

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 Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal offices of the Exchange. 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-Phlx-2014-59, and should be submitted on or before October 24, 2014.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>22</sup>

**Kevin M. O'Neill,**  
*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-73245; File No. SR-FINRA-2014-026]

### 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 Arbitrator Honoraria and Increase Certain Arbitration Fees and Surcharges

September 29, 2014.

#### I. Introduction

On June 13, 2014, 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")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to amend FINRA's Code of Arbitration Procedure for Customer Disputes ("Customer Code") and the Code of Arbitration Procedure for Industry Disputes ("Industry Code")

(together, "Codes") to increase certain arbitration filing fees, member surcharges and process fees, and hearing session fees for the primary purpose of increasing arbitrator honoraria. The proposed rule change was published for comment in the **Federal Register** on July 2, 2014.<sup>3</sup> The Commission received eight comment letters on the proposal.<sup>4</sup> On August 5, 2014, FINRA granted the Commission an extension of time, until September 30, 2014, to act on the proposal.<sup>5</sup> FINRA responded to the comment letters on September 18, 2014.<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 certain arbitration filing fees, member surcharges and process fees, and hearing session fees for the primary purpose of increasing arbitrator honoraria.<sup>7</sup> In support of the proposal, FINRA stated that it has "received numerous complaints in recent years from its arbitrators regarding the honoraria paid to them for their service."<sup>8</sup> FINRA further noted that

<sup>3</sup> See Securities Exchange Act Release No. 72479 (Jun. 26, 2014), 79 FR 37786 (Jul. 2, 2014) ("Notice").

<sup>4</sup> See Letters from Steven B. Caruso, Esq., Maddox Hargett & Caruso, P.C., dated July 1, 2014 ("Caruso Letter"); Ryan K. Bakhtiari, Aidikoff, Uhl & Bakhtiari, dated July 2, 2014 ("Bakhtiari Letter"); Philip M. Aidikoff, Esq., Aidikoff, Uhl & Bakhtiari, dated July 2, 2014 ("Aidikoff Letter"); Jason Doss, President, Public Investors Arbitration Bar Association ("PIBA"), dated July 22, 2014 ("PIABA Letter"); Ellen Liang, Student Intern, Elissa Germaine, Supervising Attorney, and Jill Gross, Director, Pace Investor Rights Clinic ("PIRC"), Pace University School of Law, dated July 23, 2014 ("PIRC Letter"); David T. Bellaire, Esq., Executive Vice President and General Counsel, Financial Services Institute ("FSI"), dated July 23, 2014 ("FSI Letter"); Andrea Seidt, Ohio Securities Commissioner and President, North American Securities Administrators Association ("NASAA"), dated July 23, 2014 ("NASAA Letter"); and Michael J. Quarequio, Esq., Law Office of Michael J. Quarequio, P.A., dated July 23, 2014 ("Quarequio 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 August 5, 2014.

<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 September 18, 2014 ("FINRA Response Letter").

<sup>7</sup> See Notice, 79 FR at 37786. See also *id.* at 37787 n. 3 (noting FINRA's last increase to arbitrator honoraria and citing Securities Exchange Act Rel. No. 41056 (Feb. 16, 1999), 64 FR 10041 (Mar. 1, 1999) (File No. SR-NASD-97-79)).

<sup>8</sup> Notice, 79 FR at 37787 (stating that FINRA is also aware that arbitrators in private arbitration

surveys of organizations and individuals recruited to be FINRA arbitrators, as well as reports from arbitrators at focus groups, and other arbitrator comments indicate a "heightened sensitivity to the comparatively low honoraria paid by FINRA."<sup>9</sup>

Although FINRA acknowledged that there are non-monetary benefits to serving as an arbitrator, FINRA still believes that "the current honoraria level is a barrier to recruiting."<sup>10</sup> FINRA also reported that "arbitrators have regularly cited the honoraria level when leaving the roster, particularly when they are asked to take a new training course or complete a survey or disclosure statement."<sup>11</sup> Accordingly, FINRA believes that increasing honoraria is needed to "retain a roster of high-quality arbitrators and attract qualified individuals who possess the skills necessary to manage arbitration cases and consider thoroughly all arbitration issues presented, which are essential elements for FINRA to meet its regulatory objective of protecting the investing public."<sup>12</sup>

To fund these honoraria increases, FINRA is proposing to increase certain fees and surcharges assessed in the arbitration forum. Specifically, FINRA's proposal would amend Rules 12214 (Payment of Arbitrators), 12800 (Simplified Arbitration), 12900 (Fees Due When a Claim is Filed), 12901 (Member Surcharge), 12902 (Hearing Session Fees, and Other Costs and Expenses), and 12903 (Process Fees Paid by Members) of the Customer Code. The proposed rule change would also amend Rules 13214 (Payment of Arbitrators), 13800 (Simplified Arbitration), 13900 (Fees Due When a Claim is Filed), 13901 (Member Surcharge), 13902 (Hearing Session Fees, and Other Costs and Expenses), and 13903 (Process Fees Paid by Members) of the Industry Code.<sup>13</sup>

In general, the proposal would increase the member surcharges and

forums set their own rates and charge significantly more than FINRA pays).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* (noting the non-monetary benefits to serving as a FINRA arbitrator include "learning the skills necessary to be an effective commercial arbitrator, serving the public, or giving back to one's community by applying professional knowledge gained as an arbitrator").

<sup>11</sup> *Id.* (stating that "[t]hese extra requests are viewed as the 'last straw' that prevents good arbitrators from remaining on the roster at the current honoraria rate").

<sup>12</sup> *Id.*

<sup>13</sup> See *id.* at 37786-87. The text of the proposed rule change is available at the principal office of FINRA, on FINRA's Web site 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.

<sup>22</sup> 17 CFR 200.30-3(a)(12).

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

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

process fees for claims larger than \$250,000<sup>14</sup> as well as filing fees for investors, associated persons, or firms bringing claims of more than \$500,000 and hearing session fees for claims of more than \$500,000.<sup>15</sup> FINRA recognizes that increasing honoraria to market rates would impose a significant burden on forum users and, therefore, believes that “the proposed rule change is the best option to narrow the gap without unduly increasing costs to forum users.”<sup>16</sup>

The following sections outline each of FINRA’s proposed rule change amendments.

