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Required fields are shown with yellow backgrounds and asterisks.

Page 1 of * 23

SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549
Form 19b-4

File No.* SR - 2011 - * 075
Amendment No. (req. for Amendments *)

Proposed Rule Change by Financial Industry Regulatory Authority

Pursuant to Rule 19b-4 under the Securities Exchange Act of 1934

Initial * ☑ Amendment * ☐ Withdrawal ☐

Section 19(b)(2) * ☑ Section 19(b)(3)(A) * ☐ Section 19(b)(3)(B) * ☐

Pilot ☐

Extension of Time Period for Commission Action * ☐

Date Expires *

Rule

☐ 19b-4(f)(1) ☐ 19b-4(f)(2) ☐ 19b-4(f)(3) ☐ 19b-4(f)(4) ☐ 19b-4(f)(5) ☐ 19b-4(f)(6)

Exhibit 2 Sent As Paper Document ☐

Exhibit 3 Sent As Paper Document ☐

Description

Provide a brief description of the proposed rule change (limit 250 characters, required when Initial is checked *).

FINRA is filing a proposed rule change to amend Rule 13204 of the Industry Code to preclude collective action claims from being arbitrated under the Industry Code.

Contact Information

Provide the name, telephone number and e-mail address of the person on the staff of the self-regulatory organization prepared to respond to questions and comments on the proposed rule change.

First Name * Mignon Last Name * McLemore

Title * Assistant Chief Counsel

E-mail * mignon.mclemore@finra.org

Telephone * (202) 728-8151 Fax

Signature

Pursuant to the requirements of the Securities Exchange Act of 1934,

has duly caused this filing to be signed on its behalf by the undersigned thereunto duly authorized officer.

Date 12/22/2011

By Linda D. Fienberg
(Name *)

President, FINRA Dispute Resolution
(Title *)

NOTE: Clicking the button at right will digitally sign and lock this form. A digital signature is as legally binding as a physical signature, and once signed, this form cannot be changed.

Linda D. Fienberg,

SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

For complete Form 19b-4 instructions please refer to the EFFS website.

Form 19b-4 Information (required)

Add Remove View

The self-regulatory organization must provide all required information, presented in a clear and comprehensible manner, to enable the public to provide meaningful comment on the proposal and for the Commission to determine whether the proposal is consistent with the Act and applicable rules and regulations under the Act.

Exhibit 1 - Notice of Proposed Rule Change (required)

Add Remove View

The Notice section of this Form 19b-4 must comply with the guidelines for publication in the Federal Register as well as any requirements for electronic filing as published by the Commission (if applicable). The Office of the Federal Register (OFR) offers guidance on Federal Register publication requirements in the Federal Register Document Drafting Handbook, October 1998 Revision. For example, all references to the federal securities laws must include the corresponding cite to the United States Code in a footnote. All references to SEC rules must include the corresponding cite to the Code of Federal Regulations in a footnote. All references to Securities Exchange Act Releases must include the release number, release date, Federal Register cite, Federal Register date, and corresponding file number (e.g., SR-[SRO]-xx-xx). A material failure to comply with these guidelines will result in the proposed rule change being deemed not properly filed. See also Rule 0-3 under the Act (17 CFR 240.0-3)

Exhibit 2 - Notices, Written Comments, Transcripts, Other Communications

Add Remove View

Exhibit Sent As Paper Document ☐

Copies of notices, written comments, transcripts, other communications. If such documents cannot be filed electronically in accordance with Instruction F, they shall be filed in accordance with Instruction G.

Exhibit 3 - Form, Report, or Questionnaire

Add Remove View

Exhibit Sent As Paper Document ☐

Copies of any form, report, or questionnaire that the self-regulatory organization proposes to use to help implement or operate the proposed rule change, or that is referred to by the proposed rule change.

Exhibit 4 - Marked Copies

Add Remove View

The full text shall be marked, in any convenient manner, to indicate additions to and deletions from the immediately preceding filing. The purpose of Exhibit 4 is to permit the staff to identify immediately the changes made from the text of the rule with which it has been working.

