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April 9, 2008

BY EMAIL TO: rule-comments@sec.gov

Ms. Nancy Morris
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549

Re: File No. SR-FINRA-2007-021
Proposal amending Rules 12206 and 12504 of the Customer Code and Rules 13206 and 13504 of the Industry Code to address motions to dismiss.

Dear Ms. Morris:

Thank you for the opportunity to comment on the above-referenced rule proposals submitted to the Commission by the Financial Industry Regulatory Authority ("FINRA").

I am an attorney who has represented clients for over 25 years in securities arbitration/litigation. Over the course of my career, I have handled or supervised well over a thousand customer-member arbitrations before the National Association of Securities Dealers, and the New York Stock Exchange. My experience in securities arbitrations has included a number of circumstances in which dispositive motions were appropriately considered and granted by arbitration panels-- claims which were clearly time-barred, claims which were barred by *res judicata*, and claims for which there was no legal basis whatsoever. In each of those cases, the arbitration panel recognized the importance of dismissing improper claims prior to a final hearing on the merits in order to avoid the waste of valuable time and unnecessary expense on the part of all parties involved in the dispute.

Based on my experience, I am strongly opposed to the proposed rules; indeed, I would urge FINRA to strengthen the right of parties to obtain pre-hearing dismissals of legally deficient claims. The proposed rules effectively preclude meritorious motions to dismiss, and thereby encourage the filing of utterly frivolous claims in the hope of extracting undeserved settlements. To the extent the goal of the proposed rule is to discourage frivolous motions, that goal can be accomplished by other means-- for example, forum fees and/or fee-shifting in extreme circumstances. As currently framed, the proposed rules are terribly overbroad and unnecessary.

While I recognize that spurious or bad-faith dispositive motions should be discouraged, there are many circumstances under which dispositive motions are necessary and appropriate. In each of those situations, arbitration panels should be permitted to hear and decide pre-hearing motions to dismiss in order to prevent meritless and frivolous claims and to promote fairness and efficiency in arbitration proceedings. As currently drafted, the proposed amendments to FINRA Rules 12206 and 12504 of the Customer Code and Rules 13206 and 13504 of the Industry Code

amendments are unfairly biased against Respondents and serve to discourage arbitrators from considering appropriately made and meritorious motions to dismiss. Accordingly, I adopt SIFMA's comments regarding the proposal to amend Rules 12206 and 12504 of the Customer Code and Rules 13206 and 13504 of the Industry Code as expressed in SIFMA's April 7, 2008 letter to the Commission. A copy of SIFMA's April 7, 2008 letter is attached hereto as Exhibit A.

Thank you for your consideration of this matter. Should you have any questions regarding this comment letter, please do not hesitate to contact me.

Very truly yours,

A. Inge Selden III

AIS/twm

attachment

SIFMA
Securities Industry and
Financial Markets Association

April 7, 2008

BY EMAIL TO: rule-comments@sec.gov

Ms. Nancy Morris
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549

Re: File No. SR-FINRA-2007-021
Proposal amending Rules 12206 and 12504 of the Customer Code and Rules 13206 and 13504 of the Industry Code to address motions to dismiss

Dear Ms. Morris:

The Securities Industry and Financial Markets Association ("SIFMA")[1] Arbitration Committee, Litigation Advisory Committee, and Clearing Firms Committee appreciate the opportunity to comment on the above-referenced rule proposals (the "rule proposals") submitted to the Commission by the Financial Industry Regulatory Authority ("FINRA"). SIFMA applauds FINRA's continuing efforts to implement rules targeted against spurious or bad-faith dispositive motions. To the extent the rule proposals serve this purpose, they have SIFMA's full support. Recognizing, however, that there are a number of circumstances under which dispositive motions are appropriate and should be allowed, we offer the following constructive comments to improve the fairness and operation of the proposed rules. For your convenience, we have also attached as **Attachment 1** a redlined version of the Customer Code rule proposals that includes specific language to implement the changes we recommend below.[2]