*B. Proposed Arbitrator Honoraria Increases*

Proposed Amendments to FINRA Rules 12214 and 13214 (Payment to Arbitrators) and FINRA Rules 12800 and 13800 (Simplified Arbitration)

Arbitrator honoraria are the payments that FINRA makes to its arbitrators for

the services they provide to FINRA’s dispute resolution forum.<sup>17</sup> Currently, under Rule 12214(a), an arbitrator receives \$200 for each hearing session in which the arbitrator participates.<sup>18</sup>

FINRA noted that “[c]hairpersons are often the arbitrators on FINRA’s rosters with the most experience who have completed chairperson training.”<sup>19</sup> In recognition of a chairperson’s increased experience and extra responsibilities during a hearing,<sup>20</sup> FINRA currently pays chairpersons an additional \$75 per hearing day.<sup>21</sup>

Arbitrators also receive honoraria when they decide contested motions requesting the issuance of a subpoena without a hearing (“contested subpoena requests”).<sup>22</sup> FINRA assesses a \$200 fee to the parties for each arbitrator who participates in deciding the contested subpoena request to cover the cost of the honoraria.<sup>23</sup> As FINRA explained, this amount of honoraria is paid on a per case basis, regardless of the number of

contested subpoena requests decided by an arbitrator or panel during the case.<sup>24</sup>

Finally, under Rule 12800, when a claimant<sup>25</sup> files a claim in which the amount in dispute, excluding interest and expenses (“claim amount”) is \$50,000 or less, one arbitrator decides the case based solely on the documents provided by the parties (*i.e.*, no hearings are held).<sup>26</sup> FINRA refers to these types of cases as “simplified arbitration.” The arbitrator who decides a simplified arbitration case currently receives \$125 per case.<sup>27</sup>

Under the proposed rule change, FINRA would amend Rules 12214 and 12800 of the Customer Code to increase the arbitrator honoraria.<sup>28</sup> Table 1 (below) illustrates the proposed increases and the percentage changes from the current rates.

PROPOSED ARBITRATOR HONORARIA INCREASES—TABLE 1

| Arbitrator honoraria                           | Current | Proposed | Percentage change |
|--|---------|----------|-------------------|
| Per arbitrator, per hearing session .....      | \$200   | \$300    | 50                |
| Chairpersons (per day of hearing) .....        | 75      | 125      | 67                |
| Contested Subpoena Requests .....              | 200     | 250      | 25                |
| Simplified Arbitration Cases (flat rate) ..... | 125     | 350      | 180               |

Specifically, FINRA is proposing to amend Rule 12214(a) to increase the payment to each arbitrator for each hearing session in which the arbitrator participates from \$200 to \$300 per hearing session. The rule would also be amended to increase the additional amount that chairpersons receive from \$75 to \$125 per day of hearings. Rule 12214(d) would be amended to increase the honoraria that arbitrators receive when they decide contested subpoena requests from \$200 to \$250. Finally,

Rule 12800(f) would be amended to increase the honoraria for simplified arbitration cases, which is a flat per case payment, from \$125 to \$350. FINRA stated that “[a]lthough no hearings are conducted in simplified arbitrations, these cases can be time-consuming, and, in FINRA’s view, the current honoraria level does not reflect fairly the arbitrator’s time and effort to render a decision.”<sup>29</sup>

To fund these increases in arbitrator honoraria, FINRA is proposing to

increase certain filing fees, member surcharges and process fees, and the hearing session fees assessed under the Codes as illustrated in the tables below.<sup>30</sup> FINRA stated that it “believes the proposed fee increases would generate sufficient revenue to offset the proposed increases in the arbitrator honoraria as described [above] without placing an undue burden on the public customer.”<sup>31</sup>

<sup>14</sup> See *id.* at 37787 n. 4 (noting, however, that the proposed rule change would also increase the member surcharge for the \$10,000.01 to \$25,000 tier).

<sup>15</sup> See *id.*

<sup>16</sup> *Id.* (explaining that, for example, “increasing honoraria to market rates could require a greater increase in arbitration filing fees, which would increase the costs of customers, associated persons, and firms”).

<sup>17</sup> See *id.*

<sup>18</sup> See *id.* n. 10 (noting that the term “hearing session” typically means “any meeting between the parties and arbitrator(s) of four hours or less, including a hearing or a prehearing conference”). See also *id.* at 37787 (noting that a typical day has two hearing sessions).

<sup>19</sup> Notice, 79 FR at 37787 (noting that “to qualify as a chairperson, an arbitrator must have served on at least three arbitrations through award in which hearings were held, or be a lawyer who served on

at least two arbitrations through award in which hearings were held”).

<sup>20</sup> See *id.* n. 12 (FINRA notes that, for example, during a typical arbitration, the chairperson decides discovery motions and conducts the initial prehearing conference(s)) (citing Rules 12500(c), 12503(d)(3), 13500(c), and 13503(d)(3)).

<sup>21</sup> See *id.* at 37787–88. See also *id.* at 37788 (explaining that a “hearing” means the hearing on the merits and that the chairperson receives the additional honoraria for each day he or she serves as chair at a hearing, regardless of the number of hearing sessions per day).

<sup>22</sup> See Notice, 79 FR at 37788 (citing Rules 12214(d) and 13214(d)).

<sup>23</sup> See *id.*

<sup>24</sup> See *id.* (explaining that “[i]f an arbitrator or the panel decides a contested subpoena request, the arbitrator or panel allocates the cost of the honoraria to the parties in the award”) (citing Rules 12214(d)(3) and 13214(d)(3)).

<sup>25</sup> See *id.* (explaining that FINRA Rules 12100(e) and 13100(e) define the term “claimant” as a party that files the statement of claim that initiates an arbitration).

<sup>26</sup> FINRA noted that it recently raised the claim amount limit for simplified arbitration from \$25,000 to \$50,000. See *id.* at 37794 n. 57 (citing Securities Exchange Act Rel. No. 66913 (May 3, 2012), 77 FR 27262 (May 9, 2012) (File No. SR-FINRA-2012-012)). FINRA also stated that “[t]ypically, as the claim amount increases, arbitrators encounter issues that are more complicated to resolve, and, thus, require more of their time.” *Id.* at 37794.

<sup>27</sup> See Notice, 79 FR at 37788.

<sup>28</sup> See *id.* at 37794.

<sup>29</sup> *Id.*

<sup>30</sup> See, e.g., *id.* at 37790 (noting that although FINRA refers to rules in the Customer Code, the changes and discussion below also apply to the same rules of the Industry Code).

<sup>31</sup> *Id.*

*C. Proposed Increases to Certain Fees and Surcharges*

1. Proposed Amendments to FINRA Rules 12900 and 13900 (Fees Due When A Claim is Filed)

Currently, Rules 12900(a) and 13900(a) require a customer, associated person, other non-member, or member who files a claim, counterclaim, cross claim, or third party claim to pay a

filing fee to initiate an arbitration. The filing fee consists of two parts: (1) A non-refundable fee, which FINRA keeps when a claim is filed, and (2) a deposit, which FINRA may return in whole or in part to the party that filed the claim in certain circumstances.<sup>32</sup>

Under the proposed rule change, FINRA would amend Rules 12900 and 13900 to increase the filing fees for investors, associated persons, other non-

members, or members bringing claims of more than \$500,000.<sup>33</sup> Tables 2 and 3 (below) show the current filing fee, proposed filing fee, dollar and percentage changes, and the non-refundable and partial refund breakdown of each fee.<sup>34</sup>