Exhibit 5 - Proposed Rule Text

Add Remove View

The self-regulatory organization may choose to attach as Exhibit 5 proposed changes to rule text in place of providing it in Item I and which may otherwise be more easily readable if provided separately from Form 19b-4. Exhibit 5 shall be considered part of the proposed rule change.

Partial Amendment

Add Remove View

If the self-regulatory organization is amending only part of the text of a lengthy proposed rule change, it may, with the Commission's permission, file only those portions of the text of the proposed rule change in which changes are being made if the filing (i.e. partial amendment) is clearly understandable on its face. Such partial amendment shall be clearly identified and marked to show deletions and additions.

1. Text of Proposed Rule Change

(a) Pursuant to the provisions of Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] the Financial Industry Regulatory Authority, Inc. ("FINRA") is filing with the Securities and Exchange Commission ("SEC" or "Commission") a proposed rule change to amend Rule 13204 of the Code of Arbitration Procedure for Industry Disputes ("Industry Code") to preclude collective action claims under the Fair Labor Standards Act (FLSA), the Age Discrimination in Employment Act (ADEA), or the Equal Pay Act of 1963 (EPA) from being arbitrated under the Industry Code.

Below is the text of the proposed rule change. Proposed new language is underlined; deletions are in brackets.

* * * * *

Industry Code

13204. Class Action & Collective Action Claims

(a) Class Actions

(1) Class action claims may not be arbitrated under the Code.

(2) Any claim that is based upon the same facts and law, and involves the same defendants as in a court-certified class action or a putative class action, or that is ordered by a court for class-wide arbitration at a forum not sponsored by a self-regulatory organization, shall not be arbitrated under the Code, unless the party bringing the claim files with FINRA one of the following:

(i) a copy of a notice filed with the court in which the class action is pending that the party will not participate in the class action or in any recovery that may result from the class action, or has withdrawn from the class according to any conditions set by the court; or

(ii) a notice that the party will not participate in the class action or in any recovery that may result from the class action.

(3) The Director will refer to a panel any dispute as to whether a claim is part of a class action, unless a party asks the court hearing the class action to resolve the dispute within 10 days of receiving notice that the Director has decided to refer the dispute to a panel.

[1] 15 U.S.C. § 78s (b)(1).

(4) A member or associated person may not enforce any arbitration agreement against a member of a certified or putative class action with respect to any claim that is the subject of the certified or putative class action until:

- The class certification is denied;
- The class is decertified;
- The member of the certified or putative class is excluded from the class by the court; or
- The member of the certified or putative class elects not to participate in the class or withdraws from the class according to conditions set by the court, if any.

(b) Collective Actions

(1) Collective action claims under the Fair Labor Standards Act, the Age Discrimination in Employment Act, or the Equal Pay Act of 1963 may not be arbitrated under the Code.

(2) Any claim that involves plaintiffs who are similarly-situated against the same defendants as in a court-certified collective action or a putative collective action, or that is ordered by a court for collective action at a forum not sponsored by a self-regulatory organization, shall not be arbitrated under the Code, if the party bringing the claim has opted-in to the collective action.

(3) The Director will refer to a panel any dispute as to whether a claim is part of a collective action, unless a party asks the court hearing the collective action to resolve the dispute within 10 days of receiving notice that the Director has decided to refer the dispute to a panel.

(4) A member or associated person may not enforce any arbitration agreement against a member of a certified or putative collective action with respect to any claim that is the subject of the certified or putative collective action until the collective action certification is denied or the collective action is decertified.

[This] These subparagraphs do[es] not otherwise affect the enforceability of any rights under the Code or any other agreement.

* * * * *

(b) Not applicable.

(c) Not applicable.

2. Procedures of the Self-Regulatory Organization

At its meeting on July 13, 2011, the FINRA Board of Governors authorized the filing of the rule change with the SEC. No other action by FINRA is necessary for the filing of the proposed rule change.

FINRA will announce the effective date of the proposed rule change in a Regulatory Notice to be published no later than 60 days following Commission approval. The effective date will be 30 days following publication of the Regulatory Notice announcing Commission approval.

