, FINRA declines to amend the proposal to add further explanation regarding the content of the fact-based decision.

One commenter argues that requiring a joint request for an explained decision eliminates the need for the proposal.<sup>11</sup> The commenter notes that FINRA already fosters a policy of accommodating parties' joint requests. Another commenter asks if, under the current Codes, a panel would be required to write a reasoned decision if the parties made a joint request.<sup>12</sup> The answer is that the panel currently is not required to accede to a joint request for an explained decision. While FINRA would, today, forward the parties' joint request for an explained decision to the arbitrators, the arbitrators could decline the parties' request under current rules. The proposed rule change would make it clear that arbitrators must provide an explained decision upon the joint request of the parties, set a timetable for such requests, and, as noted in the Davis letter, provide for compensation for the chairperson's efforts in writing in the explained decision. The proposed rule change also specifies that arbitrators would not be required to provide an explained decision in cases resolved under the simplified or default arbitration rules.

In conclusion, FINRA believes that the proposal will increase investor confidence in the fairness of the arbitration process, and should be approved. If you have any questions, please contact me by telephone at (212) 858-4481 or by email at [margo.hassan@finra.org](mailto:margo.hassan@finra.org).

Very truly yours,

Margo A. Hassan  
Counsel

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<sup>9</sup> See Black and Gross letter.

<sup>10</sup> Rules 12400 and 13400 state that an arbitrator is eligible to serve as chairperson if the arbitrator has completed chairperson training and: 1) has a law degree and is a member of a bar of at least one jurisdiction and has served as an arbitrator through award on at least two arbitrations in which hearings were held; or 2) has served as an arbitrator through award on at least three arbitrations in which hearings were held.

<sup>11</sup> See PIABA letter.

<sup>12</sup> See Davis letter.