

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-75036; File No. SR-FINRA-2015-003)

May 22, 2015

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Order Approving Proposed Rule Change to Amend the Code of Arbitration Procedure for Customer Disputes and the Code of Arbitration Procedure for Industry Disputes to Increase a Fee for the Late Cancellation of a Scheduled Hearing, Lengthen the Notice Period for Cancelling a Scheduled Hearing, and Increase the Amount of Honoraria Paid to Arbitrators Affected by a Late Cancellation of a Scheduled Hearing

I. Introduction

On February 5, 2015, the Financial Industry Regulatory Authority, Inc. (“FINRA”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act” or “Exchange Act”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to amend Rules 12214 and 12601 of FINRA’s Code of Arbitration Procedure for Customer Disputes (“Customer Code”) and Rules 12214 and 12601 of its Code of Arbitration Procedure for Industry Disputes (“Industry Code”) (together, “Codes”) to increase the fee for the late cancellation or postponement of a scheduled hearing, lengthen the notice period for cancelling or postponing a scheduled hearing session, and increase the amount of honoraria paid to arbitrators affected by the late cancellation or postponement of a scheduled hearing session. The proposed rule change was published for comment in the Federal Register on February 24, 2015.<sup>3</sup> The Commission received twelve comment letters on the proposal.<sup>4</sup> On

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

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

<sup>3</sup> See Exchange Act Release No. 74289 (Feb. 18, 2015), 80 FR 9773 (Feb. 24, 2015) (“Notice”).

<sup>4</sup> See Letters from Steven B. Caruso, Esq., Maddox Hargett & Caruso, P.C., dated February 20, 2015 (“Caruso Letter”); Philip M. Aidikoff, Aidikoff, Uhl & Bakhtiari, dated February 24, 2015 (“Aidikoff Letter”); George H. Friedman, Esq., George H.

March 26, 2015, FINRA granted the Commission an extension of time, until May 25, 2015, to act on the proposal.<sup>5</sup> FINRA responded to the comment letters on April 24, 2015.<sup>6</sup> This order approves the rule change as proposed.

## II. Description of the Proposed Rule Change

### A. Background

As stated in the Notice, FINRA is proposing to amend the Codes to increase the fee for the late cancellation or postponement of a scheduled hearing session for the primary purpose of encouraging parties to provide more advance notice of cancellations and postponements, or, in the alternative, to compensate arbitrators more for lost time and opportunities in the event of a late cancellation or postponement.<sup>7</sup>

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Friedman Consulting, LLC, dated March 1, 2015 (“Friedman Letter”); Joseph C. Pfeiffer, President, Public Investors Arbitration Bar Association (“PIABA”), dated March 9, 2015 (“PIABA Letter”); Ryan K. Bakhtiari, Aidikoff, Uhl & Bakhtiari, dated March 9, 2015 (“Bakhtiari Letter”); Jasmine Blake-Stewart, Francis Laryea, Jason Robinson, and Darius Wood, Student Interns, and Nicole Iannarone, Assistant Clinical Professor, Investor Advocacy Clinic, Georgia State University College of Law, dated March 13, 2015 (“GSU Letter”); Mark R. Harris, dated March 16, 2015 (“Harris Letter”); Patrick J. Paul, Student Intern, Elissa Germaine, Supervising Attorney, and Jill Gross, Director, Pace Investor Rights Clinic at Pace University School of Law, dated March 16, 2015 (“PIRC Letter”); Matthew Chan, Student, and William A. Jacobson, Esq., Clinical Professor of Law, Cornell Law School, and Director, Cornell Securities Law Clinic, dated March 17, 2015 (“CSLC Letter”); Paige M. Szymanski, Law Student Clinician, Investor Advocacy Clinic, Michigan State University College of Law, dated March 17, 2015 (“MSU Letter”); Leonard Steiner, Steiner & Libo, dated April 7, 2015 (“Steiner Letter”); and Richard P. Ryder, Esq., President, Securities Arbitration Commentator, Inc., dated April 7, 2015 (“Ryder Letter”).

<sup>5</sup> See Letter from Mignon McLemore, Assistant Chief Counsel, FINRA Dispute Resolution, Inc., to Lourdes Gonzalez, Assistant Chief Counsel, Sales Practices, Division of Trading and Markets, Securities and Exchange Commission, dated March 26, 2015.

<sup>6</sup> See Letter from Mignon McLemore, Assistant Chief Counsel, FINRA Dispute Resolution, Inc., to Brent J. Fields, Secretary, Securities and Exchange Commission, dated April 24, 2015 (“FINRA Response Letter”).

<sup>7</sup> See Notice, 80 FR at 9774.

Under current Rules 12601(b)(2) and 13601(b)(2) of the Codes, each arbitrator selected to hear a case receives a \$100 honorarium<sup>8</sup> when a hearing is cancelled or postponed within three business days of the scheduled hearing date.<sup>9</sup> In the event a scheduled hearing is cancelled or postponed more than three business days in advance of the scheduled hearing date, the arbitrators do not receive an honorarium.<sup>10</sup>

FINRA stated that it has “received many complaints from arbitrators concerning the current late cancellation rule,” noting that it is the most frequent complaint Dispute Resolution staff receives from arbitrators.<sup>11</sup> Moreover, when FINRA formed its Dispute Resolution Task Force in 2014 to consider possible enhancements to its arbitration and mediation forum, it published a request for comment.<sup>12</sup> FINRA stated that the majority of comments it received from arbitrators suggested that FINRA address the issue of late cancellation of scheduled

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<sup>8</sup> These honoraria are typically funded by the Late Cancellation Fee (defined *infra*).