Questions regarding this rule filing may be directed to Mignon McLemore, Assistant Chief Counsel, FINRA Dispute Resolution at (202) 728-8151.

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

a) Purpose

Current Rules 12204 of the Code of Arbitration Procedure for Customer Disputes (Customer Code) and 13204 of the Industry Code (together, class action rules) provide that any claim that is based upon the same facts and law, and involves the same defendants as in a court-certified class action or a putative class action, shall not be arbitrated, unless the party bringing the claim files with FINRA one of the following: 1) a copy of a notice filed with the court in which the class action is pending that the party will not participate in the class action or in any recovery that may result from the class action, or has withdrawn from the class according to any conditions set by the court; or 2) a notice that the party will not participate in the class action or in any recovery that may result from the class action.

In 1999, FINRA issued an Interpretive Letter (FINRA Letter) stating that its class action rules should include collective action claims brought under the Fair Labor Standards Act (FLSA) and, therefore, has considered these claims ineligible for arbitration in its forum.[2] Nevertheless, in Hugo Gomez et al. v. Brill Securities, Inc. et al.,[3] a United States District Court for the Southern District of New York found that an FLSA[4] collective action is not a class action for purposes of Rule 13204 of the Industry Code and, thus, compelled arbitration of the claim in FINRA's dispute resolution forum.

As the court found that FINRA's interpretation of its class action rules did not expressly exclude collective actions, FINRA is proposing to amend its class action rule of the Industry Code to preclude collective action claims under the FLSA from being arbitrated in its forum. As a collective action claim also may be filed pursuant to the Age Discrimination in Employment Act (ADEA)[5] or the Equal Pay Act of 1963 (EPA),[6] FINRA is proposing to preclude these claims from being arbitrated as well. The Customer Code would not be amended because, for the FLSA, ADEA or EPA to apply,

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[2] See, e.g., FINRA Interpretive Letter to Cliff Palefsky, Esq., dated Sept. 21, 1999. The letter is available at http://www.finra.org/Industry/Regulation/Guidance/InterpretiveLetters/P002521 (last visited on June 7, 2011).

[3] Hugo Gomez et al. v. Brill Securities, Inc. et al. (No. 10 Civ. 3503), 2010 U.S. Dist. LEXIS 118162 (S.D.N.Y. Nov. 2, 2010).

[4] See 29 U.S.C. § 201 et seq.

[5] See 29 U.S.C. §§ 621 et seq. The relief provisions of the ADEA incorporate Section 16 of the FLSA, which outlines the penalties for violations of the statute, and state that the ADEA shall be enforced by the "powers, remedies and procedures" of the FLSA. See 29 U.S.C. § 626(b).

[6] See 29 U.S.C. § 206(d). The EPA, which is part of FLSA as amended, is administered and enforced by the United States Equal Employment Opportunity Commission. The relief provisions of the EPA also incorporate Section 16 of the FLSA.

there must be an employment relationship between an "employer" and "employee."[7]

United States District Court Decision

In Gomez,[8] the plaintiffs, stock brokers formerly employed by Brill Securities, Inc. (Brill), filed an FLSA collective action claim seeking unpaid overtime compensation on behalf of similarly-situated former and current Brill stock brokers. They relied on the FINRA Letter which concludes that FLSA claims should be considered ineligible for arbitration in the NASD Regulation (now FINRA) forum.[9] The court found that the FINRA Letter did not, however, distinguish between collective and class actions and, therefore, did not expressly preclude collective actions from being eligible for arbitration at FINRA. The Gomez court was not persuaded by the FINRA Letter and concluded that the differences between a class action and an FLSA collective action undercut FINRA's position that collective actions should be treated like class actions.[10] Based on its analysis, the court found that an FLSA collective action is not a class action for purposes of Rule 13204, and compelled arbitration of the plaintiffs' claims.[11]

Collective Actions under the FLSA, ADEA, and EPA

Under the FLSA,[12] ADEA,[13] and EPA,[14] courts are permitted to certify a

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[7] See U.S. Department of Labor, "What does the Fair Labor Standards Act require?," elaws – Fair Labor Standards Act Advisor, available at http://www.dol.gov/elaws/esa/flsa/screen5.asp (last visited July 26, 2011).

