April 9, 2008

Via Email to rule-comments@sec.gov
Nancy M. Morris, Esq.
U.S. Securities and Exchange Commission
100 F. Street, N.E.
Washington, D.C. 20549-0609

Re: Proposed Revisions to Rules 12206, 12504, 13206 and 13540 of the FINRA Code of Arbitration Procedure – Motions to Dismiss, Subject File No.: SR-FINRA-2007-021

Dear Ms. Morris:

I write to express my strong opposition to the above-referenced rule changes that seek to severely limit the filing of motions to dismiss in arbitration proceedings before the Financial Industry Regulatory Authority ("FINRA"). For the reasons set forth below, the Commission should not approve the proposed rule change in its present form.

By way of background, I have been representing members of the securities industry for over a decade. I have represented industry members ranging from broker-dealers and clearing firms to registered representatives and a broker-dealer's officers and directors. And when there has been a good faith basis for filing a motion to dismiss, I have filed a motion to dismiss on behalf of a respondent seeking the dismissal of time-barred or baseless legal claims – motions that many arbitration panels have granted.

The problem with the proposed rule is that it recognizes some absolute legal defenses (such a general release), but it prohibits a motion based on other absolute legal defenses. In particular, the proposed rule prohibits a pre-hearing motion to dismiss based upon a statute of limitations defense and, as a result, the mechanics of the rule frustrates the quick and cost efficient resolution of disputes.

Simply because a dispute has been submitted to arbitration before FINRA, the parties do not abrogate the law. Every Statement of Claim sets forth either a common law or statutory legal claim upon which a customer requests that the Panel hold a respondent liable and award damages – *i.e.*, a claim under Section 10(b) of the Securities and Exchange Act of 1934 (the "Act"). And, in many cases, the sole claim against a particular respondent is for "control person" liability under Section 20(a) of the Act. Every day, FINRA arbitrators are called upon by the parties to apply the law to the facts in order to determine whether or not a respondent is liable and accountable to a customer for damages. In so doing, the arbitrators – a large percentage of which have legal backgrounds – decide issues such as material misrepresentation, causation, reliance, and scienter in fraud cases under the Act. It is disingenuous, as some commentators have opined, that these same arbitrators are unprepared to handle motions to dismiss based on a straightforward legal defense such as the statute of limitations.[1]

While the current and proposed six-year eligibility rule (FINRA Rule 12206) provides that any claim made within six years is eligible for submission to arbitration, this rule specifically provides that the rule "does not extend applicable statute of limitations..." FINRA Code of Arbitration, Rule 12206(c). With the passage of the Sarbanes-Oxley Act of 2002, Congress mandated that the statute of limitations for claims arising under 10(b) and 20(a) of the Act is two years from discovery of the alleged violation or five years from the date of the transaction, whichever occurred earlier. See 28 U.S.C. §1658(b) (West 2007). The U.S. Supreme Court has held that the outside time period (now, five years) for bringing a claim under the federal securities laws is absolute and the doctrine of equitable tolling does not apply to the statute of limitations for claims arising under the federal securities laws. See Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350, 363 (1991). Therefore, while a claim may be eligible for submission to arbitration under the six year eligibility rule (FINRA Rule 12206), a claim under the federal securities laws is absolutely time-barred five years after the transaction that gave rise to the claim occurred.

Notwithstanding that the law mandates the dismissal of a claim for violations of Sections 10(b) or 20(a) of the Act for transactions that are beyond the five-year limitations period, the proposed rule would prohibit a respondent from moving for the dismissal of the time-barred claim until after a claimant completes his/her case-in-chief – a proposed rule structure that is patently unfair to an industry respondent. Rather than the quick and cost-efficient resolution of a time-barred claim prior to the hearing, the proposed rule would require an individual respondent who has been sued as a "control person" under 20(a) of the Act to incur substantial legal fees in preparing for a hearing, to incur travel costs to attend a hearing that may be on the opposite side of the country, to incur lodging expenses for a several day hearing, and to possibly lose a portion

[1] In a brief survey of FINRA arbitration awards issued within the past year, numerous Arbitration Panels have addressed motions to dismiss based on the statute of limitations and granted such motions. See Hughes v. Morgan Stanley DW, Inc., FINRA No. 07-02249 (Jan. 17, 2008) (granting motion to dismiss based on statute of limitations); Chandler v. Prudential Equity Group, LLC, FINRA No. 07-01120 (Nov. 2, 2007) (same); McGinnis v. UBS Financial Services, Inc., FINRA No. 06-04621 (Oct. 5, 2007) (same); Efron v. Merrill Lynch, Pierce, Fenner & Smith Inc., FINRA No. 07-00586 (Oct. 3, 2007) (same); Hober v. Merrill Lynch, Pierce, Fenner & Smith Inc., FINRA No. 06-03869 (Oct. 3, 2007) (same); Oakes v. UBS PaineWebber, FINRA No. 07-00715 (Sept. 28, 2007) (same); Vasquez v. Chase Investment Services Corp., FINRA No. 07-00385 (Aug. 17, 2007) (same); Helm v. Citigroup Global Markets, Inc., FINRA No. 07-00166 (July 31, 2007) (same); McCurdy v. MetLife Securities, Inc., FINRA No. 07-00439 (July 30, 2007) (same); Pennington v. CUNA Brokerage Services, Inc., FINRA No. 06-03143 (May 17, 2007) (same); Mortner v. Prudential Securities Inc., FINRA No. 06-03641 (May 18, 2007) (same); Olson v. Prudential Equity Group, LLC, FINRA No. 06-00528 (May 1, 2007) (same); Stafford v. Morgan Stanley DW, Inc., FINRA No. 06-03040 (Apr. 26, 2007) (same).

of his/her livelihood while being out of the office to attend the hearing – only to have the claim against him/her dismissed as time-barred after a Claimant rests his/her case-in-chief. If the claim is time-barred after the Claimant has rested his/her case, the claim is time-barred before the evidentiary hearing and such expenses are unnecessarily incurred.

In crafting the proposed rule, FINRA expressed that it had learned through various constituents and focus groups that some respondents were filing multiple dispositive motions at various stages of the arbitration proceedings in an apparent effort to delay scheduled hearing sessions on the merits. See SEC Release No. 34-57497 at p. 12. A practice that, on its face, is plainly abusive.[2] The proposed rule, however, contains provisions that allows the Arbitration Panel to sanction and award attorneys' fees to the non-moving party if they deem a motion to dismiss was "frivolous" or filed in "bad faith". These provision are sufficient to deter and prevent the abusive practices that FINRA asserts has occurred in the past and to allow the arbitrators to control the proceeding and parties before them. These remedial provisions sufficiently address the concerns expressed to FINRA by its constituents to prevent abusive motion practice. Therefore, there is no need for a ban on pre-hearing dispositive motions to dismiss that are based on valid legal defenses. An industry respondent should be able to seek dismissal of legal claims that Congress, state legislatures, or the Courts have deemed time-barred by the statute of limitations or for which no legal private right of action exists.

For these reasons, I oppose the proposed rule and request that the Commission deny approval of the rule in its present form. I also implore FINRA to craft a balanced and fair rule that will protect the legal rights of, and prevent an undue cost burden on, members of the securities industry while preventing the claimed abusive practice of some respondents that file multiple dispositive motions.

Respectfully submitted,

Richard J. Babnick Jr.

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[2] There may be situations in which the Arbitration Panel has denied a motion to dismiss, without prejudice, but ordered that a respondent may re-file the motion after some event in the case has occurred. In such instances, a party's re-filing of the motion, as permitted by the Arbitration Panel, would not be abusive.