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DENVER

April 10, 2008

**VIA E-mail: rule-comments@sec.gov**

BOULDER

Ms. Nancy M. Morris  
Secretary  
U.S. Securities and Exchange Commission  
100 F. Street NE  
Washington, D.C. 20549

COLORADO SPRINGS

Re: **SR-FINRA-2007-021**  
**Proposal amending Rules 12206 and 12504 of the NASD Customer Code and Rules 13206 and 13504 of the NASD Industry Code to address motions to dismiss**

LONDON

Dear Ms. Morris:

LOS ANGELES

Thank you for the opportunity to comment on the above-referenced rule proposal (the "Rule Proposal") submitted to the Securities and Exchange Commission (the "Commission") by the Financial Industry Regulatory Authority, Inc. ("FINRA"). For the reasons set forth below, I respectfully oppose the adoption of the Rule Proposal to the extent it prohibits the filing of pre-hearing motions to dismiss on substantive grounds.

MUNICH

**A. FINRA Fails To Identify Any Legitimate Need For the Rule Proposal.**

SALT LAKE CITY

The Rule Proposal, as currently drafted, eliminates the filing of pre-hearing dispositive motions except under the following three narrow exceptions: (1) when a wrong party was named ("factual impossibility"); (2) when the claims were previously settled and released ("settlement"); and (3) when the six-year time limit to submit claims has expired ("eligibility limit"). The Rule Proposal, while appealing to claimants and the claimants' bar, is unjustified and unnecessary.

SAN FRANCISCO

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FINRA states that the Rule Proposal is necessary to curtail respondent firms' practice of filing dispositive motions "routinely and repetitively in an apparent effort to delay scheduled hearing sessions on the merits, increase investors' costs (typically claimants), and intimidate less sophisticated parties." SEC Release No. 34-57497, pg. 12 (citations omitted) (the "Release"). In support, FINRA cites to a Fall 2006 study which concluded that motions to dismiss were filed in 28% of customer cases that went to award in 2006. *Id.*, n. 7. This means, however, that 72% of customer cases in 2006 that went to award had no pre-hearing dispositive motions filed. This hardly smacks of "routine" and "repetitive" conduct. In addition, the mere fact that approximately a quarter of customer cases that went to award had motions to dismiss filed does not, by itself, suggest that such motions were filed in bad faith or for dilatory purposes. FINRA presents no evidence that any of the motions filed in the 28% of customer cases that went to award in 2006 were filed for any other reason than a substantive legal issue. In fact, I suspect that a large percentage of these motions were filed for legitimate legal reasons, such as the claims at issue were time barred by applicable statutes of limitation.

Notably, FINRA provides no data with respect to arbitration cases where motions to dismiss were successfully filed. Pre-hearing motions to dismiss serve important purposes in arbitrations. When granted, such motions serve the primary goal of arbitration -- the efficient resolution of parties' disputes. Perhaps more importantly, when not granted, such motions often narrow the claims and highlight the important facts for the parties and panel, which in turn creates a much more focused and efficient hearing as opposed to the "shotgun" approach that one often sees in arbitrations. Additionally, I also find unpersuasive FINRA's statement that pre-hearing motions to dismiss are being used by parties to derail a scheduled hearing on the merits. In the 25 years of handling arbitrations for clients, I have yet to experience a situation where the filing of a pre-hearing dispositive motion has delayed a scheduled hearing.

Even assuming that FINRA is correct that the filing of pre-hearing motions to dismiss are "routinely and repetitively" being made in bad faith, proposed

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amendments to Rules 12504(a) and 13504(a) adequately address FINRA's concerns. These new provisions prevent abusive practices by (i) requiring a party to file an answer before filing a motion to dismiss and requiring all such motions to be filed well in advance of a scheduled hearing, (ii) requiring panels to assess forum fees against parties who file unsuccessful motions, (iii) requiring such motions to be decided by the full panel at a recorded hearing and, where dismissal is granted, accompanied by an unanimous written explanation, and (iv) providing for sanctions in response to frivolous motions, including the assessment of attorneys' fees against the filing party. With the adoption of these proposed provisions, a panel is adequately equipped with the necessary tools to handle the "bad apples" that may be filing pre-hearing motions to dismiss in bad faith.

**B. The Rule Proposal Has Numerous Negative Ramifications**

My greatest concern with the adoption of the Rule Proposal is the severe negative ramifications that will result. The Rule Proposal will erase long-standing and well-accepted grounds for seeking pre-hearing dismissal of claims in arbitrations, most notably, claims that are barred by applicable statutes of limitations. Additionally, the Rule Proposal will increase the costs and fees of parties who are forced to undertake the burden of preparing for a full arbitration in cases that should have been resolved months earlier. Last, the Rule Proposal is one-sided. While removing a respondent's ability to obtain pre-hearing dismissals of demonstrably deficient claims, the Rule Proposal contains no corresponding rule to deter or prevent a claimant from filing such claims.

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**1. The Rule Proposal Erases Long-Standing Precedent  
Allowing Pre-Hearing Dismissal of Claims**

FINRA and NYSE panels regularly grant pre-hearing motions to dismiss.<sup>1</sup> Furthermore, numerous court have recognized that FINRA arbitration panels have full authority to grant pre-hearing motions to dismiss “so long as the dismissal does not deny a party fundamental fairness.” Sheldon v. Vermonty, 269 F.3d 1202, 1206 (10<sup>th</sup> Cir. 2001); see also Vento v. Quick & Reilly, 128 Fed. Appx. 719, 722 (10<sup>th</sup> Cir. 2005); Warren v. Tacher, 114 F.Supp.2d 600, 602 (W.D. Ky. 2000); Max Marx Color & Chemical Co. Employees’ Profit Sharing Plan v. Barness, 37 F.Supp.2d 248 (S.D.N.Y. 1999).