<sup>9</sup> If the parties settle an arbitration claim, hearings that were scheduled to occur after settlement are cancelled and, depending on the timing of the cancellation, could result in the assessment of a Late Cancellation Fee. *See* FINRA Rules 12902(d) and 13902(d). These rules incorporate the fees and costs incurred under FINRA Rules 12601 and 13601, and, therefore, would incorporate the proposed increase to the Late Cancellation Fee.

<sup>10</sup> For each postponement agreed to by the parties, or granted upon request of one or more parties, FINRA also assesses an additional postponement fee to the parties, equal to the applicable hearing session fee (“Postponement Fee”). *See* FINRA Rules 12601(b)(1) and 13601(b)(1). The Postponement Fee is paid to FINRA and not passed through to the arbitrators. *See* Notice, 80 FR at 9774, note 4.

<sup>11</sup> *See* Notice, 80 FR at 9774.

<sup>12</sup> *See id.* FINRA’s Dispute Resolution Task Force comprises individuals from the public and industry sectors who work together to suggest strategies to enhance the transparency, impartiality, and efficiency of FINRA’s securities dispute resolution forum for all participants. *See* [FINRA Dispute Resolution Task Force](http://www.finra.org/ArbitrationAndMediation/FINRADisputeResolution/MoreonFINRADisputeResolution/P600966), available at <http://www.finra.org/ArbitrationAndMediation/FINRADisputeResolution/MoreonFINRADisputeResolution/P600966>.

hearings.<sup>13</sup> More specifically, FINRA reported that it has learned that “the lack of sufficient notice and compensation is frustrating for arbitrators and is a reason some arbitrators leave FINRA’s roster”<sup>14</sup> and that many arbitrators have expressed concern that “the forum’s honoraria are too low.”<sup>15</sup> In addition, FINRA received feedback that “the current rule is inadequate because the three-business-day cancellation window does not provide arbitrators ... with enough time to schedule other income-generating opportunities.”<sup>16</sup>

FINRA stated that it has started addressing these concerns by amending its rules to increase the amount of honoraria paid to arbitrators to \$300 per hearing session in 2014.<sup>17</sup> In order to further respond to arbitrators’ concerns, however, FINRA is proposing to amend the Codes to require that parties to an arbitration give more advance notice before cancelling a hearing, or be assessed a higher late cancellation fee if sufficient advance notice is not provided.<sup>18</sup> Specifically, FINRA’s proposal would amend Rule 12601(b)(2) to provide that if a cancellation request is made by one or more parties within ten calendar days before a scheduled hearing session and granted, the party or parties making the request shall pay a fee of \$600 per arbitrator (“Late

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<sup>13</sup> See Notice, 80 FR at 9774.

<sup>14</sup> Id.

<sup>15</sup> Id. at 9775.

<sup>16</sup> Id. at 9774. Commenters also noted that the current \$100 honorarium for late cancellations does not adequately compensate arbitrators for the time they have spent preparing for a cancelled hearing or the income they would have earned for conducting a hearing. Id.

<sup>17</sup> See id. at 9775. See also Exchange Act Release No. 73245 (Sept. 29, 2014), 79 FR 59876 (Oct. 3, 2014) (Order Approving File No. SR-FINRA-2014-026) (“Honoraria Order”).

<sup>18</sup> See Notice, 80 FR at 9774, note 10. The text of the proposed rule change is available at the principal office of FINRA, on FINRA’s website at <http://www.finra.org>, and at the Commission’s Public Reference Room. For ease of reference, this Order generally refers only to rules in the Customer Code. However, the changes and discussion would also apply to the same rules of the Industry Code.

Cancellation Fee”) in addition to any required Postponement Fee.<sup>19</sup>

FINRA believes that these changes would result in fewer late cancellations by parties to an arbitration as the higher Late Cancellation Fee would incentivize parties to begin settlement negotiations earlier in the process.<sup>20</sup> FINRA also believes that the increased Late Cancellation Fee would help address arbitrators’ concerns about honoraria and compensation for lost time and opportunities, thus helping decrease arbitrator turnover.<sup>21</sup>

B. Proposed Increase to Late Cancellation Fees and Cancellation Timeframe

The proposal would amend Rules 12601(b)(2) and 13601(b)(2) to increase from three business days to ten calendar days the timeframe before which parties must request cancellation of hearings in order to avoid incurring the proposed Late Cancellation Fee. FINRA believes that the increased time would give arbitrators more opportunity to secure other income-generating opportunities and potentially save arbitrators time lost in preparation for assigned hearings.<sup>22</sup>

The proposed rule change would also increase the amount of honoraria paid to arbitrators for late cancellations of hearings from \$100 to \$600 per arbitrator, making the honorarium equal to that which arbitrators would have received for one typical day of hearings,<sup>23</sup> no matter how

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<sup>19</sup> See id. at 9774-75. See also supra note 10.

