

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-60159; No. SR-FINRA-2009-041]

### Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of Proposed Rule Change To Amend Rules 12100, 12506, and 12902 of the Code of Arbitration Procedure for Customer Disputes and Rule 13100 of the Code of Arbitration Procedure for Industry Disputes To Implement Conforming Changes

June 22, 2009.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Exchange Act” or “Act”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that Financial Industry Regulatory Authority, Inc. (“FINRA” or the “Corporation”) (f/k/a National Association of Securities Dealers, Inc. (“NASD”)) filed with the Securities and Exchange Commission (“SEC” or “Commission”) on June 5, 2009, the proposed rule change as described in Items I, II, and III below, which Items have been substantially 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 the Code of Arbitration Procedure for Industry Disputes (“Industry Code”) to amend Rules 12100(r), 12506(a), and 12902(a) of the Code of Arbitration Procedure for Customer Disputes (“Customer Code”) and Rule 13100(r) of the Code of Arbitration Procedure for Industry Disputes (“Industry Code”) to amend the definition of “associated person,” streamline a case administration procedure, and clarify that customers could be assessed hearing session fees based on their own claims for relief in connection with an industry claim.

The text of the proposed rule change is available on FINRA’s Web site at <http://www.finra.org>, at the principal office of FINRA and at the Commission’s Public Reference Room.

#### 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

On January 24, 2007, the SEC approved amendments to the NASD Code of Arbitration Procedure (“old Code”) in connection with rules applicable to customer disputes and to industry disputes,<sup>3</sup> a final step in the reorganization of the old Code into three separate procedural codes: the Customer Code, the Industry Code, and the Mediation Code (the “Code Revision”).<sup>4</sup> The Code Revision simplified the language of the old Code, codified current dispute resolution practices, and implemented several substantive changes to dispute resolution rules. Since the SEC approved the Code Revision, Dispute Resolution staff (“staff”) has found rule language that was omitted inadvertently from the Customer Code and the Industry Code (collectively, “Codes”), as well as rule language that could be improved to better convey FINRA’s intent or to clarify current practice regarding certain dispute resolution rules. To address these concerns, FINRA is proposing to amend:

- Rules 12100(r) and 13100(r) of the Codes (the definition of “person associated with a member”) so that the definition in the Codes conforms to the definition in FINRA’s By-Laws;

<sup>3</sup> See Securities Exchange Act Release No. 55158 (January 24, 2007); 72 FR 4574 (January 31, 2007) (File Nos. SR-NASD-2003-158 and SR-NASD-2004-011).

<sup>4</sup> The Mediation Code was filed separately with the Commission as SR-NASD-2004-013. The Commission approved the Mediation Code on October 31, 2005, and it became effective on January 30, 2006. See Order Granting Approval to Proposed Rule Change and Amendments Nos. 1 and 2 Thereto, and Notice of Filing and Order Granting Accelerated Approval to Amendment No. 3, to Amend NASD Rules for Mediation Proceedings, Securities Exchange Act Rel. No. 52705 (October 31, 2005), 70 FR 67525 (November 7, 2005) (SR-NASD-2004-013).

- Rule 12506(a) of Customer Code (Document Production Lists) to encourage parties to download the Discovery Guide from FINRA’s Web site instead of having a copy mailed to them automatically when a claim is filed; and

- Rule 12902(a) of the Customer Code (Hearing Session Fees, and Other Costs and Expenses) to clarify that the arbitrators may assess hearing session fees against a customer in connection with a claim filed by a member against a customer in cases where there is also a responsive customer claim.

A discussion of the proposed amendments to each rule follows.

##### Rules 12100(r) and 13100(r)—Person Associated With a Member

A “person associated with a member” or an “associated person” is an individual who is licensed by FINRA to buy and sell securities for a FINRA member and its customers.<sup>5</sup> An associated person works for a member and, in most cases, is the individual with whom customers communicate to discuss their accounts or securities transactions.

FINRA intended the definition of associated person in the Codes to match the By-Laws definition,<sup>6</sup> except for one phrase relating only to Procedural Rule 8210. To that end, FINRA is proposing to amend Rules 12100(r) and 13100(r) of the Codes to make these definitions consistent with the definition in FINRA’s By-Laws. The proposal would amend the definition of “person associated with a member” in the Codes in two ways: (1) Insert the word “other”

<sup>5</sup> Rules 12100(r) and 13100(r) define “person associated with a member” to mean:

(1) A natural person registered under the Rules of FINRA; or

(2) A sole proprietor, partner, officer, director, or branch manager of a member, or a natural person occupying a similar status or performing similar functions, or a natural person engaged in the investment banking or securities business who is directly or indirectly controlling or controlled by a member, whether or not any such person is registered or exempt from registration with FINRA under the By-Laws or the Rules of FINRA.