I. Proper Motions to Dismiss Should be Encouraged, Not Stigmatized

The first provision of the proposed dispositive motions rule states: "Motions to decide a claim prior to the conclusion of a party's case in chief are *discouraged* in arbitration" (emphasis added).[3] This language is overbroad and unwarranted because it unnecessarily sets a negative tone that may predispose

[1] SIFMA brings together the shared interests of more than 650 securities firms, banks and asset managers. SIFMA's mission is to promote policies and practices that work to expand and perfect markets, foster the development of new products and services and create efficiencies for member firms, while preserving and enhancing the public's trust and confidence in the markets and the industry. SIFMA works to represent its members' interests locally and globally. It has offices in New York, Washington D.C., and London and its associated firm, the Asia Securities Industry and Financial Markets Association, is based in Hong Kong.

[2] We also recommend conforming language changes to Rules 13206 and 13504 of the Industry Code.

[3] NASD Code of Arbitration Procedure for Customer Disputes ("Code of Arbitration Procedure") § 12504(a)(1).

arbitrators to give less than full and fair consideration to appropriately-made and meritorious dispositive motions. The language is also contradictory and confusing insofar as the proposed rule proclaims that dispositive motions are discouraged, and then proceeds to list the grounds upon which such motions may be properly made and granted. Presumably, the grounds listed in the proposed rule are intended to prevent meritless and frivolous claims from proceeding, thereby lending fairness and efficiency to the arbitral process. Surely, the proposed rule is not intended to discourage these types of motions but rather, spurious or bad faith motions. In this respect, the "discouraged" language is superfluous and again, it injects confusion. Accordingly, we recommend that this language be stricken.

II. The Scope of Permissible Dispositive Motions is Unduly Narrow

Under the rule proposals, the panel is limited to three narrow grounds on which to grant a dispositive motion: (1) The parties previously settled their dispute in writing;[4] (2) The party was not associated with the account(s), security(ies), or conduct at issue;[5] or (3) The existing six-year time limit to submit an arbitration claim has expired.[6] As currently drafted, these grounds are unduly narrow and improperly exclude dispositive motions in a number of situations where such motions are entirely appropriate and desirable in the interests of judicial economy and fairness. We recommend that dispositive motions be allowed for each of the following additional grounds.

A. Clearing Firm Cases

Cases that name clearing firms are often appropriate for dispositive motions by the clearing firm. Clearing firms generally perform certain back-office and other services for introducing firms, including carrying the customer accounts. When a problem arises between a customer and the introducing firm, however, the clearing firm is often dragged into the fray. In the typical case, the claim involves alleged misconduct by an introducing firm, but the statement of claim nevertheless names the clearing firm as a respondent, based solely on its role as a clearing firm. The clearing firm's motion to dismiss in these cases is routinely granted because it does not owe and has not breached a legal duty to the claimant.[7]

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[4] Code of Arbitration Procedure § 12504(a)(6)(A).

[5] Code of Arbitration Procedure § 12504(a)(6)(B).

[6] Code of Arbitration Procedure § 12206(a).

[7] From time to time, even claimants recognize this fact and agree to voluntarily dismiss their claims against the clearing firm. *See, e.g., Richard L. Lackey and Diane Lackey, et al. v. National Financial Services, LLC, Casimir Capital, L.P. and James Ahern*, FINRA #05-02643 (Dec. 2007); *Donald M. Ball, et al. v. National Securities Corporation, National Financial Services, LLC, Kevin Guzman, Francisco Javier Tineo*, FINRA #07-00468 (Oct. 2007); *Dawsey v. Raymond James Financial Services, et al.*, NASD #07-01363 (Sep. 2007); *Segrest v. Raymond James Financial Services, et al.*, NASD #07-01361 (Aug. 2007); *Lois A. Koons, et. al. v. Neel R. Dekle, Dekle Financial Group, Park Avenue Securities LLC, National Financial Services LLC, The Guardian Life Insurance Companies of America*, NASD #04-03141(Feb. 2007); *Darnell N. McWillie, et al. v. Keith Cox et al.*, NASD #03-08900 (Jun. 2005); *Michael N. King & Associates Profit Sharing Plan et al. v. Katrina Bowers, Invest Financial Corporation and National Financial Services Corporation*, NASD #03-01623 (Nov. 2004); *Mark C. and Pattie L. Heitzman v. 1st Global Capital Corporation, Stephen P. Regouby d/b/a Union Financial Advisors, Inc. and National*