(a) Filing Fees Paid by Customers, Associated Persons, or Other Non-Members

PROPOSED FILING FEES FOR CUSTOMERS, ASSOCIATED PERSONS OR OTHER NON-MEMBER CLAIMANTS—TABLE 2

| Amount of claim (exclusive of interest and expenses) | Current claim filing fee | Proposed claim filing fee | Change in filing fee | Percent change | Non-Refundable filing fee with proposed changes | Partial refund with proposed changes |
|--|--------------------------|---------------------------|----------------------|----------------|---|--------------------------------------|
| \$.01–\$1000   | \$50                     | \$50                      | \$0                  | 0              | \$25  | \$25                                 |
| 1,000.01–2,500                                       | 75                       | 75                        | 0                    | 0              | 25  | 50                                   |
| 2500.01–5,000  | 175                      | 175                       | 0                    | 0              | 50  | 125                                  |
| 5,000.01–10,000                                      | 325                      | 325                       | 0                    | 0              | 75  | 250                                  |
| 10,000.01–25,000                                     | 425                      | 425                       | 0                    | 0              | 125   | 300                                  |
| 25,000.01–50,000                                     | 600                      | 600                       | 0                    | 0              | 150   | 450                                  |
| 50,000.01–100,000                                    | 975                      | 975                       | 0                    | 0              | 225   | 750                                  |
| 100,000.01–500,000                                   | 1,425                    | 1,425                     | 0                    | 0              | 300   | 1,125                                |
| 500,000.01–1,000,000                                 | 1,575                    | 1,725                     | 150                  | 10             | [375] 425                                       | [1,200] 1,300                        |
| 1,000,000.01–5,000,000                               | 1,800                    | 2,000                     | 200                  | 11             | 600   | [1,200] 1,400                        |
| Over \$5,000,000                                     | 1,800                    | 2,250                     | 450                  | 25             | [600] 750                                       | [1,200] 1,500                        |
| Non-Monetary/Not Specified                           | 1,250                    | 1,575                     | 325                  | 26             | [250] 375                                       | [1,000] 1,200                        |

As reflected in Table 2, under the proposed rule change, FINRA would increase the filing fees for claim amounts beginning at the \$500,000.01 to \$1,000,000 tier, so that the fee increases impact only those claimants with larger claims.<sup>35</sup>

The proposed rule change would also create two new tiers, at the upper level, to spread the cost increases among larger claims. The first new tier of \$1,000,000.01 to \$5,000,000 would have

a filing fee of \$2,000. The second new tier would begin at over \$5,000,000, with a filing fee of \$2,250.<sup>36</sup>

In addition, the proposed rule change would increase the unspecified filing fee by \$325. FINRA believes the unspecified claim fees should fall in the middle of the claim amount tiers for each fee type, where a majority of the specified claims are clustered.<sup>37</sup>

As stated above, FINRA believes that these increases would help fund the

increases in arbitrator honoraria. Furthermore, FINRA believes potential impact of the proposed increased filing fee would be mitigated by, among other things, (1) FINRA allocating most of the increases to the refundable portion of the filing fee;<sup>38</sup> and (2) the ability of arbitrators to order a respondent to reimburse all or part of any filing fee paid in the award.<sup>39</sup>

(b) Filing Fees Paid by Members

FILING FEES FOR MEMBER CLAIMANT—TABLE 3

| Amount of claim (exclusive of interest and expenses) | Current claim filing fee | Proposed claim filing fee | Change in filing fee | Percent change | Non-refundable filing fee | Partial refund with proposed changes |
|--|--------------------------|---------------------------|----------------------|----------------|---------------------------|--------------------------------------|
| \$.01–\$1000   | \$225                    | \$225                     | \$0                  | 0              | \$200                     | \$25                                 |
| 1,000.01–2,500                                       | 350                      | 350                       | 0                    | 0              | 300                       | 50                                   |
| 2500.01–5,000  | 525                      | 525                       | 0                    | 0              | 400                       | 125                                  |
| 5,000.01–10,000                                      | 750                      | 750                       | 0                    | 0              | 500                       | 250                                  |
| 10,000.01–25,000                                     | 1,050                    | 1,050                     | 0                    | 0              | 750                       | 300                                  |
| 25,000.01–50,000                                     | 1,450                    | 1,450                     | 0                    | 0              | 1,000                     | 450                                  |
| 50,000.01–100,000                                    | 1,750                    | 1,750                     | 0                    | 0              | 1,000                     | 750                                  |
| 100,000.01–500,000                                   | 2,125                    | 2,125                     | 0                    | 0              | 1,000                     | 1,125                                |
| 500,000.01–1,000,000                                 | 2,450                    | 2,550                     | 100                  | 4              | 1,250                     | [1,200] 1,300                        |
| 1,000,000.01–5,000,000                               | 3,200                    | 3,400                     | 200                  | 6              | 2,000                     | [1,200] 1,400                        |
| Over \$5,000,000                                     | 3,700                    | 4,000                     | 300                  | 8              | 2,500                     | [1,200] 1,500                        |
| Non-Monetary/Not Specified                           | 1,500                    | 1,700                     | 200                  | 13             | 500                       | [1,000] 1,200                        |

<sup>32</sup> See *id.* at 37788 (providing examples of when fees can be refunded and citing the FINRA rules governing the return of those, including Rules 12902(b)–(d) and 13902(b)–(d)).

<sup>33</sup> See *id.* at 37791.

<sup>34</sup> See *id.* at 37791–92 (discussing “Filing Fee Increases”).

<sup>35</sup> See *id.*

<sup>36</sup> See *id.* at 37792.

<sup>37</sup> See *id.*

<sup>38</sup> See *id.* See also *id.* n. 51.

<sup>39</sup> See Notice, 79 FR at 37792 (citing Rules 12900(d) and 13900(d)).

As reflected in Table 3, the proposed rule change would also increase the filing fee for members at the highest claim amount tiers, as well as at the unspecified claim tier. For each of the above increases, FINRA stated that it is proposing to add the increased amount to the refundable portion of the filing fee, explaining that “this part of the filing fee, which is linked closely to FINRA’s costs to administer arbitration cases, particularly hearing sessions, could be avoided if the parties agree to settle.”<sup>40</sup>

2. Proposed Amendments to FINRA Rules 12901 and 13901 (Member Surcharge)

Currently, FINRA Rules 12901(a) and 13901(a) provide that a surcharge will

be assessed against each member that: (1) Files a claim, counterclaim, cross claim, or third party claim under the Codes; (2) is named as a respondent in a claim, counterclaim, cross claim, or third party claim filed and served under the Codes; or (3) employed, at the time the dispute arose, an associated person who is named as a respondent in a claim, counterclaim, cross claim, or third party claim filed and served under the Codes. FINRA explained that member surcharges are intended to allocate the costs of administering the arbitration case to the brokerage firms that are involved in those cases. Thus, each member is assessed a member surcharge, based on the aggregate claim amount, when it is brought into the case, whether through a claim,

counterclaim, cross claim or third party claim. FINRA noted that the member surcharge is the responsibility of the member party and cannot be allocated to any other party (“non-allocable”).<sup>41</sup>

The proposal would amend Rules 12901 and 13901 to increase the member surcharges primarily for claim amounts larger than \$250,000. The proposal would also make a technical change to the title of the tiers in the “Member Surcharge” charts from “Amount in Dispute” to “Amount of Claim,” so that the title describing the claim amounts in all of the fee charts in the Codes would be consistent.<sup>42</sup>

Table 4 (below) illustrates the current member surcharges, the proposed surcharge, and percentage increases.