For purposes of the Code, a person formerly associated with a member is a person associated with a member.

<sup>6</sup> FINRA’s By-Laws define “person associated with a member or associated person of a member” as (1) a natural person who is registered or has applied for registration under the Rules of the Corporation; (2) a sole proprietor, partner, officer, director, or branch manager of a member, or other natural person occupying a similar status or performing similar functions, or a natural person engaged in the investment banking or securities business who is directly or indirectly controlling or controlled by a member, whether or not any such person is registered or exempt from registration with the Corporation under these By-Laws or the Rules of the Corporation; and (3) for purposes of Rule 8210, any other person listed in Schedule A of Form BD of a member. See By-Laws of the Corporation, Article I, Definitions (rr).

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

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

before the second reference to “natural person” to clarify that the definition does not include corporate entities; and (2) insert the criterion that a natural person includes someone who has applied for registration.

FINRA believes that amending the definition in Rules 12100(r) and 13100(r) to clearly exclude corporate entities from the definition of associated person would remove any ambiguity concerning how the definition will be applied. Further, amending these rules to expand the forum’s jurisdiction to natural persons who have applied for registration would ensure that these individuals, who may be working in some capacity with a firm while awaiting their license, are subject to FINRA’s rules, and hence would be required to arbitrate should a dispute involving them arise. Moreover, FINRA notes that this amendment would conform the definitions under the Codes to the Corporation’s definition of person associated with a member.<sup>7</sup>

#### Rule 12506—Document Production Lists

During the arbitration process, parties can request discovery of documents, names of witnesses, and other information from each other to prepare their cases for the arbitration hearing. To help parties understand what information they should disclose, staff provides a copy of the FINRA Discovery Guide<sup>8</sup> to parties when the Director serves the statement of claim. The Discovery Guide provides parties in customer cases with guidance on which documents they should exchange without arbitrator or staff intervention (called Document Production Lists)<sup>9</sup> and provides guidance to arbitrators in determining which documents parties are presumptively required to produce.<sup>10</sup>

Rule 12506 of the Customer Code states that when the Director serves the statement of claim, “the Director will provide the FINRA Discovery Guide and Document Production Lists to the

parties.” In light of the availability of Dispute Resolution forms, guides and the claim filing system on FINRA’s Web site, FINRA believes that it is no longer necessary to disseminate the Discovery Guide to parties automatically when they file a claim in the dispute resolution forum. Further, many parties and counsel who use FINRA’s arbitration forum are repeat users who are likely to have a current copy of the Discovery Guide in their files. Due to these circumstances, FINRA believes that automatic distribution of the Discovery Guide is not an efficient use of resources.

Therefore, FINRA is proposing to amend Rule 12506(a) to state that, when the Director serves the statement of claim, the Director will notify parties of the location of the Discovery Guide (which includes the Document Production Lists) on FINRA’s Web site, but will not provide a copy except upon request. FINRA believes the proposed change would enhance the efficiency of the case administration process, and would reduce FINRA’s printing and mailing costs. Moreover, the proposal would encourage parties, especially those who frequently use the forum, to download relevant information from FINRA’s Web site as needed.

#### Rule 12902—Hearing Session Fees, and Other Costs and Expenses

Under the old Code, arbitrators could allocate hearing session fees against any party. Rule 10332(c)<sup>11</sup> of the old Code protected customers from potentially higher forum fees (now hearing session fees) triggered by amounts sought in industry claims by prohibiting the arbitrators from assessing forum fees against customers if the industry claim was dismissed. Moreover, the rule protected customers from higher forum fees by requiring the amount of the forum fees to be based on the amount awarded to an industry party and not on the amount of damages requested by the industry claim. However, Rule 10332(c) also provided that customers could be fairly subject to potential forum fees based on their own claims for relief in connection with the industry claim.<sup>12</sup>

<sup>11</sup> Rule 10332(c) of the old Code stated, in relevant part, that “no fees shall be assessed against a customer in connection with an industry claim that is dismissed; however, in cases where there is also a customer claim, the customer may be assessed forum fees based on the customer claim.”

<sup>12</sup> For example, if a member filed a claim against a customer, and the arbitrators dismissed the claim, the customer would not be assessed any forum fees. However, if, in connection with the industry claim, the customer filed a counterclaim against the member, the customer would be subject to potential forum fees based on the customer’s own claim for relief.

During the Code Revision, FINRA inadvertently omitted from the corresponding provision, Rule 12902(a)(4) of the Customer Code, the provision in old Rule 10332(c) that permitted the forum to assess fees against the customer based on the customer’s claim in an industry dispute. Thus, FINRA is proposing to amend Rule 12902(a)(4) to incorporate the omitted language at the end of the rule. Specifically, the new language would state that “in cases where there is also a customer claim, the customer may be assessed a filing fee under Rule 12900(a), and may be subject to hearing session fees under Rule 12902(a).”

