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FINRA's All Public Panel Option Is Now Available in All Customer Cases

The Securities and Exchange Commission recently approved a rule change that allows claimants to choose an arbitration panel made up entirely of public arbitrators. This change is applicable to all current customer cases in which FINRA has not sent a list of arbitrators by the rule's effective date of February 1, 2011.

Background

Investor advocates have long attacked the arbitration process as being unfair to customers, particularly because an industry arbitrator is included on each three-person panel. In response to these criticisms, FINRA enacted a trial program called the Public Arbitrator Pilot Program (PAPP), which allowed broker-dealers to opt-in to a process that gave claimants a choice between the traditional majority public panel or an all public panel. Nearly 60% of claimants chose the all public panel option in these PAPP cases. The new rule expands the procedures implemented in PAPP to all cases involving customers.

What Changed?

Since single arbitrator panels are already "all public," the new rule affects only three-arbitrator panels. In short, when a customer now chooses the all public panel option, the ranking lists will remain the same, but each separately represented party will have the ability to use up to ten strikes in the non-public arbitrator category, thus eliminating the industry arbitrator from the panel.

Here are the specifics:

- (1) The customer may select either an all public panel or a majority public panel (the current method of panel selection) within 35 days of service of the statement of claim. If no affirmative selection is made, the default will be a majority public panel, although FINRA staff members have indicated that they will not rigidly enforce this 35-day deadline during the early period of implementation. Instead, FINRA has sent letters to claimants in particular cases notifying them of certain deadlines for making the election. Of course, if there is any question about whether or not an arbitrator list sent on or after February 1 is pursuant to the all public panel option, check with the FINRA case administrator assigned to that particular case.
- (2) Under *both* options, each party will be given three lists of ten arbitrators: (1) chair-qualified public arbitrators, (2) public arbitrators, and (3) non-public arbitrators.
- (3) If the customer chooses or defaults to the majority public panel, the process will remain as it has been: each separately represented party will be given the ability to strike four arbitrators from each list, and the remaining arbitrators on each list will be ranked.
- (4) If the customer chooses the all public panel option, each separately represented party will be given ten strikes for the non-public arbitrator list, giving any party (whether claimant or respondent) the ability to ensure that the panel will be comprised of all public arbitrators. The remaining two lists will be ranked with the customary four strikes available. FINRA will then use the following process to fill the panel with public arbitrators:

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- a. If all non-public arbitrators are stricken, FINRA will appoint the next highest ranked public arbitrator that is available to serve on the panel.
- b. If there are no available public arbitrators on the list, FINRA will appoint the next highest available chair-qualified public arbitrator.
- c. If there are no available chair-qualified public arbitrators, FINRA will randomly appoint an arbitrator.

These procedures are now found in [Rule 12403](#).¹

Consequences

The new rule went into immediate effect on February 1, 2011. Therefore, all customer cases with a three-arbitrator panel in which FINRA has not yet sent arbitrator lists will be subject to the rule. The new rule does not affect industry cases between two broker-dealers or a broker-dealer and a registered representative.

So how will this change affect customer cases for firms that were not part of the PAPP? Most obviously, some cases will go forward without industry arbitrators. In these cases, there may be an added importance to educating the panel members on industry practices, and the use of experts may increase.

Another general change will be an expected increase in the selection of chair-qualified arbitrators. Although FINRA will draw from the public pool before the chair-qualified pool to fill the slot traditionally left for the industry arbitrator, both of these pools (unlike the non-public pool) include chair-qualified arbitrators. Chair-qualified arbitrators should therefore find an increasing role in customer arbitrations, and some panels could be comprised of as many as three chair-qualified arbitrators. Chair-qualified arbitrators have additional training requirements and tend to be more experienced at FINRA arbitrations (with a minimum of three prior hearings, or two if an attorney), and they have often developed some degree of understanding of industry rules and standards, if not to the extent of the typical industry arbitrator. This may at least partially diminish the impact of losing industry experience on a panel.

The new rule brings with it an increased potential for a randomly appointed (*i.e.*, “cram down”) arbitrator. Although the parties are limited in their use of strikes with respect to the remaining arbitrator pools, arbitrator unavailability or conflicts always leave the possibility that the panel cannot be filled with arbitrators from the ranking lists. Neither respondents nor claimants relish this possibility, as witnessed by the widespread consensus to expand the eight-person lists to ten potential arbitrators. The list expansion should, however, keep this risk fairly minimal, even when the all public panel option is exercised.

¹ Along with including the all public panel option, the new Rule 12403 now consolidates the three-arbitrator-panel content of former Rules 12402, 12403, 12404, 12405, 12406, and 12411. The content of these former rules relating to cases with one arbitrator have been consolidated into the new Rule 12402.



If you have any questions about this Legal Alert, please feel free to contact any of the attorneys listed below or the Sutherland attorney with whom you regularly work.

Author

Bryan M. Ward

404.853.8249

bryan.ward@sutherland.com

Related Attorneys

Keith J. Barnett

404.853.8384

keith.barnett@sutherland.com

Bruce Bettigole

202.383.0165

bruce.bettigole@sutherland.com

Cheryl Haas-Goldstein

404.853.8521

cheryl.haas-goldstein@sutherland.com

S. Lawrence Polk

404.853.8225

larry.polk@sutherland.com

Brian L. Rubin

202.383.0124

brian.rubin@sutherland.com

Avital Stadler

404.853.8772

avi.stadler@sutherland.com