MEMBER SURCHARGE SCHEDULE—TABLE 4

| Amount [in dispute] of claim (exclusive of interest and expenses) | Current surcharge | Proposed surcharge | Change | Percentage change |
|---|-------------------|--------------------|--------|-------------------|
| \$.01–\$2,500 .....   | \$150             | \$150              | \$0    | 0                 |
| 2,500.01–5,000 .....  | 200               | 150                | (50)   | (25)              |
| 5,000.01–10,000 .....   | 325               | 325                | 0      | 0                 |
| 10,000.01–25,000 .....  | 425               | 450                | 25     | 6                 |
| 25,000.01–30,000 .....  | 600               | 750                | 150    | 25                |
| 30,000.01–50,000 .....  | 875               | 750                | (125)  | (14)              |
| 50,000.01–100,000 .....   | 1,100             | 1,100              | 0      | 0                 |
| 100,000.01–250,000 .....  | 1,700             | 1,700              | 0      | 0                 |
| 250,000.01–500,000 .....  | 1,700             | 1,900              | 200    | 12                |
| 500,000.01–1,000,000 .....  | 2,250             | 2,475              | 225    | 10                |
| 1,000,000.01–5,000,000 .....                                      | 2,800             | 3,025              | 225    | 8                 |
| 5,000,000.01–10,000,000 .....                                     | 3,350             | 3,600              | 250    | 8                 |
| Over \$10,000,000 .....   | 3,750             | 4,025              | 275    | 7                 |
| Non-Monetary/Not Specified .....                                  | 1,500             | 1,900              | 400    | 27                |

As reflected in Table 4, the proposal would reduce the member surcharge for some smaller claims<sup>43</sup> and increase the member surcharge for larger claims.<sup>44</sup> The proposal would also increase the member surcharge assessed for unspecified claims by \$400.<sup>45</sup> FINRA believes that this change is consistent with comparable increases in the unspecified filing fees for customer and industry claimants. FINRA also noted that member surcharges would remain non-allocable under the proposal, and, thus, would not result in any additional costs to customers.<sup>46</sup>

The proposal would also combine the current \$25,000.01-to-\$30,000 and \$30,000.01-to-\$50,000 tiers. FINRA stated that this change “was intended to make the proposed tiers in the surcharge schedule more consistent with other fee

schedules in the Codes.”<sup>47</sup> FINRA also believes that this merger “is a more practical approach for case administration purposes, and would make the surcharge schedule easier to understand for parties.”<sup>48</sup> In addition, the proposal would divide the current \$100,000.01-to-\$500,000 tier with its surcharge of \$1,700 into two new tiers. The surcharge for the new \$100,000.01-to-\$250,000 tier would remain \$1,700 while the surcharge for the new \$250,000.01-to-\$500,000 tier would increase by \$200 or about 12 percent. FINRA proposed this change because it believes “a large percentage of claims fall within the current tier and FINRA decided that there should be a greater distinction between the claims.”<sup>49</sup>

3. Proposed Amendments to FINRA Rules 12902 and 13902 (Hearing Session Fees, and Other Costs and Expenses)

Currently, FINRA Rules 12902(a) and 13902(a) assess a hearing session fee for each hearing session held. A hearing session is a meeting of the parties and arbitrators, including any hearing, pre-hearing, and injunctive hearing.<sup>50</sup> According to FINRA, the hearing session fee is “intended to offset FINRA’s cost to conduct hearing sessions.”<sup>51</sup>

As FINRA explained, the hearing session fee is allocable to the parties and based on the highest claim amount within the case. In addition, Rules 12902(a)(1) and 13902(a)(1) provide arbitrators the authority to apportion the fees in any manner, including assessing

<sup>40</sup> *Id.* (citing Rules 12701(a) and 13701(a)).

<sup>41</sup> *See id.* at 37788 (citing Rules 12901(a)(4) and 13901(d)). *See also* Rules 12701(b) and 13701(b).

<sup>42</sup> *See* Notice, 79 FR at 37788.

<sup>43</sup> *See id.* at 37790.

<sup>44</sup> *See id.* n. 49 (noting that the surcharge for the \$10,000.01-to-\$25,000 tier would also increase by \$25 or 6 percent).

<sup>45</sup> *See id.* at 37790–91.

<sup>46</sup> *See id.* at 37791.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *See id.* at 37788.

<sup>51</sup> *Id.* at 37789 (noting that “[t]he cost of conducting a hearing session includes arbitrator compensation and travel expenses, hearing conference rooms, and staff work and expenses”).

the entire amount against one party.<sup>52</sup> FINRA also stated that it applies the refundable portion of the filing fee against any hearing session fees assessed against the party that paid the filing fee.<sup>53</sup>

FINRA is proposing to amend Rule 12902 to increase the hearing session fees for claims of more than \$500,000.<sup>54</sup> The proposal would also make two technical changes to the “Hearing Session Fees” charts: (1) Add “(exclusive of interest and expenses)” to the “Amount of Claim” title to make it consistent with those in the Codes’

other fee schedules and to clarify that hearing session fees are based on the claim amount and do not include interest or expenses;<sup>55</sup> and (2) change the title of the tier currently identified as “Unspecified” to “Non-Monetary/Not Specified” so that the title is consistent with those in the other fee schedules in the Codes.<sup>56</sup>

Tables 5 and 6 (below) illustrate the current fee for hearing sessions with either one or three arbitrators, the proposed fee, dollar and percentage changes, and the arbitrator payment at each tier.

(a) Hearings With One Arbitrator

As reflected in Table 5 (below), under the proposed rule change, the fees for a hearing session with one arbitrator would not change.<sup>57</sup> FINRA noted, however, that the proposal would create two new tiers, beginning at \$500,000.01, so that the tiers for the fees for a hearing session with one arbitrator match the claim amount tiers for filing fees. FINRA would retain the \$450 hearing session fee for each new tier.<sup>58</sup>

TABLE 5—HEARING SESSION FEES FOR SESSION WITH ONE ARBITRATOR

| Amount of claim (exclusive of interest and expenses)          | Current fee for session/ decision w/ one arbitrator | Proposed fee for session/ decision w/ one arbitrator | Change | Percent change |
|---|---|--|--------|----------------|
| \$.01–\$2,500 .....   | \$50  | \$50   | \$0    | 0              |
| 2,500.01–5,000 .....  | 125   | 125  | 0      | 0              |
| 5,000.01–10,000 .....   | 250   | 250  | 0      | 0              |
| 10,000.01–25,000 .....  | 450   | 450  | 0      | 0              |
| 25,000.01–50,000 .....  | 450   | 450  | 0      | 0              |
| 50,000.01–100,000 .....                                       | 450   | 450  | 0      | 0              |
| 100,000.01–500,000 .....                                      | 450   | 450  | 0      | 0              |
| 500,000.01–1,000,000 .....                                    | 450   | 450  | 0      | 0              |
| 1,000,000.01–5,000,000 .....                                  | 450   | 450  | 0      | 0              |
| Over \$5,000,000 .....  | 450   | 450  | 0      | 0              |
| [Unspecified Damages] <i>Non-Monetary/Not Specified</i> ..... | 450   | 450  | 0      | 0              |

FINRA stated that “[i]n assessing the hearing session fees for cases heard by one arbitrator, FINRA determined to retain the current fee structure . . . even though the current fees would not cover the proposed increased honoraria payments for claims in the \$.01–\$10,000

tiers.”<sup>59</sup> FINRA explained that it “would retain the current fees for these lower claim amounts, so that the forum remains accessible and affordable to claimants with smaller claims.”<sup>60</sup>