The duties of a clearing firm are limited by rule as well as by the terms of its clearing agreement with the introducing firm. In fact, at the outset of their relationship, introduced customers must be advised in writing of the limited role of the clearing firm.[8] Although clearing firms are frequently named for failing to supervise, or for allowing alleged misconduct by introducing firms, clearing firms cannot be held liable for the negligence or wrongful acts of the correspondent.[9] Thus, when a statement of claim does not make factual allegations of direct misconduct by a clearing firm, the clearing firm should be dismissed from the case. FINRA has historically followed the compelling legal authority in this area by granting motions to dismiss under these circumstances where the clearing firm is merely performing its routine and ministerial clearing function.[10] The rule proposals should likewise recognize and incorporate the well settled law that clearing firms are not liable for the conduct of introducing firms under the federal securities laws or under SEC and SRO rules.[11]

Financial Services Corporation, FINRA #03-00076 (Oct. 2004); *The Argo Corporation et al. v. First Institutional Securities, L.L.C et al.*, NASD #03-01250 (Apr. 2004).

[8] NYSE Rule 382(c) ("Each customer whose account is introduced on a fully disclosed basis shall be notified in writing upon the opening of his account of the existence of the [clearing] agreement and of the relationship between the introducing and [clearing] organization."). *See also* NASD Rule 3230 ("Each customer whose account is introduced on a fully disclosed basis shall be notified in writing upon the opening of his account of the existence of the clearing or carrying agreement.").

[9] *See, e.g., Carlson v. Bear Stearns & Co.*, 906 F.2d 315 (7th Cir. 1990); *Flickinger v. Harold C. Brown & Co.*, 947 F.2d 595, 599 (2nd Cir. 1991); *Ross v. Bolton*, 904 F.2d 819 (2d Cir. 1990); *Edwards & Hanly v. Wells Fargo Sec. Clearance Corp.*, 602 F.2d 478, 484 (2d. Cir. 1979); *Cromer Finance Ltd. V. Berger*, 137 F. Supp.2d 452 (S.D.N.Y. 2001); *Goldberger v. Bear, Stearns & Co.* [200-2001 Transfer Binder] *Fed. Sec. L. Rep.* (CCH) P91,287 (S.D.N.Y. Dec. 28, 2000); *Riggs v. Schappell*, 939 F. Supp. 321 (D.N.J. 1996); *Connolly v. Havens*, 763 F. Supp. 6, 10 (S.D.N.Y. 1991); *Stander v. Financial Clearing & Servs. Corp.*, 730 F.Supp. 1282, 1298 (S.D.N.Y. 1990); *Antinoph v. Lavarell Reynolds Sec., Inc.*, 703 F. Supp. 1185, 1189 (E.D. Pa. 1989); *Cacciola v. Kochcapital, Inc.*, 1997 WL 407867 (Wash. App. Jul. 1997); *Mars v. Wedbush Morgan Securities, Inc.*, 283 Cal. Rptr. 238 (Ct. App. 1991); *Petersen v. Sec. Settlement Corp.*, 277 Cal. Rptr. 468, 473 (Ct. App. 1991).

[10] *See, e.g., Lawrence and Patricia Taylor v. Pershing LLC*, NASD #06-00914 (Mar. 2007) (pre-hearing dismissal granted); *Inversiones Interven, Ltd. v. National Financial Services*, LLC, NASD #05-06544 (Jul. 2006) (same); *Ray v. SunTrust Securities, Inc.*, NASD #03-07628 (Jun. 2004) (same); *Miller v. National Financial*, NASD #96-00706 (confirmed by Superior Court of California, San Francisco, Jul. 29, 1999). *See also, Hoffman v. Fereydouni*, NASD #04-04302 (Oct. 2005) (pre-hearing dismissal); *Ray v. SunTrust Securities, Inc.*, NASD #03-07628 (Jun. 2004) (pre-hearing dismissal); *Voigtlander v. Wilson*, NASD # 03-5994 (Jun. 2004) (pre-hearing dismissal); *Shandy v. Cambridge Way*, NASD #02-02280 (Jan. 2003) (pre-hearing dismissal); *Lupo v. Schroder & Co.*, NASD #99-01364 (Jul. 2001) (pre-hearing dismissal); *Chafin v. Securities America Securities Corp.*, NASD #99 04423 (Aug. 2000); *Razouvaev v. Schroder, Wertheim & Co., Inc.*, NASD #9604398 (Dec. 1997); *Robinson v. Rauscher Pierce Refsnes, Inc.*, NASD #92 00528 (Sep. 1993); and *Beitner v. Herzog, Heine, Geduld, Inc.*, NASD #96 04576 (Feb. 1998 Order; Award Jul. 1998).