[8] Supra note 3 at 2.

[9] Id.

[10] Supra note 3 at 4-5.

[11] Id. Several courts have agreed with this finding when they considered whether an FLSA collective action is arbitrable under FINRA rules. See, e.g., Velez v. PHD Capital Corp. (No. 10 Civ. 3735), 2011 U.S. Dist. LEXIS 16678 (S.D.N.Y. Feb. 3, 2011); Suschil v. Ameriprise Financial Servs., Inc. (No. 07 Civ. 2655), 2008 U.S. Dist. LEXIS 27903 (N.D. Ohio Apr. 7, 2008); and Chapman v. Lehman Bros., Inc., 279 F. Supp. 2d 1286 (S.D. Fla. 2003).

[12] See FLSA, supra note 4.

collective action, rather than a class action, under the Federal Rules of Civil Procedure.[15] One difference between a collective action and a class action is that, under the collective action statutes, collective action members must affirmatively consent or "opt-in"[16] to become a member of a collective action to benefit or be bound by the judgment.[17] This means that a collective action member will not be bound by the case, unless the person affirmatively consents to become a member.[18] This requirement effectively protects the interests of absent class members,[19] because a lack of consent to join a collective action would not preclude them from pursuing their claims in other forums.[20]

Once a court grants approval for a collective action to proceed under the FLSA, ADEA or EPA,[21] FINRA believes the collective action should be considered ineligible for arbitration in the FINRA forum.

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[13] See ADEA, supra note 5.

[14] See EPA, supra note 6.

[15] Fed. R. Civ. P. 23.

[16] Cathy Ventrell-Monsees, Representative and Collective Actions Under the ADEA Class Actions in Employment Law: Class Action Basics, August 10, 1999, http://www.bna.com/bnabooks/ababna/annual/99/adeaclas.pdf at 1-3.

[17] Id.

[18] Id.

[19] Id.

[20] See Saincome v. Truly Nolen of America, Inc. (No. 11-CV-825-JM), 2011 U.S. Dist. LEXIS 85880 (S.D.CA. Aug. 3, 2011) (affirming that 29 U.S.C. § 216(b) of FLSA permits class members to participate in a collective action on an opt-in basis only, thus preserving absent parties' rights to proceed with the claim in arbitration).

[21] See Hyman v. First Union Corp., 982 F. Supp. 1, 26 (D.D.C. 1997) (court approving two collective actions, one for former bank employees and one for persons seeking employment, alleging age discrimination under the ADEA). See also Schwed v. General Electric Co. (No. 94-CV-1308), 1997 U.S. Dist. LEXIS 5103 at *10 (N.D.N.Y. April 11, 1997) (court approving collective action for former employees of an industrial power plant alleging age discrimination); Jarvaise et al v. Rand Corporation (Civil Action No. 96-2680), 212 F.R.D. 1 (D.D.C. 2002) (court certifying class of all female Rand employees in exempt positions under EPA).

Proposed Amendments to Rule 13204

FINRA is proposing, therefore, to amend Rule 13204 of the Industry Code to preclude collective actions from being arbitrated in the forum.

The current rule would be separated into two sections: subparagraph (a) for class actions, and subparagraph (b) for collective actions. Subparagraph (a) would be titled, "Class Actions," and re-numbered. Subparagraph (b) would be titled, "Collective Actions," and would contain four subparagraphs.

First, proposed Rule 13204(b)(1) would state that collective action claims under the FLSA, the ADEA, or the EPA may not be arbitrated under the Code. FINRA believes that, although collective actions are opt in actions, once a court grants approval for the collective action to proceed under a federal statute, the claims in dispute are administered like a class action, and, therefore, should be ineligible for arbitration in FINRA's forum. Moreover, FINRA believes that collective actions, like class actions, should be handled by the judiciary system, which has extensive procedures to manage such claims.