(b) Hearings With Three Arbitrators

As reflected in Table 6 (below), the proposal would create new tiers for claims amounts starting at \$500,000.01 for hearing sessions with three arbitrators and would increase the fees only for those tiers.<sup>61</sup>

TABLE 6—HEARING SESSION FEES FOR SESSION WITH THREE ARBITRATORS

| Amount of claim (exclusive of interest and expenses)          | Current fee for session w/ three arbitrators | Proposed fee for session w/ three arbitrators | Change | Percent change |
|---|--|---|--------|----------------|
| Up–\$2,500 .....  | N/A  | N/A   | N/A    | N/A            |
| 2,500.01–5,000 .....  | N/A  | N/A   | N/A    | N/A            |
| 5,000.01–10,000 .....   | N/A  | N/A   | N/A    | N/A            |
| 10,000.01–25,000 .....  | N/A  | N/A   | N/A    | N/A            |
| 25,000.01–50,000 .....  | 600  | 600   | 0      | 0              |
| 50,000.01–100,000 .....                                       | 750  | 750   | 0      | 0              |
| 100,000.01–500,000 .....                                      | 1,125  | 1,125   | 0      | 0              |
| 500,000.01–1,000,000 .....                                    | 1,200  | 1,300   | 100    | 8              |
| 1,000,000.01–5,000,000 .....                                  | 1,200  | 1,400   | 200    | 17             |
| Over \$5,000,000 .....  | 1,200  | 1,500   | 300    | 25             |
| [Unspecified Damages] <i>Non-Monetary/Not Specified</i> ..... | 1,000  | 1,125   | 125    | 13             |

<sup>52</sup> See *id.* (noting that “[a]rbitrators may assess the hearing session fees in the award, or by arbitrator order if the parties held hearing sessions before agreeing to settle”). See also *id.* n. 34 (explaining that “[t]he parties may agree to a different allocation in the settlement agreement”).

<sup>53</sup> See Notice, 79 FR at 37789. See also *id.* at 37788 (explaining, for example, that “if a case goes to hearing, and the panel orders a respondent to pay

all hearing session fees, the refundable portion of the filing fee will be refunded to the claimants, less any fees, costs, and expenses that may have been assessed against this party under the Code”).

<sup>54</sup> See Notice, 79 FR at 37792.

<sup>55</sup> See *id.* at 37793 (noting that the exclusion of interest or other expenses “would codify current practice”).

<sup>56</sup> See *id.* at 37793–94.

<sup>57</sup> See *id.* at 37792.

<sup>58</sup> See *id.* at 37793.

<sup>59</sup> *Id.*

<sup>60</sup> See *id.*

<sup>61</sup> See *id.*

FINRA stated that it would retain the current fees for lower claim amounts despite the fact that “the hearing session fees do not cover the forum’s actual costs for smaller claims.”<sup>62</sup> FINRA stated that it intends this proposed amendment to keep the forum accessible and affordable for claimants with smaller claims.<sup>63</sup> FINRA further noted that the proposed increases on larger claim amounts “would provide the forum with enough revenue to cover its honoraria payments for these cases as well as offset the deficits created at the lower tier amounts.”<sup>64</sup>

#### 4. Proposed Amendments to FINRA Rules 12903 and 13903 (Process Fees Paid by Members)

Currently, FINRA Rules 12903(a) and 13903(a) require each member that is a

party to an arbitration in which the claim amount is more than \$25,000 to pay process fees, which are assessed at specific milestones in each case.<sup>65</sup> In particular, FINRA assesses each member a non-refundable prehearing process fee of \$750 at the time the parties are sent arbitrator lists and a non-refundable hearing process fee, based on the claim amount, when the parties are notified of the date and location of the hearing on the merits. Like the member surcharges, the process fee is non-allocable to other parties to the arbitration.<sup>66</sup>

As reflected in Table 7 (below), the proposal would combine the prehearing process fee and hearing process fee, into one fee, which would be due at the time the parties are sent the arbitrator lists.<sup>67</sup> FINRA recognizes that this change

would result in an increase to the member process fee in many cases.<sup>68</sup> However, FINRA believes this change is “necessary to ensure that the forum has the resources available at the initial stages of a case to cover the proposed honoraria increases.”<sup>69</sup> Further, FINRA states that this change would also “make the collection process more efficient for FINRA and the members, as it would reduce the number of invoices sent and collection activities performed by FINRA’s Finance Department.”<sup>70</sup> The proposed rule change would also amend Rule 12903 to increase the member process fees for claim amounts larger than \$250,000.<sup>71</sup>

Table 7 (below) shows the current process fees, the proposed combined fees, and the changes between the two.

MEMBER PROCESS FEE SCHEDULE—TABLE 7

| Amount of claim (exclusive of interest and expenses) | Pre-hearing process fee | Hearing process fee | Current combined process fees | Proposed fees | Change | Percentage change |
|--|-------------------------|---------------------|-------------------------------|---------------|--------|-------------------|
| \$.01–\$5,000 .....                                  | N/A                     | N/A                 | N/A                           | N/A           | N/A    | N/A               |
| 2,500.01–5,000 .....                                 | N/A                     | N/A                 | N/A                           | N/A           | N/A    | N/A               |
| 5,000.01–10,000 .....                                | N/A                     | N/A                 | N/A                           | N/A           | N/A    | N/A               |
| 10,000.01–25,000 .....                               | N/A                     | N/A                 | N/A                           | N/A           | N/A    | N/A               |
| 25,000.01–30,000 .....                               | 750                     | 1,000               | 1,750                         | N/A           | N/A    | N/A               |
| 30,000.01–50,000 .....                               | 750                     | 1,000               | 1,750                         | N/A           | N/A    | N/A               |
| 50,000.01–100,000 .....                              | 750                     | 1,700               | 2,450                         | 2,250         | (200)  | (8)               |
| 100,000.01–250,000 .....                             | 750                     | 2,750               | 3,500                         | 3,250         | (250)  | (7)               |
| 250,000.01–500,000 .....                             | 750                     | 2,750               | 3,500                         | 3,750         | 250    | 7                 |
| 500,000.01–1,000,000 .....                           | 750                     | 4,000               | 4,750                         | 5,075         | 325    | 7                 |
| 1,000,000.01–5,000,000 .....                         | 750                     | 5,000               | 5,750                         | 6,175         | 425    | 7                 |
| 5,000,000.01–10,000,000 .....                        | 750                     | 5,500               | 6,250                         | 6,800         | 550    | 9                 |
| Over 10,000,000 .....                                | 750                     | 5,500               | 6,250                         | 7,000         | 750    | 12                |
| Non-Monetary/Not Specified .....                     | 750                     | 2,200               | 2,950                         | 3,750         | 800    | 27                |

The proposal would increase the fees for claim amounts beginning with the new \$250,000.01-to-\$500,000 tier. Similar to the member surcharge increase discussed above, FINRA is proposing to spread the process fee increases among larger claim amounts, while retaining or decreasing the fees associated with the lower claim amounts.<sup>72</sup> The proposal would also increase the process fees assessed for unspecified claims by \$800. FINRA believes that this change is consistent with comparable increases in the unspecified filing fees for customer and industry claimants.<sup>73</sup> FINRA also explained that the member process fee—like the member surcharge increase

discussed above—would remain non-allocable under the proposal, and, thus, would not result in any additional costs to customers.<sup>74</sup>

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

As noted above, the Commission received eight comment letters on the proposed rule change<sup>75</sup> and a response letter from FINRA.<sup>76</sup> As discussed in more detail below, all of the eight commenters expressed support, in whole or in part, for FINRA’s proposal.<sup>77</sup> Three of the eight commenters, however, also suggested further modifications.<sup>78</sup> In addition, two of the eight commenters also expressed

partial opposition to the proposal.<sup>79</sup> The sections below outline the suggestions or specific concerns raised by those five commenters as well as FINRA’s response.