[11] To the extent a claim alleges clearing firm liability under state law, the panel would remain free to deny the motion to dismiss if such claim is viable under the specific state law alleged in the statement of claim.

As currently drafted, the proposed rules will also place an unfair and undue burden on clearing firms by requiring them to defend through the discovery process and hearing stage claims that are clearly subject to dismissal. Clearing firms will be made to incur substantial attorneys' fees and costs and significant discovery costs, which may lead to increased clearing charges and ultimately, increased costs to customers. The proposed rules would also needlessly delay the adjudication of a very straightforward dispositive legal issue. To the extent the proposed rules inject unnecessary cost and delay in the process, they run counter to a fundamental purpose of arbitration.

For the foregoing reasons, the proposed rules should be amended to provide that a clearing firm named as a respondent, based solely on its role as a clearing firm, and not based upon any independent alleged misconduct, shall be encouraged and permitted to file a motion to dismiss on the basis that the firm did not owe, and did not breach, any legal or regulatory duty to the claimant.

B. Executives Improperly Named as Respondents

As currently drafted, the proposed rules would not allow prehearing dismissal of claims that improperly name a firm's executives as respondents under circumstances where such executives had no relation to, involvement in, knowledge of, or direct supervisory responsibility with respect to, the conduct at issue.[12] Both courts and arbitrators widely agree and historically have ruled that such claims are entirely appropriate for dismissal.[13] Accordingly, the proposed rules should be amended to permit prehearing motions to dismiss where a named respondent had no involvement in, personal knowledge of, or direct supervisory responsibility with respect to, the claim.

C. Legal Impossibility

The proposed rules would also disallow prehearing motions to dismiss based on a number of well-established and time honored "legal impossibility" grounds. For example, under New York law, a claim for damages for defamation on a Form U-5 cannot possibly prevail.[14] Likewise, under the doctrine of *res*

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[12] Proposed rule 12504(a)(6)(B) permits prehearing motions to dismiss a party who "was not associated with the account(s), security(ies) or conduct at issue." It is far from clear, however, that this language extends to senior executives who have no meaningful connection to the claim.

[13] *See, e.g., Rich v. Maidstone Financial, Inc.*, 2001 WL 286757 (S.D.N.Y. Mar. 23, 2001) (dismissing claim against officer of brokerage company because the complaint offered no factual details in support of its general allegations of officer's involvement in alleged misconduct); *Cascardo v. A.G. Edwards & Sons, Inc., et al.*, 2007 WL 3022844 (FINRA Sep. 24, 2007) (ordering prehearing dismissal of Chief Executive Officer Robert L. Bagby); *Goldsmith v. Merrill Lynch,et al.*, 2005 WL 524733 (NASD Feb. 14, 2005) (ordering prehearing dismissal of Chief Executive Officer E. Stanley O'Neal); *Soofi v. American Express Financial Advisors, et al.*, 2003 WL 22462637 NASD Oct. 21, 2003) (ordering prehearing dismissal of Chief Executive Officer Kenneth I. Chenault); *Woody v. Morgan Stanley DW Inc., et al.*, 2003 WL 22881023 (NASD Nov. 5, 2003) (ordering prehearing dismissal of Chief Executive Officer Philip J. Purcell); *Ganguly v. Charles Schwab & Co., Inc.*, 2004 WL 213016, at *2 (S.D.N.Y. Feb. 4, 2004) (hearing panel dismissed brokerage firm's CEO despite nominal responsibility for allegedly improper practices).