Second, under proposed Rule 13204(b)(2), any claim that involves similarly-situated[22] plaintiffs against the same defendants, like a court-certified collective action or a putative collective action,[23] would not be arbitrated in FINRA's arbitration forum. Thus, if an associated person opts in to a collective action, that person could not arbitrate

[22] The FLSA statute uses the term "similarly-situated", but does not define it. See 29 U.S.C. § 216(b). However, its meaning can be understood by considering two of the class action criteria in which a plaintiff must demonstrate that there are common questions of law or fact, and the claims or defenses of the class representatives are typical of those of the class. See supra note 15.

[23] Before a collective action is certified, courts often refer to the case as a *putative* collective action.

the same claims in FINRA's arbitration forum. The proposed rule would not prevent an associated person from opting in to a collective action in court. However, an associated person would be required to choose the forum – either arbitration or court – that the person believes would address effectively the issues in dispute. Further, under proposed Rule 13204(b)(2), a case in which a court orders the plaintiffs to file as a collective action at a forum not sponsored by a self-regulatory organization would be ineligible for arbitration at FINRA.

Third, proposed Rule 13204(b)(3) would give arbitrators the authority to decide disputes about whether a claim is part of a collective action. This provision would be consistent with the proposed, renumbered class action rule, Rule 13204(a)(3), in that the panel decides the merits and disposition of an arbitration claim. Alternatively, under the proposed rule, parties may ask the court hearing the collective action to resolve the dispute concerning whether the claim is part of the collective action within 10 days of receiving notice that the Director has decided to refer the dispute to a panel.

Fourth, proposed Rule 13204(b)(4) would prohibit a member firm or associated person from enforcing any arbitration agreement against a member of a certified or putative collective action with respect to any claim that is the subject of the certified or putative collective action until either the collective certification is denied or the group is decertified. This proposed rule clarifies that the existence of a certified or putative collective action nullifies any pre-dispute arbitration agreements. If, however, a court denies a plaintiff's request to certify a collective action or the court decertifies the collective action, the pre-dispute arbitration agreement would be enforceable, and FINRA would arbitrate the claims.

Finally, FINRA is proposing to amend grammatical references in the concluding paragraph to clarify that it applies to class actions as well as collective actions.

FINRA believes the proposed rule would facilitate the efficient resolution of collective actions, as the courts have established procedures to manage these types of representative actions. Moreover, FINRA believes access to courts for class or collective action litigation should be preserved for associated persons, and the proposal accomplishes this goal.

b) Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,[24] which requires, among other things, that FINRA rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. FINRA believes the proposal would facilitate the efficient resolution of collective actions, as courts have established procedures to manage these types of representative actions. Further, FINRA believes preserving access to courts for these types of claims for associated persons protects the public interest as it permits associated persons and the forum to allocate resources effectively.

4. 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 or capital formation that is not necessary or appropriate in furtherance of the purposes of the Act, as amended.[25] Further, FINRA believes that the proposal will

[24] 15 U.S.C. § 78o-3 (b)(6).
[25] 15 U.S.C. § 78c (f).

promote efficiency in the arbitration forum as class and collective actions will be administered by the judicial system, which have established procedures to manage such cases.

5. 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.

6. Extension of Time Period for Commission Action

FINRA does not consent at this time to an extension of the time period for Commission action specified in Section 19(b)(2) of the Act.

7. Basis for Summary Effectiveness Pursuant to Section 19(b)(3) or for Accelerated Effectiveness Pursuant to Section 19(b)(2)

Not applicable.

8. Proposed Rule Change Based on Rules of Another Self-Regulatory Organization or of the Commission

Not applicable.