#### A. FINRA Members Should Pay All Proposed Fee Increases

While a majority of the commenters supported the proposed increase in arbitrator honoraria, two commenters opposed the proposed increase in filing fees that customers would pay to help fund the honoraria increases.<sup>80</sup>

One of these commenters expressed concern “that requiring investors to pay the increased honorarium by raising the filing fees may deny them access to the

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> See *id.* at 37788.

<sup>66</sup> See *id.* (citing Rules 12903(c) and 13903(c)). See also Rules 12701(b) and 13701(b).

<sup>67</sup> See Notice, 79 FR at 37791.

<sup>68</sup> See *id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> See *id.* at 37791.

<sup>72</sup> See *id.*

<sup>73</sup> See *id.*

<sup>74</sup> See *id.*

<sup>75</sup> See *supra* note 4.

<sup>76</sup> See *supra* note 6.

<sup>77</sup> See Caruso Letter; Bakhtiari Letter; Aidikoff Letter; PIABA Letter; PIRC Letter; FSI Letter; NASAA Letter; and Quarequio Letter.

<sup>78</sup> See PIRC Letter; FSI Letter; and Quarequio Letter.

<sup>79</sup> See PIABA Letter and NASAA Letter.

<sup>80</sup> See PIABA Letter at 1–2; NASAA Letter at 2.

forum.”<sup>81</sup> Rather, this commenter stated that “FINRA members should be responsible for paying 100% of the proposed increased filing fees claims” given that “investors are forced into the FINRA arbitration forum as a result of mandatory arbitration.”<sup>82</sup>

Similarly, a second commenter opposed “FINRA’s effort to pass along increased honoraria costs to investors that are forced into FINRA’s dispute resolution forum as the result of industry mandatory pre-dispute arbitration agreements.”<sup>83</sup> This commenter contended that investors with “more complicated to resolve” and “time-consuming” claims might prefer pursuing their claims in court rather than paying more for FINRA arbitrators to handle the disputes.”<sup>84</sup>

In addition, both of these commenters argued that because FINRA member firms use pre-dispute arbitration agreements (“PDAAs”) to require their customers to arbitrate claims, investors do not have a choice of forum. Consequently, these commenters asserted that such investors should not be required to pay the proposed increase in filing fees.<sup>85</sup>

In response, FINRA noted that “as claimants and respondents utilize the arbitration facilities to resolve disputes, it would be inequitable for industry members to pay 100 percent of the filing fee increase.”<sup>86</sup> Furthermore, FINRA disagreed with the one commenter’s assertion that an increase in filing fees for investors may serve to deny access to the forum for investors.<sup>87</sup> Rather, FINRA stated that the proposal would help minimize the impact on claimants of the increased fees because “the filing fee increases begin for claims over \$500,000 and a majority of the increases are added to the refundable portion of the fee.”<sup>88</sup>

In response to the comment that investors may not be able to afford the proposed filing fees after having

suffered “catastrophic losses,”<sup>89</sup> FINRA noted that “an inability to pay the filing fees would not foreclose an investor’s ability to seek redress in the forum” as FINRA may waive the filing fees “[i]f an investor demonstrates financial hardship.”<sup>90</sup>

In its response, FINRA also noted that neither the use of PDAs by FINRA members nor whether certain claims should be litigated in court or arbitrated is the subject of the proposal. Consequently, FINRA stated that both issues are “outside the scope of the filing.”<sup>91</sup> Nevertheless, FINRA noted that, while the proposed filing fees may not be comparable to those in state courts, “investors experience substantial savings in arbitration compared to litigation.”<sup>92</sup> Accordingly, FINRA stated that “the benefits and cost savings of arbitration make filing an arbitration claim a less costly option for investors.”<sup>93</sup>

Therefore, for these reasons, FINRA declined to modify the proposed rule change to assign all filing fee increases to FINRA members.<sup>94</sup>

#### B. Assessment of Forum Fees Against Respondents

One commenter that opposed the proposal, stating that FINRA members should be responsible for paying all of the proposed increased filing fees, also contended that “[t]his point is emphasized even more when you consider that arbitration panels rarely assess forum fees against respondents even when they find the respondents liable for the claimants’ losses.”<sup>95</sup>

FINRA refuted this commenter’s assertion, calling it “inaccurate and misleading.”<sup>96</sup> FINRA noted that “arbitrators make allocation decisions on a case-by-case basis depending on what happened during the hearings.”<sup>97</sup> FINRA also stated that it reviewed customer claimant cases closed by award from 2011 through 2013 and, “[i]n only four of these cases (less than one percent), the respondent was found

liable for claimants’ losses, but was not assessed any fees.”<sup>98</sup> FINRA further stated that three of those four cases were pursued by claimants in default proceedings,<sup>99</sup> and in the fourth case, only the claimant appeared at the hearing.<sup>100</sup> Furthermore, with respect to the fourth case, FINRA also stated that it “waived the claimant’s filing fees in that matter and the arbitrators awarded the claimant more than 160 percent of the compensatory damages claimed plus \$15,000 in sanctions from the respondent firm.”<sup>101</sup>

For these reasons, FINRA declined to modify its proposal in response to comments.

#### C. Request Additional Data

One commenter claimed that FINRA’s proposal does not provide sufficient information “to assess the reasonableness or anticipated effectiveness of the increases that FINRA proposes” because the statistical models and underlying data were not provided to the public.<sup>102</sup> This commenter requested that FINRA produce, as part of the public comment file, the statistical models FINRA used to “match anticipated revenue with expenses for purposes of setting increased rates.”<sup>103</sup>

In response to this comment, FINRA stated that the information provided in the proposal is “sufficient to elicit meaningful comment.”<sup>104</sup> Moreover, FINRA noted that its financial systems and the data generated by those systems “are used by only FINRA staff when conducting FINRA business and operations.”<sup>105</sup> Accordingly, FINRA claimed that “[b]ecause of the proprietary nature of these systems and their data, FINRA believes this information should remain non-public.”<sup>106</sup>

#### D. Enhance Recruitment To Expand the Arbitrator Roster

One commenter claimed that it cannot assess whether there is a need for increased arbitrator honoraria because FINRA’s proposal does not provide “basic information regarding the existing size or quality of FINRA’s

<sup>81</sup> PIABA Letter at 1–2.

<sup>82</sup> *Id.* at 2.