[14] *See Rosenberg v. Metlife*, 8 N.Y.3d 359, 368 (2007) (statements made by a brokerage firm in a Form U-5 Termination Notice are subject to an absolute privilege in a defamation suit).

judicata, a claim that has already been litigated to final resolution in court cannot be tried anew in an arbitration proceeding. A third example is the doctrine of legal standing, under which a claimant must have some legally protectable interest, that was invaded by the respondent, as a requisite to filing her claim in arbitration to obtain relief. In each of these cases, a respondent defending a claim on these "legal impossibility" grounds would be forced to bear the costs of discovery, arbitration preparation and an evidentiary hearing – even though at the end of the day, the law would not permit the arbitrator to grant the claimant any relief. Accordingly, the proposed rules should be amended to permit prehearing motions to dismiss upon a showing of the absence of liability based on the facts alleged in the claim and the documents produced by or to the moving party.

D. Time-Barred Claims

The third ground for granting a dispositive motion is the expiration of the six-year time limit on the submission of arbitration claims.[15] This rule, known as the "eligibility rule," states that a claim must be filed within six years of the conduct at issue in order for it to be "eligible" for arbitration. The eligibility rule, however, by its express terms, "does not extend applicable statutes of limitations."[16] Accordingly, this ground should be expanded to include claims that are time-barred under *any* applicable legal authority.

The policy reasons that support enforcing statutes of limitations apply equally in court-based litigation as in arbitration. These policy reasons include: penalizing claimants who are not industrious in pursuing their claims; security against stale demands (including the dissipation of evidentiary records and witness recollections); the prevention of fraudulent claims; and a remedy for the other inconveniences resulting from delay.[17]

Respondents should not be forced to absorb the cost of evidentiary hearings against parties with demonstrably stale claims. Both sides would be forced to prepare their cases despite the potential loss of witnesses, loss of memory, and loss of relevant documents that often occur when stale cases litigate. These are the very policy concerns that support application of statutes of limitations in the first place, and they militate in favor of allowing panels to dismiss time-barred claims at the outset of a case.

Accordingly, the proposed rules should be amended to permit prehearing motions to dismiss claims that are deemed legally stale under an applicable statute of limitations, regardless of whether they have aged beyond the six-year limit on arbitration claims.

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[15] Code of Arbitration Procedure § 12206(a).

[16] Code of Arbitration Procedure § 12206(c). *See also* NASD Arbitrator's Manual (Jan. 2007 at p. 8) ("[t]he arbitrators should also be aware that a statute of limitations may preclude the awarding of damages even though the claim is eligible for submission to arbitration.").

[17] *See, e.g., Nielson v. Barnett*, 485 N.W.2d 666, 669 (Mich. 1992).

III. Procedural Comments (Unanimity, Fees, and Sanctions)

A. Unanimous Decision

The rule proposals provide that decisions to grant a motion to dismiss be unanimous. This provision is unfair to movants and unnecessary to ensure just disposition of such motions. In the current Code of Arbitration Procedure, nowhere does it require a unanimous vote of the panel. Not even final decisions on the merits require a unanimous vote.[18] This provision is unfair to movants because a single arbitrator could guarantee the denial of a motion to dismiss – even if such arbitrator had no reasonable basis for doing so. This provision is unnecessary to ensure just outcomes, given the extremely limited and narrow grounds that remain on which to seek dismissal, and particularly given the long history and current record of fair outcomes in arbitration that are the product of majority decisions.[19] Accordingly, majority rule should govern dispositive motions, as it does all other decisions in arbitration.

B. Assessment of Forum Fees

The rule proposals also provide that if the panel denies a motion to dismiss (filed prior to the conclusion of the claimant's case), the panel must assess against the moving party all forum fees associated with the motion. This provision is patently unfair to movants who file in good faith, based on the narrow available grounds, and in reliance on the accuracy and completeness of the papers filed by the opposing party. To the extent this provision operates to punish good faith filers, it is unfair and inappropriate. Thus, a movant should not bear the costs where, for example, a claimant's poorly, inaccurately, incompletely, and/or mistakenly drafted statement of claim makes it appear that the movant satisfies the "factual impossibility" or "statute of limitations" grounds for filing, but when additional facts later unfold, it turns out such was not the case.

