

Late Cancellation Fees

SEC Approves Amendments to the Codes of Arbitration Procedure to Increase the Fees Assessed for Late Cancellation or Postponement of a Hearing

Effective Date: July 6, 2015

Executive Summary

The Code of Arbitration Procedure for Customer Disputes (Customer Code) and the Code of Arbitration Procedure for Industry Disputes (Industry Code) (together, codes) govern the payments that FINRA makes to its arbitrators for the services they provide to FINRA's dispute resolution forum, as well as the fees assessed to the parties for arbitration proceedings. FINRA has amended Rules 12214(a), 12601(b)(2), 13214(a) and 13601(b)(2) to require that if one or more parties request a postponement or cancellation within 10 days before a scheduled hearing session and the arbitrators grant the request, the party or parties making the request would pay a late cancellation fee of \$600 per-arbitrator.¹

The amendments are effective for arbitration cases filed on or after July 6, 2015. The extended cancellation period and the increased late cancellation fee would not apply to parties whose cases were filed prior to the effective date.

The text of the amendments is set forth in Attachment A.

Questions concerning this *Notice* should be directed to:

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Notice Type

- ▶ Rule Amendment

Suggested Routing

- ▶ Compliance
- ▶ Legal
- ▶ Operations
- ▶ Registered Representatives
- ▶ Senior Management

Key Topics

- ▶ Arbitration
- ▶ Arbitrators
- ▶ Fees
- ▶ Honoraria

Referenced Rules & Notices

- ▶ FINRA Rule 12214
- ▶ FINRA Rule 12601
- ▶ FINRA Rule 13214
- ▶ FINRA Rule 13601

Background & Discussion

In FINRA arbitration, after the parties select arbitrators, the arbitrators hold an initial pre-hearing conference (IPHC)² with the parties, usually by telephone, to discuss procedural issues, the mediation alternative, discovery and scheduling of hearings.³ In many cases, the hearing dates are selected months in advance, thus requiring arbitrators to reserve these dates and forego other opportunities that would result in a conflict with the scheduled dates. An arbitrator receives an honorarium payment only for participation in the hearing sessions that take place. A typical day in an arbitration case has two hearing sessions for which an arbitrator would receive \$600 or \$300 for each session.⁴

Prior to the amendments, if a party or parties cancelled or postponed a hearing more than three business days before the start of a scheduled hearing, arbitrators did not receive an honorarium. Further, if the hearing was postponed or cancelled within three business days of the hearing, the arbitrators received a per-arbitrator honorarium of \$100. Many arbitrators complained that the three-day cancellation period did not provide enough time to schedule other opportunities, and the \$100 per-arbitrator fee did not adequately compensate them for their preparation time or anticipated income, now lost due to cancellation of the hearings. In light of the inconvenience and lost income to arbitrators that late cancellations cause, FINRA has amended the codes to increase the cancellation period and late cancellation fee to encourage parties to begin case preparation earlier and, when appropriate, to begin settlement discussions as soon as reasonably possible.

Late Cancellations or Postponements

Rules 12601 and 13601⁵ permit parties and arbitrators to postpone⁶ hearings under certain circumstances, and establish fees, which the parties could incur, depending on the timing of the postponement request. Rules 12601(b)(2) and 13601(b)(2), which address late postponements, have been amended to require that parties give more advance notice before postponing or cancelling a hearing, or be assessed a higher late cancellation fee if such notice is not provided. Specifically, the amendments require that if a postponement or cancellation request is made by one or more parties within 10 calendar days⁷ before a scheduled hearing session and granted, the party or parties making the request must pay a late cancellation fee of \$600 per arbitrator.

Under the amendments, if a party or parties request a postponement more than 10 days before the start of a scheduled hearing session, the party or parties would not be assessed a late cancellation fee, regardless of when the arbitrators grant the request.⁸ Further, if the party or parties request a postponement of a group of consecutively scheduled hearing sessions within the 10-day cancellation period and the arbitrators grant the request, the party or parties making the request would be assessed the \$600 per-arbitrator late cancellation fee for the first of the scheduled hearing sessions, not for each of the remaining scheduled hearing sessions that are cancelled.

The following example illustrates how the rule will work. An arbitrator schedules the first of five consecutive hearing sessions to begin on Monday, March 15. If the party or parties' request postponement no later than Thursday, March 4, the party or parties would not be assessed the per-arbitrator fee because the request was made more than 10 days before the start of the first scheduled hearing session.⁹ If, however, the party or parties' request postponement on Monday, March 8, then the party or parties would be assessed the \$600 per-arbitrator late cancellation fee because the request was made seven days prior to the first day of scheduled hearing sessions. The party or parties would not be assessed the per-arbitrator late cancellation fee for each of the four remaining scheduled hearing sessions that also have been postponed or cancelled.

FINRA notes that arbitrators will notify the parties during the IPHC of the deadline by which the party or parties must request a postponement or cancellation to avoid the late cancellation fee, so that the parties can prepare their cases accordingly.