<sup>83</sup> NASAA Letter at 2 (NASAA generally supports and “does not question FINRA’s need to update arbitrator honoraria” and “appreciates FINRA’s efforts to mitigate the impact to smaller public users,” however, “NASAA respectfully disagrees with FINRA that it is incumbent upon [investors] to pay or contribute more to enhance FINRA’s dispute resolution program.”)

<sup>84</sup> *Id.* (claiming that state court filing fees in most jurisdictions are generally less than the filing fees contemplated in the proposal). *See also id.* (stating that “investors with catastrophic losses as might be found in half- to multi-million dollar claims are often the least able to afford large fees”).

<sup>85</sup> *See* PIABA Letter at 2; NASAA Letter at 2.

<sup>86</sup> Response Letter at 3.

<sup>87</sup> *See id.* (citing PIABA Letter at 1–2).

<sup>88</sup> *Id.* (citing Notice, 79 FR at 37791–92).

<sup>89</sup> *See supra* note 84.

<sup>90</sup> Response Letter at 3.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* (explaining that, for example, “claims in arbitration are typically resolved more quickly than claims in litigation” and “investors in arbitration avoid the expense of depositions and similar costs associated with discovery in litigation”).

<sup>93</sup> *Id.* at 4.

<sup>94</sup> *See id.*

<sup>95</sup> PIABA Letter at 2.

<sup>96</sup> Response Letter at 5.

<sup>97</sup> *Id.* (explaining that arbitrator training materials and the Award Information Sheet guide arbitrators on making allocation decisions and noting that some of the factors arbitrators might consider when making allocation decisions include “a party’s perceived ability to pay forum fees”).

<sup>98</sup> *Id.*

<sup>99</sup> *See id.* (noting that in these three cases, the arbitrators assessed forum fees of \$300, \$300, and \$1,425 respectively against the claimants).

<sup>100</sup> *See id.* (noting that in the fourth case, the arbitrators assessed the claimant a total of \$4,500 for two hearing sessions and four prehearing conference sessions).

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> NASAA Letter at 2.

<sup>104</sup> Response Letter at 5.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

existing arbitrator pool, including relevant recruiting and retention rates.”<sup>107</sup> This commenter also suggested that the Commission “consider expanding FINRA’s roster by revising arbitrator qualifications and by utilizing different recruiting methods of outreach.”<sup>108</sup> Finally, this commenter claimed that “FINRA may have greater flexibility in setting honoraria amounts by expanding its geographical presence.”<sup>109</sup>

In response, FINRA stated that it “relies on a diverse roster of over 6,300 arbitrators to maintain its fair, impartial and efficient system of dispute resolution” and that “[t]he exact number of arbitrators, broken down by public and non-public classifications, is updated monthly and published on [FINRA’s] Web site.”<sup>110</sup> FINRA also responded to the commenter’s concerns about the quality of FINRA’s arbitrators by describing its: (i) Minimum requirements for arbitrators; (ii) application and screening processes; (iii) background verification and re-verification processes; (iv) arbitrator training programs; (v) mandatory surveys to ensure classification as either a public or a non-public arbitrator; and (vi) evaluation processes by FINRA staff, the parties, and fellow arbitrators at the conclusion of each case.<sup>111</sup>

With respect to the commenter’s concerns about expanding FINRA’s geographical presence, FINRA explained that it “already focuses on areas of the country where there is a lower number of available arbitrators” and that “[i]n its effort to recruit arbitrators from a diverse group of professionals, FINRA continues to conduct outreach activities in underserved locations.”<sup>112</sup> FINRA further noted that it “tracks the success of its recruitment initiatives by asking in its application how applicants learned of the arbitrator opportunity” and that

“[i]t also asks [applicants] to provide names of individuals whom they recommend for the roster.”<sup>113</sup>

FINRA stated that “the increased honoraria would be helpful in its recruiting efforts, as staff has received feedback from prospective applicants who have declined to apply when they learn of the current pay structure.”<sup>114</sup> FINRA further explained that increased honoraria would also support its “retention objective, as current arbitrators express their concerns to FINRA staff regularly about the honoraria levels.”<sup>115</sup>

For these reasons, FINRA declined to modify its proposal.

#### *E. Apply Increased Honoraria Retroactively*

One commenter expressed concern that applying the proposed increased honoraria prospectively would create a two-tier pay structure: One for arbitrators assigned before the proposal’s effective date and another for those assigned after the effective date.<sup>116</sup> This commenter suggested making the honoraria increase partially retroactive to pending cases.

In response, FINRA explained that, although it understands the concern, it believes that if the suggestion was implemented it “would have a negative impact on the forum’s resources.”<sup>117</sup> FINRA noted that if it were to extend the honoraria increases to pending cases, the honoraria payments would not be properly funded, as the fees in those cases would be based on the current, lower fee structure.<sup>118</sup> FINRA stated that in order “[t]o simplify the technology programming and to ensure consistent application of the honoraria and fee changes, FINRA believes the increased honoraria should apply to cases filed on or after the effective date.”<sup>119</sup>

For these reasons, FINRA declined to modify the proposal to make the honoraria increase partially retroactive to pending cases.

#### *F. The Proposal Could Create Conflicts of Interest*

One commenter suggested that “FINRA should also consider the impact increased arbitrator compensation could

have on certain conflicts of interest.”<sup>120</sup> For example, “an arbitrator may be reluctant to grant a Motion to Dismiss because it would eliminate the potential compensation they would receive from serving on the panel.”<sup>121</sup> Therefore, this commenter suggested that FINRA consider paying a “set honorarium” which, the commenter believes, “would reduce or eliminate any reluctance on the part of the arbitrator to grant the motion that is motivated by a desire to be adequately compensated for their time.”<sup>122</sup>

In response, FINRA stated that it “does not believe that increasing the honoraria would prevent arbitrators from performing their duties and deciding disputes in a fair manner, as they must agree to do by executing the arbitrator oath.”<sup>123</sup> Furthermore, FINRA noted that, “if arbitrators deny a motion to dismiss, it would be because they believe that the grounds for dismissing a claim prior to the conclusion of a claimant’s case in chief have not been met.”<sup>124</sup>

FINRA also clarified that, although the commenter does not define “set honorarium,” FINRA interpreted it to mean “a fixed amount, regardless of the number of motions decided or hearings held during a case.”<sup>125</sup> FINRA believes that such a payment structure would present the following challenges to the forum: (1) It would negate the benefit of providing the parties with some control over the tasks and activities that arbitrators need to perform in a case;<sup>126</sup> (2) it “would be unfair to parties whose arbitration case requires a minimal number of hearing sessions as well as to those arbitrators who sit on cases with a large number of hearing sessions;”<sup>127</sup> and (3) “more cases would go to hearing, as there would be no incentive to settle, which would result in an increase in forum expenses.”<sup>128</sup>

For these reasons, FINRA declined to amend the proposal to pay a “set honorarium.”

<sup>107</sup> NASAA Letter at 2.

<sup>108</sup> *Id.* at 3.

<sup>109</sup> *Id.* (explaining that “[e]xtending its reach in this manner would reduce FINRA travel expense reimbursements for many participants”).