<sup>20</sup> See Notice, 80 FR at 9775.

<sup>21</sup> See id.

<sup>22</sup> See id. (explaining that many hours of reviewing materials might be involved depending on the number of parties involved and the complexity of the case).

<sup>23</sup> A hearing is a meeting between the parties and the arbitrators of four hours or less to determine the merits of the arbitration. See FINRA Rules 12100(m) and 13100(m); see also FINRA Rules 12100(n) and 13100(n). A typical day in an arbitration case has two hearing sessions. See Notice, 80 FR at 9774, note 7.

many consecutive days are cancelled.<sup>24</sup> The Late Cancellation Fee would continue to be charged to the party or parties making the request, but under Rule 12601(b)(2), arbitrators have the authority to allocate all or a portion of the fee to the non-requesting party if the arbitrators determine that the non-requesting party caused or contributed to the cancellation.<sup>25</sup> Moreover, Rule 12601(b)(2) also permits the panel to waive the Late Cancellation Fee if an extraordinary circumstance prevented a party or parties from making a timely cancellation request.<sup>26</sup> This would not change if the Commission approves the proposed rule change.

The proposed rule change would also shift the phrase “and granted” to the end of the first dependent clause in Rule 12601(b)(2) to clarify that the timing of a cancellation request controls whether the fee is assessed, not the timing of the arbitrators’ decision on the request, if a decision is required.<sup>27</sup>

FINRA is also proposing to make conforming changes to Rule 12214(a), by amending the reference to the Late Cancellation Fee in Rule 12214(a).

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<sup>24</sup> Under the proposed rule change, the Late Cancellation Fee for a three-person arbitration panel would be \$1,800, instead of \$300 under the current rules. FINRA reported in the Notice that it found that approximately 80% of arbitration cases were heard by a three-person panel based on an analysis of arbitration data from September 2013 to August 2014. See Notice, 80 FR at 9774, note 6.

<sup>25</sup> See Notice, 80 FR at 9775.

<sup>26</sup> See id. (explaining that “the panel [may] waive the fees ... if the circumstances warrant, like a sudden illness or accident”).

<sup>27</sup> See id. (describing the circumstances when the Late Cancellation Fee would not apply when parties jointly request cancellation or postponement ten calendar days or more before a scheduled hearing date or one party makes a cancellation request).

### III. Summary of Comments and FINRA’s Response

As noted above, the Commission received twelve comment letters on the proposed rule change<sup>28</sup> and a response letter from FINRA.<sup>29</sup> As discussed in more detail below, ten of the twelve commenters expressed support for FINRA’s proposal.<sup>30</sup> Five of those ten commenters, however, also suggested some modifications.<sup>31</sup> Two of the twelve commenters expressed opposition to the proposed rule change.<sup>32</sup> The sections below outline the suggestions or specific concerns raised by the commenters suggesting changes or opposed to the proposal as well as FINRA’s response.

#### A. Effect of Late Cancellation Fees on Customer Claimants

##### 1. Potential Impact on Settlement of Claims

While a majority of the commenters supported the proposed increase in arbitrator honoraria, two commenters opposed the proposed rule change stating that the increased Late Cancellation Fee could discourage parties from settling their claims and, instead, encourage them to arbitrate their claims.<sup>33</sup> One of these commenters stated that the proposal would impose additional costs on customer claimants making the arbitration forum less consumer friendly.<sup>34</sup> The other commenter stated that the proposal would negatively impact small investors. In this commenter’s view, investors asserting “small” claims may feel pressure to arbitrate even when it

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<sup>28</sup> See supra note 4.

<sup>29</sup> See supra note 6.

<sup>30</sup> See Caruso Letter, Aidikoff Letter, Friedman Letter, Bakhtiari Letter, Harris Letter, PIRC Letter, CSLC Letter, MSU Letter, PIABA Letter, and Ryder Letter.

<sup>31</sup> See PIRC Letter, CSLC Letter, MSU Letter, PIABA Letter, and Ryder Letter.

<sup>32</sup> See GSU Letter and Steiner Letter.

<sup>33</sup> See id.

<sup>34</sup> See Steiner Letter.

is in their best interest to settle a claim because of the threat of the increased Late Cancellation Fee.<sup>35</sup>

In its response, FINRA acknowledged that customers would likely be required to pay some of the increased Late Cancellation Fee under the proposed rule change.<sup>36</sup> FINRA also acknowledged that the proposed increase could affect settlement negotiations if the potential settlement amount is small compared to the Late Cancellation Fee.<sup>37</sup> FINRA noted, however, that “the Codes provide parties with some cost mitigation options, regardless of their claim amount.”<sup>38</sup> For instance, parties could avoid the Late Cancellation Fee by providing sufficient notice when requesting the cancellation of a scheduled hearing.<sup>39</sup> FINRA also stated that if, however, parties settle a claim with fewer than ten days remaining to cancel a scheduled hearing,<sup>40</sup> the parties could negotiate (as part of any settlement agreement) the allocation of fees.<sup>41</sup> In addition, FINRA noted that arbitrators have the authority under the Codes (i) to

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<sup>35</sup> See GSU Letter (noting that the proposal represents a 500% increase in the penalty for cancellation and claimants might choose to forego settlement to avoid the increased Late Cancellation Fee).