9. Exhibits

1. Completed notice of proposed rule change for publication in the Federal Register.

EXHIBIT 1

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34- ; File No. SR-FINRA-2011-075)

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of Proposed Rule Change Relating to Amend the Industry Code of Arbitration Procedure to Preclude Collective Action Claims from Being Arbitrated

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b-4 thereunder,[2] notice is hereby given that on December 22, 2011, the Financial Industry Regulatory Authority, Inc. ("FINRA") filed with the Securities and Exchange Commission ("SEC" or "Commission"), the proposed rule change as described in Items I, II, and III below, which Items have been prepared by FINRA. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

FINRA is proposing to amend Rule 13201 of the Code of Arbitration Procedure for Industry Disputes ("Industry Code") to preclude collective action claims under the Fair Labor Standards Act (FLSA), the Age Discrimination in Employment Act (ADEA), or the Equal Pay Act of 1963 (EPA) from being arbitrated under the Industry Code.

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

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

2 17 CFR 240.19b-4.

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

In its filing with the Commission, FINRA included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. FINRA has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

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

1. Purpose

Current Rules 12204 of the Code of Arbitration Procedure for Customer Disputes (Customer Code) and 13204 of the Industry Code (together, class action rules) provide that any claim that is based upon the same facts and law, and involves the same defendants as in a court-certified class action or a putative class action, shall not be arbitrated, unless the party bringing the claim files with FINRA one of the following: 1) a copy of a notice filed with the court in which the class action is pending that the party will not participate in the class action or in any recovery that may result from the class action, or has withdrawn from the class according to any conditions set by the court; or 2) a notice that the party will not participate in the class action or in any recovery that may result from the class action.

In 1999, FINRA issued an Interpretive Letter (FINRA Letter) stating that its class action rules should include collective action claims brought under the Fair Labor Standards Act (FLSA) and, therefore, has considered these claims ineligible for

arbitration in its forum.[3] Nevertheless, in Hugo Gomez et al. v. Brill Securities, Inc. et al.,[4] a United States District Court for the Southern District of New York found that an FLSA[5] collective action is not a class action for purposes of Rule 13204 of the Industry Code and, thus, compelled arbitration of the claim in FINRA's dispute resolution forum.

As the court found that FINRA's interpretation of its class action rules did not expressly exclude collective actions, FINRA is proposing to amend its class action rule of the Industry Code to preclude collective action claims under the FLSA from being arbitrated in its forum. As a collective action claim also may be filed pursuant to the Age Discrimination in Employment Act (ADEA)[6] or the Equal Pay Act of 1963 (EPA),[7] FINRA is proposing to preclude these claims from being arbitrated as well. The Customer Code would not be amended because, for the FLSA, ADEA or EPA to apply, there must be an employment relationship between an "employer" and "employee."[8]

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[3] See, e.g., FINRA Interpretive Letter to Cliff Palefsky, Esq., dated Sept. 21, 1999. The letter is available at http://www.finra.org/Industry/Regulation/Guidance/InterpretiveLetters/P002521 (last visited on June 7, 2011).

[4] Hugo Gomez et al. v. Brill Securities, Inc. et al. (No. 10 Civ. 3503), 2010 U.S. Dist. LEXIS 118162 (S.D.N.Y. Nov. 2, 2010).

[5] See 29 U.S.C. § 201 et seq.

[6] See 29 U.S.C. §§ 621 et seq. The relief provisions of the ADEA incorporate Section 16 of the FLSA, which outlines the penalties for violations of the statute, and state that the ADEA shall be enforced by the "powers, remedies and procedures" of the FLSA. See 29 U.S.C. § 626(b).

[7] See 29 U.S.C. § 206(d). The EPA, which is part of FLSA as amended, is administered and enforced by the United States Equal Employment Opportunity Commission. The relief provisions of the EPA also incorporate Section 16 of the FLSA.

[8] See U.S. Department of Labor, "What does the Fair Labor Standards Act require?," elaws – Fair Labor Standards Act Advisor, available at http://www.dol.gov/elaws/esa/flsa/screen5.asp (last visited July 26, 2011).