<sup>110</sup> Response Letter at 6 (citing FINRA, Arbitration & Mediation, Dispute Resolution Statistics, available at <http://www.finra.org/ArbitrationAndMediation/Arbitrators/Responsibilities/OathofArbitrator/index.htm>). See also *id.* (noting that FINRA’s roster “consists of arbitrators from various backgrounds, including educators, accountants, medical professionals and others, as well as lawyers and securities professionals”).

<sup>111</sup> See Response Letter at 6–7.

<sup>112</sup> *Id.* at 7 (citing, for example, “attending business and recruitment conferences, initiating direct marketing and ad campaigns, publishing articles in *The Neutral Corner*, and soliciting applicant referrals in a monthly email that is distributed to FINRA neutrals”).

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> See Quarequio Letter at 1 (stating that “[a]lthough this imbalance would be temporary until existing cases work their way through the system, it does not appear fair to have, at least for some time, a ‘two-tier’ pay structure which penalizes those who have been arbitrators longer”).

<sup>117</sup> Response Letter at 8.

<sup>118</sup> See *id.*

<sup>119</sup> *Id.*

<sup>120</sup> FSI Letter at 2.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> Response Letter at 8 (citing Canon 1 of the Code of Ethics for Arbitrators in Commercial Disputes which states that “an arbitrator should uphold the integrity and fairness of the arbitration process” and requires that “arbitrators conduct themselves in a way that is fair to all parties and should not be swayed by outside pressure, public clamor, and fear of criticism or self-interest”).

<sup>124</sup> *Id.* at 8–9.

<sup>125</sup> *Id.* at 9.

<sup>126</sup> See *id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*



### G. Calculate Hearing Session Fees at an Hourly Rate

One commenter suggested changing FINRA's current payment structure for arbitrators "from sessions of 'four hours or less' to an hourly rate."<sup>129</sup>

Specifically, this commenter claimed that, in its experience, "most hearing sessions last significantly less than four hours and the length of each session can vary considerably,"<sup>130</sup> and that arbitrators are compensated the same amount regardless of whether a hearing session lasts two hours or four hours.<sup>131</sup>

In response, FINRA explained that the structure of hearing session payments is not the subject of this rule filing and therefore outside the scope of the proposal.<sup>132</sup> Therefore, FINRA declined to respond to that comment at this time.<sup>133</sup>

### IV. Discussion and Commission Findings

The Commission has carefully considered the proposal, the comments received, and FINRA's responses 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>134</sup> In particular, the Commission finds that the proposed rule change is consistent with Section 15A(b)(5) of the Act,<sup>135</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>136</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 outlined above, the Commission received eight comment letters on the proposed rule change<sup>137</sup> and FINRA's

<sup>129</sup> PIRC Letter at 2 (suggesting that "[t]his more equitable compensation structure should help eliminate unnecessary expenses to FINRA—which are passed along to claimants and members").

<sup>130</sup> *Id.*

<sup>131</sup> *See id.*

<sup>132</sup> *See* Response Letter at 9.

<sup>133</sup> *See id.*

<sup>134</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>135</sup> 15 U.S.C. 78o-3(b)(5).

<sup>136</sup> 15 U.S.C. 78o-3(b)(6).

<sup>137</sup> *See supra* note 4.

response to the comments.<sup>138</sup> While the Commission appreciates the suggestions raised by some commenters, the Commission believes that FINRA responded appropriately to their concerns. Most notably, the Commission agrees with FINRA's observation that "[a] majority of the commenters acknowledge that, as it has been 15 years since the last increase, the proposed increase is long overdue and critical to the forum in recruiting and retaining a roster of high quality arbitrators."<sup>139</sup>

Specifically, the Commission believes that the proposed rule change would further the purposes of the Act as it provides for the equitable allocation of reasonable fees, surcharges and other charges among FINRA members, customers, associated persons, or other non-members using FINRA's arbitration forum.<sup>140</sup> The Commission agrees with the views of certain commenters that FINRA: (1) "investigated several alternative approaches for increasing honoraria and has struck an effective balance" and (2) took "a measured and balanced approach to the economic considerations that are associated with the arbitrator honoraria increases."<sup>141</sup> The Commission also notes, as certain commenters did, "FINRA's effort to minimize the exposure of the fee increases to the investing public."<sup>142</sup> The Commission also agrees that FINRA's proposal to allocate the majority of the proposed fee increases among higher claim amounts will help "[minimize] the impact of the increases on smaller claims and keeps the arbitration forum accessible for the small investor."<sup>143</sup>

Moreover, the Commission also believes that the proposed rule change

<sup>138</sup> *See supra* note 6.

<sup>139</sup> Response Letter at 2. *See also* Aidikoff Letter at 1 (stating that "there has been no increase in the arbitrator honoraria for fifteen years and in my view increasing these payments will help retain qualified individuals in the pool as well as helping to recruit new arbitrators").

<sup>140</sup> *See* 15 U.S.C. 78o-3(b)(5).

<sup>141</sup> Caruso Letter at 1. *See also* Aidikoff Letter at 1 (stating that "increasing these payments will help retain qualified individuals in the pool as well as helping to recruit new arbitrators."); Bakhtiari Letter at 1 (stating that "[t]he honoraria raise is fair and will not materially affect aggrieved public investors that file claims in the Finra forum").

<sup>142</sup> PIRC Letter at 1-2 (noting that the fee allocation "is consistent with FINRA's goal of maintaining a just and equitable forum for parties to settle their disputes"). *See also* NASAA Letter at 1-2 (stating that it "appreciates FINRA's efforts to mitigate the impact to smaller public users").

<sup>143</sup> Response Letter at 4. *See also id.* (explaining that "to further mitigate the impact of the filing fee increases, most of the increases would be added to the refundable portion of the filing fee" and noting that "the filing fee and hearing session fee increases for customers begin for claim amounts of more than \$500,000").

would further the purposes of the Act as it is reasonably designed to protect investors and the public interest.<sup>144</sup> In addition to the observations above regarding FINRA's efforts to minimize the exposure of its fee increases to investors in order to keep the forum accessible to small investors,<sup>145</sup> the Commission also agrees with FINRA's assessment that the proposal is designed to "retain a roster of high-quality arbitrators and attract qualified individuals who possess the skills necessary to manage arbitration cases and consider thoroughly all arbitration issues presented, which are essential elements for FINRA to meet its regulatory objective of protecting the investing public."<sup>146</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>147</sup> that the proposed rule change (SR-FINRA-2014-026), be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>148</sup>

**Kevin M. O'Neill,**  
Deputy Secretary.

[FR Doc. 2014-23568 Filed 10-2-14; 8:45 am]

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### SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-73238; File No. SR-FINRA-2014-038]

#### Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of a Proposed Rule Change To Adopt FINRA Rule 3110(e) (Responsibility of Member To Investigate Applicants for Registration) in the Consolidated FINRA Rulebook

September 26, 2014.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act" or "SEA")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on September 18, 2014, Financial Industry Regulatory Authority, Inc. ("FINRA")

<sup>144</sup> *See* 15 U.S.C. 78o-3(b)(6).

<sup>145</sup> *See supra* notes 142 and 143 and accompanying text.

<sup>146</sup> *See* Notice, 79 FR at 377887. *See also* Response Letter at 2.

<sup>147</sup> 15 U.S.C. 78s(b)(2).

<sup>148</sup> 17 CFR 200.30-3(a)(12).

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

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