<sup>36</sup> See FINRA Response Letter.

<sup>37</sup> See id. See also Notice, 80 FR at 9775.

<sup>38</sup> See FINRA Response Letter (stating that “parties would avoid the late cancellation fee by providing notice of a cancellation 10 or more days prior to the first scheduled hearing session”).

<sup>39</sup> See id.

<sup>40</sup> See GSU Letter (stating that “many matters settle on the eve of arbitration”).

<sup>41</sup> See FINRA Response Letter (stating, for example, that if a party waits until the day before a hearing to begin settlement negotiations in earnest, the party who is not the cause of the delay has leverage to negotiate with the other party to pay all, or a larger percentage of, the Late Cancellation Fee). See FINRA Rules 12701(b) and 13701(b) (under Rules 12701(b) and 13701(b), a customer may only be responsible for half the proposed Late Cancellation Fee if the settlement agreement does not address its allocation).



allocate all or a portion of the Late Cancellation Fee to the party or parties that cause a delay or contribute to the need to cancel or otherwise postpone a scheduled hearing<sup>42</sup> or (ii) to waive the Late Cancellation Fee “in the event that an extraordinary circumstance prevents a party or parties from making a timely postponement request.”<sup>43</sup>

## 2. Proposed Exemptions for “Small” Claims

Two commenters suggested that FINRA amend the proposal to create exceptions for investors with “small” claims.<sup>44</sup> One of these commenters recommended setting an exemption threshold for claims of \$100,000 or less.<sup>45</sup> The other commenter, who otherwise supported the proposal, also suggested that FINRA amend the proposal to exempt investors with claims of \$50,000 or less.<sup>46</sup> This commenter suggested that an investor with a claim of \$50,000 or less who cancels a hearing session less than ten days before the scheduled date would pay more in Late Cancellation Fees than he or she would pay in honorarium if the hearing took place.<sup>47</sup> The commenter stated that this may create “another roadblock to requesting a hearing.”<sup>48</sup> This commenter believes that investors with claims of \$50,000 or less who cancel a scheduled hearing

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<sup>42</sup> See FINRA Response Letter.

<sup>43</sup> Id.

<sup>44</sup> See GSU Letter and Ryder Letter (generally supportive of the proposal because it would help FINRA recruit and retain arbitrators).

<sup>45</sup> See GSU Letter.

<sup>46</sup> See Ryder Letter (noting that arbitrators receive a \$350 honorarium under FINRA Rules 12800(a) and 12800(f) when they oversee arbitration claims of \$50,000 or less. If parties request and schedule a hearing, then later cancel the hearing with insufficient notice, however, the fees would include the \$450 Postponement Fee and the \$600 Late Cancellation Fee).

<sup>47</sup> See id. (stating that “[c]harging for the late notice more than three times (\$450 & \$600) the amount the Arbitrator is to be compensated for service (\$350) will erect an unnecessary, unhealthy and substantial impediment to aggrieved customers”).

<sup>48</sup> See id.

should only be subject to the Postponement Fee,<sup>49</sup> or alternatively, that FINRA should reduce the Late Cancellation Fee for small claims to “an amount that comports with the lower compensation rate for Rule 12800 arbitrators.”<sup>50</sup>

In its response, FINRA noted that claims of \$50,000 or less are subject to FINRA Rules 12800 and 13800 (“simplified arbitration rules”).<sup>51</sup> Under the simplified arbitration rules, these types of claims are usually decided by one arbitrator based on the pleadings submitted. In these cases, no hearings are held and, consequently, the Late Cancellation Fee would not apply to these investors. The simplified arbitration rules, however, permit customers who have claims of \$50,000 or less to request a hearing.<sup>52</sup> In that event, the provisions of the Code relating to hearings and prehearings, including those governing fee, would apply,<sup>53</sup> accordingly, the customer claimant could be subject to the increased Late Cancellation Fee if the parties do not request a cancellation or postponement before the point when the Late Cancellation Fee would apply. FINRA stated, however, that when a customer with a claim of \$50,000 or less requests a hearing, FINRA pays the arbitrators regular hearing session honoraria pursuant to Rule 12214 instead of the \$350 honorarium for deciding a claim based solely on the pleadings pursuant to FINRA Rules 12800(f).<sup>54</sup>

FINRA also stated that it believes that exempting claims of \$100,000 or less as suggested

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<sup>49</sup> See id. (recommending that FINRA pay arbitrators from funds collected under the Postponement Fee rather than charging a Late Cancellation Fee when a late settlement occurs, which would “allow customers a more realistic choice of a hearing.”).

<sup>50</sup> See id.

<sup>51</sup> See FINRA Response Letter.

<sup>52</sup> See FINRA Rule 12800(c)(1). The Ryder Letter noted that out of approximately 200 small claims awards in 2014, 36 investor claimants requested a hearing.

<sup>53</sup> See FINRA Rule 12800(c)(2).