FINRA notes that the proposed amendment does not reflect a change in FINRA’s stated policy or practice. Under the Customer Code, if a customer files a claim, counterclaim, cross claim or third party claim, Rule 12900(a)(1) requires the customer to pay a filing fee. Moreover, the first sentence of Rule 12902(a)(4) addresses the instance in which a customer may be assessed hearing session fees in connection with a claim filed by a member or associated person.<sup>13</sup> Similarly, the proposed amendment to Rule 12902(a)(4) would make clear to customers that if they file a claim in connection with a claim filed by a member, they may be subject to filing fees and hearing session fees based on their own claim for relief. FINRA believes the proposed amendment would clarify the forum’s policy concerning fees in connection with a customer counterclaim for relief and make the Code easier to administer for staff.

#### 2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,<sup>14</sup> which requires, among other things, that the Association’s 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. The proposed rule change is consistent with FINRA’s statutory obligations under the Act to protect investors and the public interest because the proposal would ensure that individuals who have applied for registration are bound by FINRA’s rules, and therefore subject to the jurisdiction

<sup>13</sup> Rule 12902(a)(4) maintains the protection of old Rule 10332(c) by requiring that “the amount of hearing session fees the customer must pay must be based on the amount actually awarded to the member or associated person, rather than on the amount claimed by the member or associated person.”

<sup>14</sup> 15 U.S.C. 78o-3(b)(6).

<sup>7</sup> See *supra* note 6.

<sup>8</sup> In January 1996, FINRA (then-NASD) created a Discovery Guide to assist customers in an arbitration with directing discovery and resolving discovery disputes. The Discovery Guide was approved by the SEC after a public comment period, see Exchange Act Release No. 41833 (September 2, 1999), 64 FR 49256 (September 10, 1999), and was made available for use in arbitration proceedings involving customer disputes upon the publication of *Notice to Members* 99-90 (November 1999).

<sup>9</sup> Many of the provisions of the Discovery Guide were incorporated into the Codes as part of the Code Revision. See *supra* note 3.

<sup>10</sup> Although there are discovery rules in each Code, the Discovery Guide applies only in customer arbitration disputes.

of the dispute resolution forum, and would assist in the efficient administration of the arbitration process by streamlining certain procedures and clarifying the allocation of hearing fees.<sup>15</sup>

#### *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, as amended.

#### *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 by FINRA.

#### **III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

Within 35 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 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](mailto:rule-comments@sec.gov). Please include File Number SR-FINRA-2009-041 on the subject line.

##### *Paper Comments*

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

All submissions should refer to File Number SR-FINRA-2009-041. 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 Web site (<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 inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. 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 the File Number SR-FINRA-2009-041 and should be submitted on or before July 23, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>16</sup>

**Florence E. Harmon,**

*Deputy Secretary.*

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#### **SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-60173; File No. SR-DTC-2009-12]

#### **Self-Regulatory Organizations; the Depository Trust Company; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Voluntary Participants Fund Deposit**

June 25, 2009.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),<sup>1</sup> notice is hereby given that on June 12, 2009, the Depository Trust Company ("DTC") 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 primarily by DTC. DTC filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act<sup>2</sup> and Rule 19b-4(f)(4)<sup>3</sup> thereunder so that the proposal was effective upon filing with the Commission. 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**

The proposed rule change will allow a DTC participant to submit a request to have its Voluntary Participants Fund Deposit credited to its settlement account on the next business day following the request.

#### **II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change**

In its filing with the Commission, DTC 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. DTC 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*

The Participants Fund is a mandatory risk management control for all DTC participants and is comprised of the Required Participants Fund Deposits, which are collected through DTC's Settlement System, and any Voluntary Participants Fund Deposits (collectively, "Actual Participants Fund Deposits"<sup>4</sup>) of all participants. Currently, participants may request a return of their Voluntary Participants Fund Deposit on a monthly basis by sending free form wire instructions to DTC through the Participants Fund Return Request application. DTC's Risk Management Department reviews each request and, if appropriate, DTC will make the return through Fedwire to the account requested on the wire instruction.

DTC's participants have requested the ability to also receive their Voluntary

<sup>2</sup> 15 U.S.C. 78s(b)(3)(A)(iii).

<sup>3</sup> 17 CFR 240.19b-4(f)(4).

<sup>4</sup> The term "Actual Participants Fund Deposit" means the actual amount the participant has deposited to the Participants Fund including its Required Participants Fund Deposit and Voluntary Participants Fund Deposit.

<sup>15</sup> The rationale for the proposed rule change was confirmed in a phone conversation with Mignon McLemore of FINRA, on June 22, 2009.

<sup>16</sup> 17 CFR 200.30-3(a)(12).

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