

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-78279; File No. SR-FINRA-2016-022)

July 11, 2016

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of a Proposed Rule Change to Amend Rule 12403 (Cases with Three Arbitrators) of the Code of Arbitration Procedure for Customer Disputes Relating to the Panel Selection Process in Arbitration

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder,² notice is hereby given that on July 1, 2016, Financial Industry Regulatory Authority, Inc. (“FINRA”) filed with the Securities and Exchange Commission (“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 Rule 12403 of the Code of Arbitration Procedure for Customer Disputes (“Code”) concerning customer cases with three arbitrators, to increase the number of public arbitrators on the list that FINRA sends parties during the arbitration panel selection process from 10 arbitrators to 15 arbitrators. FINRA would also increase the number of strikes that parties may make to the public list from four to six strikes to keep the proportion of strikes the same under the amended rule as it is under the current rule.

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.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

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

Background

FINRA allows parties to participate in selecting the arbitrators who serve on their cases. Parties select their arbitration panel from computer generated lists of arbitrators that FINRA sends them. Under FINRA Rule 12403(a), in customer cases with three arbitrators,³ FINRA sends the parties three lists: a list of 10 chair-qualified public arbitrators, a list of 10 public arbitrators, and a list of 10 non-public arbitrators.⁴ The parties select their panel through a process of striking and ranking the arbitrators on the lists.⁵ Under Rule 12403(c)(2), each party is allowed to strike up to four arbitrators on the chair-qualified public list and four arbitrators on

³ See FINRA Rule 12401 which provides that if the amount of a claim is more than \$100,000, exclusive of interest and expenses, or is unspecified, or if the claim does not request money damages, the panel will consist of three arbitrators, unless the parties agree in writing to one arbitrator.

⁴ Public arbitrators do not have an affiliation with the financial industry. The non-public arbitrator roster includes individuals who: (1) are employed in the financial industry; (2) provide services to industry entities and their employees; or (3) devote a significant part of their business to representing or providing services to parties in disputes concerning investments or employment relationships.

⁵ See FINRA Rule 12403(c) (Striking and Ranking Arbitrators).

the public list. At least six names must remain on each list. However, Rule 12403(c)(1) provides for unlimited strikes on the non-public list so that any party may select a panel of all public arbitrators in a customer case.

When parties collectively strike all of the non-public arbitrators from the list, FINRA fills all three panel seats from the two 10-person lists of public arbitrators. Specifically, the Code provides that when parties collectively strike all of the arbitrators appearing on the non-public list, FINRA returns to the public list to select the next highest ranked available arbitrator to fill the seat. If no public arbitrators remain available to fill the vacancy, FINRA returns to the chair-qualified public list to select the next highest ranked public chair. In doing so, there is a likelihood that FINRA will appoint an arbitrator who the parties accepted, but ranked lower on the public or chair-qualified public lists.

FINRA Dispute Resolution Task Force

In 2014, FINRA formed the FINRA Dispute Resolution Task Force (“Task Force”) to suggest strategies to enhance the transparency, impartiality, and efficiency of FINRA’s securities dispute resolution forum for all participants. The Task Force discussed panel selection in customer cases. During its discussions, the Task Force reviewed statistics on how often parties were striking all of the non-public arbitrators on the list. The data indicated that between September 30, 2013 (the effective date of the rule change providing for all public panels) and January 16, 2015, claimants struck all non-public arbitrators in 69 percent of cases. Given the data on strikes, the Task Force concluded that in many cases, the parties are selecting the three public arbitrators from the 20 candidates appearing on the public lists. The Task Force recommended that in instances where parties collectively strike all the non-public arbitrators, FINRA should provide a new list of 10 public arbitrators to fill the third public arbitrator seat.

Proposed Rule Change

FINRA agrees with the Task Force that FINRA should provide parties with greater choice of public arbitrators in cases with all public panels. However, if FINRA waits until the parties collectively strike all the non-public arbitrators from the list before it provides the parties with additional names of public arbitrators, the panel selection process is likely to take at least one additional month to complete. Also, FINRA is concerned about the additional time and expense the parties would incur in vetting an additional list of 10 public arbitrators.

To address the Task Force's recommendation without delaying the panel selection process, or unduly burdening the parties, FINRA is proposing to amend Rule 12403(a)(1) to increase the number of arbitrators on the public arbitrator list FINRA sends the parties from 10 to 15. In doing so, FINRA would provide greater choice of public arbitrators during the panel selection process, and minimize the burden of vetting additional public arbitrators later in the process.

FINRA is also proposing to amend Rule 12403(c)(2) to increase the number of strikes to the public arbitrator list from four to six, so that the proportion of strikes is the same under the amended rule as it is under the current rule. Task Force members felt strongly that parties wanted additional public arbitrators to choose from because they did not want FINRA to appoint lower ranked arbitrators to the panel. We are proposing to increase the number of strikes the parties can make to the newly increased public list to improve the likelihood that FINRA will appoint the parties' preferred arbitrators to the panel.

2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,⁶ 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. FINRA believes the proposed rule change would protect investors and the public interest by providing greater choice during the panel selection process for the parties in all customer cases with three arbitrators.

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. Current rules permit parties to an arbitration to strike a specified number of arbitrators from each list of arbitrators that FINRA sends them and require them to rank order the remaining arbitrators. The propensity to strike all non-public arbitrators combined with the current rules for selecting the panel has led to concerns that panels may include a party's least preferred arbitrator, thereby diminishing a party's overall satisfaction with the arbitration process at the forum.

To remedy this concern, FINRA proposes to expand the number of arbitrators on the public arbitrator list. The longer list will increase the parties' choice of arbitrators during the panel selection process, and will improve the likelihood that FINRA will appoint the parties' preferred arbitrators to the panel.

Forum users are likely to incur costs in vetting the five additional public arbitrators on the list FINRA would send them. However, forum practitioners have indicated that they would willingly incur the additional expense in order to have greater choice in selecting arbitrators.

⁶ 15 U.S.C. 78o-3(b)(6).

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. Please include File Number SR-FINRA-2016-022 on the subject line.

Paper Comments:

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

All submissions should refer to File Number SR-FINRA-2016-022. 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 20549-1090, 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; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-FINRA-2016-022 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.⁷

Robert W. Errett
Deputy Secretary

⁷ 17 CFR 200.30-3(a)(12).