<sup>54</sup> See FINRA Response Letter.

in the GSU Letter would not address the primary goal of the proposed rule change, which is to encourage parties to provide earlier notice to cancel a scheduled hearing.<sup>55</sup> FINRA believes that, irrespective of the amount in dispute, the current fee does not adequately compensate arbitrators for the amount of time they devote to preparing for hearings as well as the opportunity cost relating to the time they have set aside for scheduled hearings.<sup>56</sup>

In addition, FINRA believes that small claims customers could mitigate the Late Cancellation Fee by, among other things, negotiating (as part of any settlement agreement) the allocation of fees, requesting that the panel waive the late cancellation fee based on extraordinary circumstances, or requesting that the panel or FINRA waive the Late Cancellation Fee pursuant Rule 12601(b)(3).<sup>57</sup>

Moreover, FINRA believes that carving out an exception for “small” claims would create a two-tiered fee system and lead to an additional burden on FINRA staff.<sup>58</sup>

For the reasons discussed above, FINRA believes that the proposed rule change should apply to all scheduled hearings regardless of the size of the claim.<sup>59</sup> Therefore, FINRA declined to modify the proposed rule change to exempt parties of \$100,000 or less from the Late Cancellation Fee.<sup>60</sup>

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<sup>55</sup> See id.

<sup>56</sup> See id.

<sup>57</sup> See id. (stating that a “waiver of the fee by the panel or by FINRA would not affect the payment of the honorarium”). See also infra note 85 (describing the forum’s policy regarding payment of the honorarium to the arbitrators in the event the fee is waived).

<sup>58</sup> See FINRA Response Letter. See also infra Section III.D.

<sup>59</sup> See FINRA Response Letter.

<sup>60</sup> See id.

B. Eliminate the Cost to Claimants in the Event of a Settlement

One commenter recommended that FINRA amend the proposal to exempt parties from Late Cancellation Fees incurred due to late cancellations that are “necessary to accommodate a mediation (or other settlement efforts) or because a case has been settled.”<sup>61</sup> This commenter stated that the customer claimants cannot control when member firms begin to consider settlement<sup>62</sup> and that the financial impact of the increased Late Cancellation Fee would negatively affect customer claimants more than broker-dealers.<sup>63</sup>

In the Notice, FINRA acknowledged that customers would likely be required to pay some of the increased Late Cancellation Fee under the proposed rule change.<sup>64</sup> FINRA believes, however, that “the cost of arbitration should be borne by users of the forum.”<sup>65</sup> FINRA stated that since either customers or members may seek to cancel or postpone a hearing, it would be inequitable to require industry members to bear the entire proposed Late Cancellation Fee.<sup>66</sup> FINRA also believes that both customers and members “benefit from the forum attracting and

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<sup>61</sup> PIABA Letter.

<sup>62</sup> See id. (arguing that “[s]ince it is respondents that get to keep their dollars in their pockets until a given claimant’s case is over ... it is respondents that need incentives to ‘address issues earlier in their cases’ [citing the Notice]”).

<sup>63</sup> See id. (suggesting that it is not fair to make claimants equally bear the financial burden due to “the financial impact of the increase in the amount of the per-arbitrator fee in the proposed rule change, as between a typical individual claimant and a large broker dealer, is too disparate to claimants, who will ‘feel’ the impact of the fee much more than broker dealers will”).

<sup>64</sup> See Notice, 80 FR at 9775.

<sup>65</sup> FINRA Response Letter.

<sup>66</sup> See id. FINRA also stated that as part of the fee increases approved in the Honoraria Order, FINRA “allocated a large portion of the arbitration fee increases to members by significantly increasing member surcharges and process fees” and that these fees cannot be allocated to other parties. In addition, FINRA noted that member firms may also be responsible for the related fees, such as filing fees and hearing session fees.

retaining qualified, dedicated arbitrators ... and they should share in the effort to sustain and improve the forum.”<sup>67</sup>

For these reasons, FINRA declined to modify its proposal to exempt parties from Late Cancellation Fees incurred by parties attempting to accommodate mediation or other settlement efforts.

C. Presumption That Only Members Would Pay Late Cancellation Fee

One commenter expressed concern that the proposed rule change would “run counter to FINRA’s objective of providing an affordable method to resolve disputes”<sup>68</sup> and recommended that FINRA create a rebuttable presumption that either the member firm or the associated person be responsible for the proposed Late Cancellation Fee unless the arbitrators determine that the customer caused the need for the cancellation or postponement.<sup>69</sup>

In its response, FINRA stated that that it does not believe that the proposed Late Cancellation Fee would significantly affect the affordability of the dispute resolution forum, noting that investors “experience substantial savings in arbitration compared to litigation.”<sup>70</sup> Specifically, FINRA stated that “the benefits and cost of savings of arbitration make filing an arbitration claim a less costly option for investors, notwithstanding the potential costs of the proposed late cancellation fee.”<sup>71</sup> In addition, FINRA stated that customers can avoid the

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<sup>67</sup>

Id.

<sup>68</sup>

CSLC Letter.

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See id.