The new rule already permits panels to award reasonable costs and attorneys' fees to the party that opposed a dispositive motion deemed to be frivolous. This provision provides ample safeguard against spurious or bad faith dispositive motions. Accordingly, the forum fee shifting provision should be stricken from the proposed rule.

C. Motions for Sanctions

SIFMA supports the provisions in the proposed rules that permit the panel to impose sanctions for frivolous or bad faith dispositive motions. As currently drafted, however, these provisions would likely result in a dramatic *increase* in the number of motions for sanctions that are filed. In order to avoid this unnecessary and inefficient result, non-moving parties should be prohibited from filing motions for sanctions, attorneys' fees and costs in response to a dispositive motion. Instead, the panel should in each case, sua sponte, determine whether a motion is frivolous or in bad faith, and order appropriate sanctions.

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[18] *See* Code of Arbitration Procedure § 12904(a).

[19] *See* White Paper on Arbitration in the Securities Industry: *The success story of an investor protection focused institution that has delivered timely, cost-effective, and fair results for over 30 years* (Oct. 2007), available at: http://www.sifma.org/regulatory/pdf/arbitration-white-paper.pdf.

Thank you for giving SIFMA's Arbitration, Litigation Advisory, and Clearing Firms Committees the opportunity to comment on the proposed rules governing dispositive motions. If you have any questions regarding this comment letter, please contact the committees' staff advisors, Kevin Carroll at 202.962.7382 (kcarroll@sifma.org), or Richard Bommer at 212.313.1229 (rbommer@sifma.org).

Sincerely,

Edward G. Turan
Chair, SIFMA Arbitration Committee

Martha E. Solinger
Chair, SIFMA Litigation Advisory Committee

Chair, SIFMA Clearing Firms Committee

cc: Linda D. Fienberg, President, FINRA Dispute Resolution
George H. Friedman, Executive Vice President, FINRA Dispute Resolution
Erik R. Sirri, Director, Division of Trading and Markets, SEC
James A. Brigagliano, Acting Chief Counsel, Division of Trading and Markets, SEC

ATTACHMENT 1

Customer Code

12206. Time Limits

(a) No change.

(b) Dismissal under Rule

Dismissal of a claim under this rule does not prohibit a party from pursuing the claim in court. By filing a motion to dismiss a claim under this rule, the moving party agrees that if the panel dismisses a claim under this rule, the non-moving party may withdraw any remaining related claims without prejudice and may pursue all of the claims in court.

(1) Motions under this rule must be made in writing, and must be filed separately from the answer, and only after the answer is filed.

(2) Unless the parties agree or the panel determines otherwise, parties must serve motions under this rule at least 90 days before a scheduled hearing, and parties have 30 days to respond to the motion.

(3) Motions under this rule will be decided by the full panel.

(4) The panel may not grant a motion under this rule unless an in-person or telephonic prehearing conference on the motion is held or waived by the parties. Prehearing conferences to consider motions under this rule will be recorded as set forth in Rule 12606.

(5) If the panel grants a motion under this rule (in whole or part), the decision must be by a majority of the panel, and must be accompanied by a written explanation.

Deleted: unanimous

(6) If the panel denies a motion under this rule, a party may not re-file the denied motion, unless specifically permitted by panel order.

(7) If the party moves to dismiss on multiple grounds including eligibility, the panel must decide eligibility first.

- If the panel grants the motion to dismiss the case on eligibility grounds on all claims, it shall not rule on any other grounds for the motion to dismiss.

- If the panel grants the motion to dismiss on eligibility grounds on some, but not all claims, and the party against whom the motion was granted elects to move the case to court, the panel shall not rule on any other ground for dismissal for 15 days from the date of service of the panel's decision to grant the motion to dismiss on eligibility grounds.

• If a panel dismisses any claim on eligibility grounds, the panel must record the dismissal on eligibility grounds on the face of its order and any subsequent award the panel may issue.

