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July 15, 2016

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

Re: File No. SR-FINRA-2016-015 – Proposed Rule Change Relating to Award Offsets in Arbitration; Response to Comments and Partial Amendment No. 1

Dear Mr. Fields:

The letter responds to comments submitted to the Securities and Exchange Commission (“Commission”) regarding the above-referenced filing. In this filing, FINRA is proposing to amend Rule 12904 of the Code of Arbitration Procedure for Customer Disputes and Rule 13904 of the Code of Arbitration Procedure for Industry Disputes, to provide that absent specification to the contrary in an award, when arbitrators order opposing parties to pay each other damages, the monetary awards shall offset, and the party that owes the larger amount shall pay the net difference. The proposed rule change was published for comment in the Federal Register on May 23, 2016.¹

The Commission received eight comment letters in response to the publication of the proposed rule change in the Federal Register.² A majority of commenters support the proposed rule change with four commenters unequivocally in favor,³ and two opposed.⁴ Two

¹ See Securities Exchange Act Release No. 77844 (May 17, 2016), 81 FR 32359 (May 23, 2016) (Notice of Filing of File No. SR-FINRA-2016-015).

² See Letter from Leonard Steiner, Esq., Steiner & Libo, P.C., dated May 9, 2016 (“Steiner”); Letter from Steven B. Caruso, Esq., Maddox Hargett & Caruso, P.C., dated May 18, 2016 (“Caruso”); Letter from George H. Friedman, Esq., Adjunct Professor of Law, Fordham Law School, dated May 23, 2016 (“Friedman”); Letter from James L. Komie, Esq., Schuyler, Roche and Crisham, P.C., dated June 7, 2016 (“Komie”); Letter from Kevin M. Carroll, Esq., Securities Industry and Financial Markets Association, dated June 9, 2016 (“SIFMA”); Letter from David T. Bellaire, Esq., Financial Services Institute, dated June 13, 2016 (“FSI”); Letter from Hugh D. Berkson, Esq., Public Investors Arbitration Bar Association, dated June 13, 2016 (“PIABA”); Letter from Bev Kennedy, Oakville Ontario, Canada, dated June 26, 2016 (“Kennedy”).

³ See Caruso, Friedman, Komie and FSI.

⁴ See Wall and Steiner.

commenters support the proposed rule change, but ask FINRA to address concerns specified in their letters.⁵ One commenter did not address the substance of the proposed rule change.⁶

The following are FINRA's responses, by topic, to the commenters' concerns.

Providing a Default in Favor of Award Offsets

The letters in support of providing a default in favor of award offsets when arbitrators are silent on the issue state, among other matters, that the proposed rule change makes common sense,⁷ would provide a fair, equitable and reasonable approach,⁸ promote greater fairness in the arbitration process,⁹ provide useful guidance to parties in drafting pleadings,¹⁰ and reduce legal expenses for the party assessed the greater amount.¹¹

Steiner and Wall opposed providing a default in favor of award offsets, stating that parties already request award offsets in their pleadings. Steiner contended that "attorneys for broker-dealers are highly competent and always ask panels to offset the competing claims in rendering their final awards."

As stated in the rule filing, FINRA believes that the proposed rule change will eliminate ambiguity and reduce the risk of post-award disputes. Moreover, FINRA believes that the proposed rule change would likely reduce legal expenses to the party owed greater damages by eliminating the need to apply for the reopening of the case or going to court to seek award offsets, or seek other redress. The default is consistent with the common practice described by Steiner and Wall.

The proposed rule does not override arbitrator discretion. If the Commission approves the proposed rule change, FINRA will alert arbitrators to the amendment and will revise the Award Information Sheet to inform arbitrators of the offset default when arbitrators are silent on the issue.

Unpaid Arbitration Awards

While PIABA generally supported the proposal, it urged FINRA to address the issue of unpaid arbitration awards for investors by implementing a national recovery pool. The issue of unpaid awards is beyond the scope of the proposed rule change.

⁵ See SIFMA and PIABA.

⁶ See Kennedy.

⁷ See PIABA.

⁸ See Caruso.

⁹ See Komie.

¹⁰ See Friedman.

¹¹ See SIFMA.

Request to Change the term “Damages” to “Payments”

The proposed rule change provides that, absent specification to the contrary in the award, when arbitrators order opposing parties to pay each other “damages,” the monetary awards shall offset, and the party that owes the larger amount shall pay the net difference. SIFMA noted that arbitration awards are not limited to “damages,” and include also costs and fees, among other matters. SIFMA expressed its belief that FINRA did not intend to limit the proposed rule change to damages and requested that FINRA revise the proposed rule text to ensure that it is not susceptible to a narrow reading. FINRA agrees that the proposal was not intended to be strictly limited to “damages” offsets and that an award directs a party to pay a monetary amount, which may consist of, and be characterized as, damages, costs, fees, etc. Therefore, for purposes of clarity, FINRA is proposing to amend the proposed rule change as follows.

Proposed additions are underlined and deletions are bracketed:

Customer Code

Rule 12904. (Awards)

(j) All monetary awards shall be paid within 30 days of receipt unless a motion to vacate has been filed with a court of competent jurisdiction. Absent specification to the contrary in the award, when arbitrators order opposing parties to [pay each other damages] make payments to one another, the monetary awards shall offset, and the party [that owes] assessed the larger amount shall pay the net difference. An award shall bear interest from the date of the award:

- (1) If not paid within 30 days of receipt;
- (2) If the award is the subject of a motion to vacate which is denied; or
- (3) As specified by the panel in the award.

Interest shall be assessed at the legal rate, if any, then prevailing in the state where the award was rendered, or at a rate set by the arbitrator(s).

* * * * *

Industry Code

Rule 13904. (Awards)

(j) All monetary awards shall be paid within 30 days of receipt unless a motion to vacate has been filed with a court of competent jurisdiction. Absent specification to the contrary in the award, when arbitrators order opposing parties to [pay each other damages] make payments to one another, the monetary awards shall offset, and the party [that owes] assessed the larger amount shall pay the net difference. An award shall bear interest from the date of the award:

- (1) If not paid within 30 days of receipt;
- (2) If the award is the subject of a motion to vacate which is denied; or

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(3) As specified by the panel in the award.

Interest shall be assessed at the legal rate, if any, then prevailing in the state where the award was rendered, or at a rate set by the arbitrator(s).

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FINRA believes that the foregoing responds to the issues raised by the commenters to the rule filing. If you have any questions, please contact me at [REDACTED], email:

[REDACTED].

Sincerely,

/s/ Margo A. Hassan

Margo A. Hassan
Associate Chief Counsel