<sup>70</sup>

FINRA Response Letter (explaining that “claims in arbitration are typically resolved more quickly than claims in litigation” due to limits on discovery and the avoidance of delays and costs associated with appeals and that “[a]ttacks on awards are rare and are based on narrow grounds under the Federal Arbitration Act”).

<sup>71</sup>

Id.

proposed new Late Cancellation Fee by cancelling or postponing a hearing at least ten calendar days before the scheduled hearing date; and, FINRA stated that “the Codes provide parties with some mitigation strategies to use to potentially reduce the amount of the fee assessed.”<sup>72</sup>

FINRA also believes that amending the proposal to impose a rebuttable presumption that the member or associate person be responsible for any Late Cancellation Fee would be unfair because there are instances in which customers create the need for and request a cancellation.<sup>73</sup> Furthermore, FINRA stated that since both customers and FINRA members benefit from the arbitration forum and its ability to attract and retain qualified, dedicated arbitrators, “it would be inequitable for industry members to pay 100 percent of the proposed late cancellation fee.”<sup>74</sup>

For these reasons, FINRA declined to modify its proposed rule to create a presumption that member firms and associated persons pay the proposed late cancellation fees.

#### D. Creation of Late Cancellation Fee Tiers

Two commenters recommended that FINRA modify the proposed rule to create separate tiers of Late Cancellation Fees that would apply based on when a request for cancellation or postponement is made.<sup>75</sup> Under these modifications, the earlier a party requests cancellation or postponement, the smaller the Late Cancellation Fee.<sup>76</sup>

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<sup>72</sup> Id. See also supra note 41.

<sup>73</sup> See FINRA Response Letter.

<sup>74</sup> Id.

<sup>75</sup> See GSU Letter (arguing that this modification would “lessen the impact on parties who decide to settle closer to the arbitration date while still ensuring arbitrators are adequately compensated for their lost time and opportunities”); and CSLC Letter.

<sup>76</sup> The GSU Letter suggested a phased-in Late Cancellation Fee that would cost \$100 per arbitrator “if a hearing is cancelled between ten and four business days in advance of a hearing, with the fee increasing to \$600 per arbitrator for a cancellation or postponement three business days prior to the scheduled hearing.”

FINRA believes adopting a phased-in, or sliding-scale, approach would be confusing for parties and more complex and time-consuming for staff to implement.<sup>77</sup> For example, FINRA believes that a tiered approach to calculating Late Cancellation Fees may lead to inaccurate fee calculations and create an additional burden on its staff resources.<sup>78</sup> In addition, FINRA stated that it does not believe that a sliding scale of Late Cancellation Fees “would provide enough of an incentive to encourage parties to change their behavior.”<sup>79</sup> Moreover, FINRA stated that incorporating the commenters’ suggestions would delay the implementation of the rule (if approved by the Commission) because FINRA would need to “reprogram its technology platforms to implement the changes.”<sup>80</sup>

For these reasons, FINRA declined to modify its proposal to create additional tiers of late cancellation fees.<sup>81</sup>

E. Arbitrators’ Conflict of Interest

Three commenters expressed concern that the proposed rule change would create a conflict of interest for arbitrators considering whether to waive the Late Cancellation Fee in the

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The CSLC Letter proposed the following sliding-scale Late Cancellation Fee schedule:

Calendar days before hearing when notice given	Cancellation Fee Per Arbitrator
11 or more	\$ 0
9-10	\$ 100
7-8	\$ 200
5-6	\$ 300
4 or fewer	\$ 600

<sup>77</sup> See FINRA Response Letter.

<sup>78</sup> See id.

<sup>79</sup> Id.

<sup>80</sup> Id.

<sup>81</sup> See id.

event of an extraordinary circumstance as permitted under Rule 12601(b)(2).<sup>82</sup> Specifically, these commenters suggested that the proposed increase to arbitrator honoraria would provide arbitrators greater incentive to deny a request for waiver because the Late Cancellation Fees are typically used to fund their honoraria payments.<sup>83</sup> In order to neutralize this conflict, one commenter recommended revising the proposal to require FINRA to “bear the financial responsibility for the late cancellation honoraria in those limited situations where it is appropriate for the arbitrators to waive the late cancellation fee.”<sup>84</sup>

In its response, FINRA stated that the forum’s policy currently is “to pay arbitrators the fee they would have received in the event the panel waives the late cancellation fee for the parties”<sup>85</sup> and that this policy would not change if the proposal is approved by the Commission.<sup>86</sup> Accordingly, FINRA declined to modify its proposal as recommended.<sup>87</sup>

#### F. Additional Arbitrator Training

One commenter suggested that FINRA provide additional arbitrator training on the types of extraordinary circumstances that would be appropriate to consider when deciding whether to

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<sup>82</sup> See PIABA Letter; MSU Letter; and CLSC Letter (citing support for the issue in the PIABA Letter).

<sup>83</sup> See, e.g., MSU Letter (stating that “the substantial increase in the fee granted to each arbitrator could discourage an arbitrator from granting the waiver”); and CSLC Letter (noting that “the requesting party is asking the arbitrators to waive the compensation that the arbitrators themselves would be entitled to” and arguing that the conflict “is amplified when the late cancellation fee is increased as dramatically as proposed”).

<sup>84</sup> PIABA Letter.