Finally, as is current practice, arbitrators should assess the per-arbitrator fee, regardless of the reason for the request. The only exception will be in cases where extraordinary circumstances exist. FINRA recognizes that there are some extraordinary circumstances that could prevent a party from making a cancellation or postponement request in time to avoid the additional fee assessment (*e.g.*, a serious accident or a sudden severe illness). In these cases, arbitrators will continue to have the discretion to waive the fee, provided they receive verification of such circumstances.¹⁰

Effective Date

The amendments are effective for arbitration cases filed on or after July 6, 2015. The extended cancellation period and the increased late cancellation fee would not apply to parties whose cases were filed prior to the effective date.

Endnotes

1. See Securities Exchange Act Release No. 34-75036 (May 22, 2015), 79 FR 30740 (May 29, 2015) (Order Approving File No. SR-FINRA-2015-003).
2. After the panel is appointed, the Director of Dispute Resolution will schedule an initial prehearing conference for the parties and panel to meet to schedule the hearing dates, set a discovery schedule and provide a list of possible motions, for example. See Rules 12500 and 13500.
3. A hearing is a meeting between the parties and the arbitrators of four hours or less to determine the merits of the arbitration. See Rules 12100(m) and 13100(m); see also 12100(n) and 13100(n).
4. See Rules 12214(a) and 13214(a).
5. Rules 12214 and 13214 govern payment of arbitrators and have also been amended, as they require FINRA to pay an honorarium to arbitrators in the event of a postponement under Rules 12601(b)(2) and 13601(b)(2).
6. If the parties settle an arbitration case, hearings that were scheduled to occur after settlement are cancelled, and depending on the timing of the cancellation, could result in the assessment of a cancellation fee. See Rules 12902(d) and 13902(d).
7. Under the codes, "day" is defined as a calendar day, not a business day. If a deadline specified in the code falls on a Saturday, Sunday or any FINRA holiday, the deadline is extended until the next business day. See Rules 12100(j) and 13100(j).
8. For each postponement agreed to by the parties, or granted upon request of one or more parties, FINRA assesses a postponement fee to the parties, equal to the applicable hearing session fee. See Rules 12601(b)(1) and 13601(b)(1).
9. If Thursday, March 4 falls on a FINRA holiday, the deadline would be extended to the next business day or March 5.
10. See Rules 12601(b)(2) and 13601(b)(2). A waiver of the fee will not affect payment of the honorarium.

Attachment A

Customer Code

12214. Payment of Arbitrators

(a) Except as provided in paragraph (b) and in Rule 12800, FINRA will pay the panel an honorarium, as follows:

- no change;
- no change;
- no change; and
- \$[100] 600 for each arbitrator if a hearing session other than a prehearing conference is postponed within [three business] 10 days before a scheduled hearing session pursuant to Rules 12601(a)(2) and (b)(2).

(b) - (e) No change.

12601. Postponement of Hearings

(a) No change.

(b) Postponement Fees

(1) No change.

(2) If a postponement request is made by one or more parties [and granted] within [three business] 10 days before a scheduled hearing session and granted, the party or parties making the request shall pay an additional fee of \$[100] 600 per arbitrator. If more than one party requests the postponement, the arbitrators shall allocate the \$[100] 600 per arbitrator fee among the requesting parties. The arbitrators may allocate all or a portion of the \$[100] 600 per arbitrator fee to the non-requesting party or parties, if the arbitrators determine that the non-requesting party or parties caused or contributed to the need for the postponement. In the event that a request results in the postponement of consecutively scheduled hearing sessions, the additional fee will be assessed only for the first of the consecutively scheduled hearing sessions. In the event that an extraordinary circumstance prevents a party or parties from making a timely postponement request, arbitrators may use their discretion to waive the fee, provided verification of such circumstance is received.

(3) No change.

(c) No change.

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Industry Code

13214. Payment of Arbitrators

(a) Except as provided in paragraph (b), Rule 13800, and Rule 13806(f), FINRA will pay the panel an honorarium, as follows:

- no change;
- no change;
- no change; and
- \$[100] 600 for each arbitrator if a hearing session other than a prehearing conference is postponed within [three business] 10 days before a scheduled hearing session pursuant to Rules 13601(a)(2) and (b)(2).

(b) - (e) No change.

13601. Postponement of Hearings

(a) No change.

(b) Postponement Fees

(1) No change.

(2) If a postponement request is made by one or more parties [and granted] within [three business] 10 days before a scheduled hearing session and granted, the party or parties making the request shall pay an additional fee of \$[100] 600 per arbitrator. If more than one party requests the postponement, the arbitrators shall allocate the \$[100] 600 per arbitrator fee among the requesting parties. The arbitrators may allocate all or a portion of the \$[100] 600 per arbitrator fee to the non-requesting party or parties, if the arbitrators determine that the non-requesting party or parties caused or contributed to the need for the postponement. In the event that a request results in the postponement of consecutively scheduled hearing sessions, the additional fee will be assessed only for the first of the consecutively scheduled hearing sessions. In the event that an extraordinary circumstance prevents a party or parties from making a timely postponement request, arbitrators may use their discretion to waive the fee, provided verification of such circumstance is received.

(3) No change.

(c) No change.

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