• If the panel denies the motion to dismiss on eligibility grounds, it shall rule on the other bases for the motion to dismiss the remaining claims in accordance with the procedures set forth in Rule 12504(a).

(8) [DELETED]

Deleted: If the panel denies a motion under this rule, the panel must assess¶
forum fees associated with hearings on the motion against the moving party.

(9) If the panel, sua sponte, deems frivolous a motion filed under this rule, the panel must also award reasonable costs and attorneys' fees to any party that opposed the motion.

(10) The panel also may issue other sanctions under Rule 12212 if it determines, sua sponte, that a party filed a motion under this rule in bad faith.

(11) A non-moving party shall not file a motion for sanctions, attorneys' fees, or costs in connection with, or in response to, a motion to dismiss a claim under this rule. The panel shall not hear or rule on such motions and may impose sanctions under Rule 12212 on a non-moving party that files such a motion.

(c) - (d) No change.

Rule 12504. [Reserved] Motions to Dismiss

(a) Motions to Dismiss Prior to Conclusion of Case in Chief

(1) [DELETED].

Deleted: Motions to dismiss a claim prior to the conclusion of a party's case in chief are discouraged in arbitration

(2) Motions under this rule must be made in writing, and must be filed separately from the answer, and only after the answer is filed.

(3) Unless the parties agree or the panel determines otherwise, parties must serve motions under this rule at least 60 days before a scheduled hearing, and parties have 45 days to respond to the motion.

(4) Motions under this rule will be decided by the full panel.

(5) The panel may not grant a motion under this rule unless an in-person or telephonic prehearing conference on the motion is held or waived by the parties. Prehearing conferences to consider motions under this rule will be recorded as set forth in Rule 12606.

(6) The panel cannot act upon a motion to dismiss a party or claim under paragraph (a) of this rule, unless the panel determines that:

(A) the non-moving party previously released the claim(s) in dispute by a signed settlement agreement and/or written release;

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(B) the moving party was not involved in, or had no personal knowledge of, or had no direct supervisory responsibility over, or owed no legal or regulatory duty with respect to, the account(s), security(ies), or conduct at issue.

Deleted: associated with

(C) the claim could not prevail as a matter of law based on the facts alleged in the claim and the documents produced by or to the moving party;

(D) the party is a clearing firm and the claim does not make factual allegations of direct misconduct by the clearing firm; or

(E) the claim is time-barred under any applicable legal authority.

(7) If the panel grants a motion under this rule (in whole or part), the decision must be by a majority of the panel, and must be accompanied by a written explanation.

Deleted: unanimous

(8) If the panel denies a motion under this rule, the moving party may not re-file the denied motion, unless specifically permitted by panel order.

(9) [DELETED]

Deleted: If the panel denies a motion under this rule, the panel must assess forum fees associated with hearings on the motion against the moving party.

(10) If the panel, sua sponte, deems frivolous a motion filed under this rule, the panel must also award reasonable costs and attorneys' fees to any party that opposed the motion.

(11) The panel also may issue other sanctions under Rule 12212 if it determines, sua sponte, that a party filed a motion under this rule in bad faith.

(12) A non-moving party shall not file a motion for sanctions, attorneys' fees, or costs in connection with, or in response to, a motion to dismiss a claim under this rule. The panel shall not hear or rule on such motions and may impose sanctions under Rule 12212 on a non-moving party that files such a motion.

(b) Motions to Dismiss After Conclusion of Case in Chief

A motion to dismiss made after the conclusion of a party's case in chief is not subject to the procedures set forth in subparagraph (a).

(c) Motions to Dismiss Based on Eligibility

A motion to dismiss based on eligibility filed under Rule 12206 will be governed by that rule.

(d) Motions to Dismiss Based on Failure to Comply with Code or Panel Order

A motion to dismiss based on failure to comply with any provision in the Code, or any order of the panel or single arbitrator filed under Rule 12212 will be governed by that rule.

(e) Motions to Dismiss Based on Discovery Abuse

A motion to dismiss based on discovery abuse filed under Rule 12511 will be governed by that rule.