<sup>85</sup> FINRA Response Letter (referencing Exchange Act Release No. 49545 (Apr. 8, 2004), 69 FR 19887 (Apr. 14, 2004) (File No. SR-NASD-2003-164) (Notice of Filing by NASD, Inc. Relating to the Adjournment of a Hearing Within Three Business Days of the First Scheduled Hearing Session), at 19889, which states that “a waiver of the fee ... will not affect the payment of the honorarium”).

<sup>86</sup> See FINRA Response Letter.

<sup>87</sup> See id.



waive the late cancellation fee, as well as how to verify the accuracy of these circumstances.<sup>88</sup>

In its response, FINRA stated that while “it has not received any complaints from parties about arbitrators failing to waive late cancellation fees in the event of extraordinary circumstances” it has issued guidance on this issue in its Notice to Members 04-53.<sup>89</sup> The guidance states that “there are some extraordinary circumstances that could prevent a party from making an adjournment request in time to avoid the additional fee assessment (e.g., a serious accident or sudden severe illness).”<sup>90</sup> FINRA stated that this guidance would continue to apply if the Commission approves the proposal.<sup>91</sup> FINRA also stated, however, that it “would review the applicable arbitrator training modules and scenarios and update them, where necessary” if the Commission approves the proposed rule change.<sup>92</sup> FINRA also stated that it would publish a Regulatory Notice “explain[ing] how the rule would be applied, including any changes to the examples of what FINRA considers ‘extraordinary circumstances.’”<sup>93</sup>

#### G. Education for Pro se Claimants about Late Cancellation

Three commenters expressed concern that the proposed rule change may harm investors who represent themselves in the forum (“pro se claimants”) because they may be less likely to be

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<sup>88</sup> See PIABA Letter (noting that this training would “reinforce the need for arbitrators to give appropriate consideration of the parties’ requests for a waiver of late cancellation fees in extraordinary circumstances” and further suggesting that arbitrators be reminded that “the rules involved specifically acknowledge that there can be ‘extraordinary circumstances’ that can excuse a late cancellation”).

<sup>89</sup> FINRA Response Letter.

<sup>90</sup> Id.

<sup>91</sup> See id.

<sup>92</sup> Id.

<sup>93</sup> Id.

aware of the increased fee and deadline for timely requesting a cancellation.<sup>94</sup> The commenters recommended that FINRA provide additional information and education to pro se claimants to help ensure that they are aware of the Late Cancellation Fee and timeline.<sup>95</sup> One of these commenters also recommended that FINRA notify pro se claimants with claims under \$100,000 by letter 30 days before a scheduled hearing to inform them of the fees and the ten-day cancellation period.<sup>96</sup>

In its response, FINRA stated that it believes that “all parties should be reminded of the proposed rule change, so that they are aware of the ramifications of postponing or cancelling a scheduled hearing inside of the proposed cancellation period.”<sup>97</sup> Accordingly, FINRA stated that it would train arbitrators to remind the parties of the deadline and Late Cancellation Fees at the initial prehearing conference (“IPHC”), as well as publish an updated Regulatory Notice describing the proposed rule changes.<sup>98</sup> Furthermore, FINRA stated that it would instruct the arbitrators to include this reminder in the IPHC Scheduling Order, which is provided to the parties at the outset of the dispute, so that parties will be informed of their responsibilities.<sup>99</sup>

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<sup>94</sup> See PIABA Letter (noting that “there will likely be pro se claimants that are unaware of the existence of the rule calling for late cancellation fees”); PIRC Letter (citing support for the position in the PIABA Letter); and MSU Letter (arguing that “pro se claimants need extra protection against incurring unexpected fees in a complicated arbitration forum”).

<sup>95</sup> See, e.g., PIABA Letter (suggesting that “FINRA provide additional education to pro se claimants so that they can make informed decisions about postponing final hearing sessions”).

<sup>96</sup> See MSU Letter (noting that a claimant “could be responsible for paying large percentages of her possible settlement in fees that she may not know exist”).

<sup>97</sup> FINRA Response Letter.

<sup>98</sup> See id.

<sup>99</sup> See id.

#### IV. Discussion and Commission Findings

The Commission has carefully considered the proposal, the comments received, and FINRA's response to the comments. Based on its review of the record, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities association.<sup>100</sup> In particular, the Commission finds that the proposed rule change is consistent with Section 15A(b)(5) of the Act,<sup>101</sup> which requires that FINRA's rules provide for the equitable allocation of reasonable dues, fees, and other charges among its members and other persons using any facility or system which FINRA operates or controls. The Commission also finds that the proposed rule change is consistent with Section 15A(b)(6) of the Act,<sup>102</sup> which requires, among other things, that FINRA's rules 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.

As discussed above, the proposed rule change would: (i) increase a fee for the late cancellation of a scheduled arbitration hearing, (ii) lengthen the notice period for a party to cancel a scheduled hearing without incurring the fee, and (iii) increase the amount of honoraria paid to arbitrators affected by the late cancellation of a scheduled hearing. As stated above, FINRA designed the proposal to, among other things: (i) encourage parties to an arbitration to provide more advance notice of cancellations and postponements of hearing sessions, and (ii) help recruit and arbitrators by better compensating them for their lost time and opportunities in the event of a late cancellation or postponement.