Notably, expiration of applicable statutes of limitation provide an important ground for the pre-hearing dismissal of claims. Historically, FINRA panels have routinely dismissed claims, before hearing, that were time barred.<sup>2</sup> In

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<sup>1</sup> To cite a few examples: The Richard Dale Relyea L.P. v. Donaldson Lufkin & Jenrette Securities Corp., Docket No. 04-01092, 2005 WL 267604, at \*2 (NASD Jan 21, 2005) (granting motion to dismiss on statute of limitation grounds); Iwaskow v. Morgan Stanley DW Inc., Docket No. 00-00279, 2003 WL 21221831, at \*2 (NASD May 12, 2003) (noting the grant of a motion to dismiss as to one party); Beckham v. All-Tech Direct, Inc., Docket No. 01-04364, 2003 WL 21221842, at \*2 (NASD May 13, 2003) (same); Cecio v. Shearson Lehman Bros., Docket No. 2000-008237, 2000 WL 33201201 (N.Y.S.E. Dec. 13, 2000) (granting motion to dismiss).

<sup>2</sup> The following represent a few recent examples: Rio Grande Employees Hospital Association v. Piper Jaffray, Inc., NASD Case No. 05-02399 (March 15, 2006) (the panel dismissed claimant’s claims pre-hearing based upon Colorado’s applicable statutes of limitation); Stahl v. Ferris Baker Watts, NASD Case No. 05-05240 (Nov. 10, 2006) (the panel dismissed claimant’s claims pre-hearing based upon Maryland’s statutes of limitation); Duffy v. SunAmerica Securities, Inc., NASD Case No. 05-05901 (July 20,

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fact, FINRA's recently published new Code of Arbitration Procedure ("NASD Code") explicitly recognizes the dismissal of claims based upon applicable statutes of limitation. NASD Code Rule 12206, dealing with eligibility requirements, specifically states that "[t]his Rule shall not extend applicable statutes of limitation." Likewise, the Arbitrator's Manual expressly contemplates motions to dismiss based upon applicable statutes of limitation:

**Motions to Dismiss Because of the Passage of Time.** The Uniform Code contains an eligibility provision, which states that no dispute, claim or controversy can be submitted to arbitration if six (6) years have elapsed from the occurrence or event giving rise to the claim. . . . The arbitrators should also be aware that a statute of limitations may preclude the awarding of damages even though the claim is eligible for arbitration.

SICA 2007 Arbitrator's Manual, pgs. 7 and 8, (emphasis added).

By removing a respondent's ability to file pre-hearing dispositive motions based upon the expiration of the statute of limitations, the Rule Proposal is unjustifiably erasing many years of established precedent and divesting arbitrators of their long-standing authority to summarily dismiss time-barred claims. Additionally, the Rule Proposal would eliminate arbitrators' authority to dismiss claims pre-hearing based upon other well-established legal grounds such as the doctrine of *res judicata*, or arbitration and award, or because the claims are not arbitrable. Nothing set forth by FINRA or anyone else justifies this drastic and severe consequence of the Rule Proposal.

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2006) (the panel dismissed claimant's claims pre-hearing based upon a state's applicable two-year statute of limitation).

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**2. The Rule Proposal Will Increase Parties' Costs and Fees Unnecessarily**

As currently drafted, the Rule Proposal prohibits the filing of a motion to dismiss before the conclusion of a claimant's case-in-chief. As a result, the Rule Proposal requires that a facially deficient claim be taken to hearing and dismissed only after a claimant has the opportunity to present his or her case-in-chief. This means that the parties will be forced to undertake the burden of preparing for a full arbitration, including engaging in discovery and discovery motions, preparing fact witnesses, retaining expert witnesses, preparing for claimant's case-in-chief, and travel expenses for counsel and witnesses to attend the hearing. Likewise, FINRA administrators and arbitrators will be burdened with discovery issues, pre-hearing conferences and a full evidentiary hearing. Only then and following the claimant's case-in-chief (which, in my experience, can last days and sometimes weeks) can the respondent make its motion to dismiss the claimant's legally deficient claim. This seems to be extraordinary and unnecessary for all parties given that the claim could have been effectively and efficiently disposed of at an early stage.

**3. The Rule Proposal Is One-Sided**

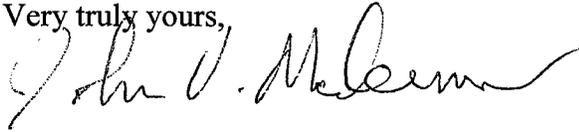
The Rule Proposal is unfairly one-sided in its application. While removing a respondent's ability to obtain pre-hearing dismissals of facially deficient claims, the Proposal contains no corresponding rule to deter or prevent a claimant from filing such claims. As a result, the Rule Proposal may actually encourage the filing of legally deficient, frivolous, harassing, or stale claims because panels will be powerless to dismiss them until the conclusion of the claimant's case-in-chief. The cost of defending such claims through an evidentiary hearing will create settlement value for claimants that did not otherwise exist before the Rule Proposal.

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For the reasons set forth above, I respectfully request that the Commission reject the provisions of the Rule Proposal that limit the substantive grounds for pre-hearing dispositive motions (Rules 12504(a)(6) and 13504(a)(6)).

Very truly yours,

A handwritten signature in cursive script, appearing to read "John V. McDermott".

John V. McDermott