United States District Court Decision

In Gomez,[9] the plaintiffs, stock brokers formerly employed by Brill Securities, Inc. (Brill), filed an FLSA collective action claim seeking unpaid overtime compensation on behalf of similarly-situated former and current Brill stock brokers. They relied on the FINRA Letter which concludes that FLSA claims should be considered ineligible for arbitration in the NASD Regulation (now FINRA) forum.[10] The court found that the FINRA Letter did not, however, distinguish between collective and class actions and, therefore, did not expressly preclude collective actions from being eligible for arbitration at FINRA. The Gomez court was not persuaded by the FINRA Letter and concluded that the differences between a class action and an FLSA collective action undercut FINRA's position that collective actions should be treated like class actions.[11] Based on its analysis, the court found that an FLSA collective action is not a class action for purposes of Rule 13204, and compelled arbitration of the plaintiffs' claims.[12]

Collective Actions under the FLSA, ADEA, and EPA

Under the FLSA,[13] ADEA,[14] and EPA,[15] courts are permitted to certify a collective action, rather than a class action, under the Federal Rules of Civil Procedure. [16]

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[9] Supra note 3 at 2.

[10] Id.

[11] Supra note 3 at 4-5.

[12] Id. Several courts have agreed with this finding when they considered whether an FLSA collective action is arbitrable under FINRA rules. See, e.g., Velez v. PHD Capital Corp. (No. 10 Civ. 3735), 2011 U.S. Dist. LEXIS 16678 (S.D.N.Y. Feb. 3, 2011); Suschil v. Ameriprise Financial Servs., Inc. (No. 07 Civ. 2655), 2008 U.S. Dist. LEXIS 27903 (N.D. Ohio Apr. 7, 2008); and Chapman v. Lehman Bros., Inc., 279 F. Supp. 2d 1286 (S.D. Fla. 2003).

[13] See FLSA, supra note 4.

[14] See ADEA, supra note 5.

[15] See EPA, supra note 6.

[16] Fed. R. Civ. P. 23.

One difference between a collective action and a class action is that, under the collective action statutes, collective action members must affirmatively consent or "opt-in"[17] to become a member of a collective action to benefit or be bound by the judgment.[18] This means that a collective action member will not be bound by the case, unless the person affirmatively consents to become a member.[19] This requirement effectively protects the interests of absent class members,[20] because a lack of consent to join a collective action would not preclude them from pursuing their claims in other forums.[21]

Once a court grants approval for a collective action to proceed under the FLSA, ADEA or EPA, [22] FINRA believes the collective action should be considered ineligible for arbitration in the FINRA forum.

Proposed Amendments to Rule 13204

FINRA is proposing, therefore, to amend Rule 13204 of the Industry Code to preclude collective actions from being arbitrated in the forum.

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[17] Cathy Ventrell-Monsees, Representative and Collective Actions Under the ADEA Class Actions in Employment Law: Class Action Basics, August 10, 1999, http://www.bna.com/bnabooks/ababna/annual/99/adeaclas.pdf at 1-3.

[18] Id.

[19] Id.

[20] Id.

[21] See Saincome v. Truly Nolen of America, Inc. (No. 11-CV-825-JM), 2011 U.S. Dist. LEXIS 85880 (S.D.CA. Aug. 3, 2011) (affirming that 29 U.S.C. § 216(b) of FLSA permits class members to participate in a collective action on an opt-in basis only, thus preserving absent parties' rights to proceed with the claim in arbitration).

[22] See Hyman v. First Union Corp., 982 F. Supp. 1, 26 (D.D.C. 1997) (court approving two collective actions, one for former bank employees and one for persons seeking employment, alleging age discrimination under the ADEA). See also Schwed v. General Electric Co. (No. 94-CV-1308), 1997 U.S. Dist. LEXIS 5103 at *10 (N.D.N.Y. April 11, 1997) (court approving collective action for former employees of an industrial power plant alleging age discrimination); Jarvaise et al v. Rand Corporation (Civil Action No. 96-2680), 212 F.R.D. 1 (D.D.C. 2002) (court certifying class of all female Rand employees in exempt positions under EPA).

The current rule would be separated into two sections: subparagraph (a) for class actions, and subparagraph (b) for collective actions. Subparagraph (a) would be titled, "Class Actions," and re-numbered. Subparagraph (b) would be titled, "Collective Actions," and would contain four subparagraphs.