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<sup>100</sup> In approving the proposed rule change, the Commission has also considered the rule change's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>101</sup> 15 U.S.C. 78o-3(b)(5).

<sup>102</sup> 15 U.S.C. 78o-3(b)(6).

The Commission received twelve comment letters on the proposed rule change<sup>103</sup> and FINRA’s response to the comments.<sup>104</sup> The Commission notes that most of the commenters generally supported the proposed rule change, believing that “the increase in the late cancellation fee will assist the forum in its efforts to retain qualified arbitrators willing to devote the time and energy necessary to serve on arbitration panels.”<sup>105</sup> The Commission also notes that a number of commenters believe that the proposal would provide “a financial incentive for parties to begin negotiations and finalize settlements earlier in the process.”<sup>106</sup> The Commission also notes, however, that some commenters opposed the proposal<sup>107</sup> or recommended FINRA revise certain aspects of it.<sup>108</sup>

While the Commission appreciates the recommendations made by some commenters and recognizes that the proposal may result in an increased financial burden on some customer claimants, including those with small claims, the Commission believes that FINRA responded appropriately to their concerns. In particular, the Commission acknowledges the safeguards that FINRA has built into its proposal to mitigate the impact of the increase Late Cancellation Fee on customer claimants. For example, FINRA stated that parties could negotiate (as part of any settlement agreements) the allocation of fees, request that an arbitration panel waive the Late Cancellation Fee based on extraordinary circumstances, or FINRA could waive the Late

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<sup>103</sup> See supra note 4.

<sup>104</sup> See supra note 6.

<sup>105</sup> FINRA Response Letter. See also Friedman Letter (noting that “arbitrator retention is very challenging” and arguing that “anything that can be done, such as the proposed rule change, to discourage last-minute settlements should be supported”).

<sup>106</sup> FINRA Response Letter. See also supra note 4.

<sup>107</sup> See supra note 32.

<sup>108</sup> See supra note 31.

Cancellation Fee.<sup>109</sup> In addition, FINRA has represented that it would take additional steps to help pro se claimants by providing additional notice of the proposed increased fee as well as instructions for when parties must cancel a hearing in order to avoid the Late Cancellation Fee.<sup>110</sup>

Moreover, the Commission agrees with the views of certain commenters that the proposed rule “strike[s] a balance between the parties and arbitrators that serve the forum.”<sup>111</sup> In addition, the Commission agrees with the many commenters who argue that the rule proposal would also more adequately compensate arbitrators for lost time and opportunities when hearings are cancelled without appropriate notice.<sup>112</sup> Accordingly, the Commission believes that the proposed rule change would further the purposes of the Act by providing for the equitable allocation of reasonable fees, in this case the Late Cancellation Fee, among FINRA members, customers, associated persons, or other non-members using FINRA’s arbitration forum.<sup>113</sup>

Furthermore, the Commission agrees with FINRA’s assessment that the proposal would “encourage parties to provide more advance notice of postponements and cancellations, or, in the

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<sup>109</sup> See FINRA Response Letter.

<sup>110</sup> See *id.* (noting that FINRA would publish a Regulatory Notice explaining how the rule would be applied, and would train arbitrators to advise parties at the IPHC that they would be subject to a Late Cancellation Fee if they requested a cancellation of a scheduled hearing within ten-business days of the hearing).

<sup>111</sup> See Bakhtiari Letter (stating that the proposed rules “provide a financial incentive for parties to discuss and consummate settlements ... while providing arbitrators with fair compensation when hearings are cancelled at the last minute”).

<sup>112</sup> See Harris Letter (arguing that “[t]he \$100 does not come close to compensating an arbitrator for the time or energy that he or she spent preparing”). See also Aidikoff Letter (stating that “waiting until the last minute does great disservice to the arbitrator pool in that arbitrators set aside the days that the hearing is scheduled and then are not compensated for last minute cancellations or postponements”).

<sup>113</sup> See 15 U.S.C. 78o-3(b)(5).

alternative, to compensate arbitrators more than they are currently paid for lost time and opportunities in the event of a late postponement or cancellation.”<sup>114</sup> In addition, the Commission believes that increase the amount of honoraria paid to arbitrators affected by a late cancellation of a scheduled hearing would help FINRA achieve its goal of retaining and recruiting arbitrators to serve in its dispute resolution forum. Accordingly, the Commission believes that the proposed rule change would further the purposes of the Act as it is reasonably designed to protect investors and the public interest.<sup>115</sup>

For the reasons stated above, the Commission finds that the proposed rule change is consistent with the Act and the rules and regulations thereunder.

V. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,<sup>116</sup> that the proposed rule change (SR-FINRA-2015-003), be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>117</sup>

Robert W. Errett  
Deputy Secretary

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<sup>114</sup> See Notice, 80 FR at 9774. See also FINRA Response Letter.

<sup>115</sup> See 15 U.S.C. 78o-3(b)(6).

<sup>116</sup> 15 U.S.C. 78s(b)(2).

<sup>117</sup> 17 CFR 200.30-3(a)(12).