SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-64225; File No. SR-FINRA-2011-006)

April 7, 2011

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Order Granting Approval of a Proposed Rule Change Relating to Motions in Arbitration

## I. Introduction

On February 4, 2011, the Financial Industry Regulatory Authority, Inc. ("FINRA") filed with the Securities and Exchange Commission ("SEC" or "Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] and Rule 19b-4 thereunder,[2] a proposed rule change to amend FINRA Rules 12206, 12503, and 12504 of the Code of Arbitration Procedure for Customer Disputes, and Rules 13206, 13503, and 13504 of the Code of Arbitration Procedure for Industry Disputes (collectively, "Codes"), to provide moving parties with a five-day period to reply to responses to motions. The proposed rule change was published for comment in the Federal Register on February 22, 2011.[3] The Commission received three comment letters on the proposed rule change.[4] FINRA responded to these comments in a letter

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1 15 U.S.C. 78s(b)(1).

2 17 CFR 240.19b-4.

3 See Exchange Act Release No. 63910 (February 15, 2011), 76 FR 9840 (February 22, 2010) ("Notice").

4 See letter from William A. Jacobson, Esq., Associate Clinical Professor and Director, Cornell Securities Law Clinic, and Negisa Balluku, Cornell Law School, dated March 15, 2011 ("Cornell Letter"); letter from Lisa A. Catalano, Esq., Director and Associate Professor of Clinical Legal Education, Christine Lazaro, Esq., Supervising Attorney, Clair S. Seu, Student Intern, and Stephen Chou, Student Intern, St. John's University School of Law Securities Arbitration Clinic, dated March 15, 2011 ("St. John's Letter"); and letter received by FINRA from David M. Foster, Esq. dated March 21, 2011, which addressed issues beyond the scope of the proposed rule change.

dated April 1, 2011.[5] This order approves the proposed rule change.

## II. Description of Proposal

The Codes specify time periods for a party to respond to a motion,[6] including a motion to dismiss.[7] They do not expressly provide time periods for the party that made the original motion (the "moving party") to reply to a response, which happens on occasion. FINRA's practice has been to forward the reply to the arbitrators, even when staff already have sent the motion and response to the arbitrators. Since the Codes do not prescribe a time period for replying to responses to motions, there have been instances where arbitrators reviewed the motion papers and even ruled on a motion before receiving a reply, causing confusion and wasting time.

FINRA proposed to amend Rules 12206 and 13206 (Time Limits), Rules 12503 and 13503 (Motions), and Rules 12504 and 13504 (Motions to Dismiss), to provide a moving party with a five-day period to reply to a response to a motion. The proposed amendments would codify FINRA's practice relating to replies to responses to motions and make it transparent. The proposal would provide parties with an opportunity to brief fully the issues in dispute, and ensure that arbitrators have all of the motion papers before issuing a final decision on the motion.

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5 See letter from Margo A. Hassan, Assistant Chief Counsel, FINRA, to Elizabeth M. Murphy, Secretary, Commission, dated April 1, 2011 ("FINRA Response").

6 Rules 12503(b) and 13503(b) (Responding to Motions) provide, generally, that parties have 10 days from the receipt of a written motion to respond to the motion.

7 Rules 12206(b) and 13206(b) (Dismissal under Rule) provide that parties have 30 days to respond to motions. Rules 12504(a) and 13504(a) (Motions to Dismiss Prior to Conclusion of Case in Chief) provide that parties have 45 days to respond to motions.

FINRA considered whether codifying a reply period might encourage additional replies to responses to motions, or cause significant delays in the arbitration proceeding. FINRA believes that a five-day period for replies gives moving parties sufficient time to react to responses to motions without causing significant delays to proceedings. Currently, FINRA Rules 12512 and 13512 (Subpoenas) provide moving parties with a 10-day period in which to reply to opposing parties' objections to motions. FINRA has not experienced any increase in replies related to subpoenas because of these rules and the 10-day reply period has not caused significant delays.

Further, on June 21, 2010, FINRA revised its practice relating to responses to motions and published a Notice to Parties on its website stating that moving parties have five calendar days from receipt of a response to a motion to submit a reply to the response.[8] After the five-day period, FINRA forwards to the panel at the same time the motion, any response to the motion, and any reply. If FINRA receives a reply after the five-day period expires, staff forwards the reply to the panel upon its receipt. However, FINRA staff does not delay sending the motion, response to the motion, and reply to the panel after the five-day period expires, and the panel may issue a decision upon receipt of those documents.

Based on FINRA's experience with the subpoena rules and its revised practice relating to replies to responses, FINRA does not expect the proposed five-day period to result in undue delays.

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[8] See http://www.finra.org/ArbitrationMediation/Parties/ArbitrationProcess/NoticesToParties/P121652

## III. Discussion of Comment Letters

One commenter asked FINRA to consider amending the subpoena rules to provide for a five-day period to reply to responses to motions in order to maintain consistency in the Codes' timeframes.[9] FINRA stated that as it is not amending the subpoena rules in the proposed rule change, the Cornell Letter is outside the scope of the proposal. However, FINRA did express its intention to consider the suggestion made in the Cornell Letter for possible future rulemaking.[10]

One commenter raised a concern that the proposed five-day period may not provide pro se claimants with adequate time to prepare their replies.[11] FINRA responded that pro se claimants would have enough time to reply under the proposed rule change, noting that pro se claimants would already be aware of the issues raised in a response, having drafted the initial motion, and that if pro se claimants need additional time to reply to a response, the Director may extend the deadline for good cause pursuant to FINRA Rule 12207(c).[12] This commenter also suggested that pro se claimants receive additional guidance regarding their procedural rights, including those not expressly codified in a rule, such as the ability to file a sur-reply.[13] In response, FINRA indicated that sur-replies and additional guidance regarding sur-replies are outside the scope of the current rulemaking,[14] noting that it did not wish to encourage additional

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9 Cornell Letter.

10 FINRA Response.

11 St. John's Letter.

12 FINRA Response.

13 St. John's Letter.

14 Telephone conversation with Margo Hassan of FINRA on April 6, 2011.

filings by addressing sur-replies in the Codes at this time.[15] Finally, the commenter asked that FINRA amend the rules to include express language limiting the scope of motion replies to those issues and facts previously raised in the motion and response.[16] FINRA responded that it does not intend to amend the proposal in response to this comment, as it believes that arbitrators are in the best position to determine the scope of motions and replies thereto and would address any such concerns directly with the parties.[17]

## IV. Discussion and Commission Findings

The Commission has carefully reviewed the proposed rule change, the comments received, and FINRA's response to the comments, and 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.[18] In particular, the Commission finds that the proposed rule change is consistent with Section 15A(b)(6) of the Act,[19] which, among other things, requires that FINRA 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. More specifically, the Commission finds that the proposed rule change codifies existing practice and helps to promote a fair and efficient process for the resolution of claims.

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[15] FINRA Response.

[16] St. John's Letter.

[17] FINRA Response.

[18] In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

[19] 15 U.S.C. 78o-3(b)(6).

## V. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,[20] that the proposed rule change (SR-FINRA-2011-006), be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[21]

Cathy H. Ahn
Deputy Secretary

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20 15 U.S.C. 78s(b)(2).

21 17 CFR 200.30-3(a)(12).