First, proposed Rule 13204(b)(1) would state that collective action claims under the FLSA, the ADEA, or the EPA may not be arbitrated under the Code. FINRA believes that, although collective actions are opt in actions, once a court grants approval for the collective action to proceed under a federal statute, the claims in dispute are administered like a class action, and, therefore, should be ineligible for arbitration in FINRA's forum. Moreover, FINRA believes that collective actions, like class actions, should be handled by the judiciary system, which has extensive procedures to manage such claims.

Second, under proposed Rule 13204(b)(2), any claim that involves similarly-situated[23] plaintiffs against the same defendants, like a court-certified collective action or a putative collective action,[24] would not be arbitrated in FINRA's arbitration forum. Thus, if an associated person opts in to a collective action, that person could not arbitrate the same claims in FINRA's arbitration forum. The proposed rule would not prevent an associated person from opting in to a collective action in court. However, an associated person would be required to choose the forum – either arbitration or court – that the person believes would address effectively the issues in dispute. Further, under proposed

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[23] The FLSA statute uses the term "similarly-situated", but does not define it. See 29 U.S.C. § 216(b). However, its meaning can be understood by considering two of the class action criteria in which a plaintiff must demonstrate that there are common questions of law or fact, and the claims or defenses of the class representatives are typical of those of the class. See supra note 15.

[24] Before a collective action is certified, courts often refer to the case as a *putative* collective action.

Rule 13204(b)(2), a case in which a court orders the plaintiffs to file as a collective action at a forum not sponsored by a self-regulatory organization would be ineligible for arbitration at FINRA.

Third, proposed Rule 13204(b)(3) would give arbitrators the authority to decide disputes about whether a claim is part of a collective action. This provision would be consistent with the proposed, renumbered class action rule, Rule 13204(a)(3), in that the panel decides the merits and disposition of an arbitration claim. Alternatively, under the proposed rule, parties may ask the court hearing the collective action to resolve the dispute concerning whether the claim is part of the collective action within 10 days of receiving notice that the Director has decided to refer the dispute to a panel.

Fourth, proposed Rule 13204(b)(4) would prohibit a member firm or associated person from enforcing any arbitration agreement against a member of a certified or putative collective action with respect to any claim that is the subject of the certified or putative collective action until either the collective certification is denied or the group is decertified. This proposed rule clarifies that the existence of a certified or putative collective action nullifies any pre-dispute arbitration agreements. If, however, a court denies a plaintiff's request to certify a collective action or the court decertifies the collective action, the pre-dispute arbitration agreement would be enforceable, and FINRA would arbitrate the claims.

Finally, FINRA is proposing to amend grammatical references in the concluding paragraph to clarify that it applies to class actions as well as collective actions.

FINRA believes the proposed rule would facilitate the efficient resolution of collective actions, as the courts have established procedures to manage these types of

representative actions. Moreover, FINRA believes access to courts for class or collective action litigation should be preserved for associated persons, and the proposal accomplishes this goal.

2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,[25] which requires, among other things, that FINRA rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. FINRA believes the proposal would facilitate the efficient resolution of collective actions, as courts have established procedures to manage these types of representative actions. Further, FINRA believes preserving access to courts for these types of claims for associated persons protects the public interest as it permits associated persons and the forum to allocate resources effectively.

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 or capital formation that is not necessary or appropriate in furtherance of the purposes of the Act, as amended.[26] Further, FINRA believes that the proposal will promote efficiency in the arbitration forum as class and collective actions will be administered by the judicial system, which have established procedures to manage such cases.

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[25] 15 U.S.C. § 78o-3 (b)(6).

[26] 15 U.S.C. § 78c (f).

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

Written comments were neither solicited nor received.

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

Within 45 days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) by order approve or disapprove such proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's Internet comment form (http://www.sec.gov/rules/sro.shtml); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-FINRA-2011-075 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-2011-075. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (http://www.sec.gov/rules/sro.shtml). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of FINRA. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-FINRA-2011-075 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[27]

Elizabeth M. Murphy

Secretary

[27] 17 CFR 200.30-3(a)(12).