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BY EMAIL TO: rule-comments@sec.gov
Ms. Nancy M. Morris
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: **File No. SR-FINRA-2007-021**
Proposal Amending Rules 12206 and 12504 of the NASD Customer Code and Rules 13206 and 13506 of the NASD Industry Code to Address Motions to Dismiss

Dear Ms. Morris:

I am Deputy General Counsel of Citigroup Global Markets Inc. ("Citigroup"). Citigroup appreciates the opportunity to comment on the proposed rules which affect motions to dismiss in arbitration cases before FINRA Dispute Resolution ("FINRA DR"). These comments are based on the substantial experience of Citigroup's lawyers, who have a wealth of experience litigating cases in-house before FINRA DR and other arbitration forums, dating back to the McMahon decision in 1987.

We have reviewed with approval several comment letters submitted by FINRA member firms, counsel who represent them, and SIFMA. We join in those comments that argue that the proposed rule goes too far in limiting the grounds on which a pre-hearing dismissal may be obtained, specifically, to those submitted by SIFMA and the law firm of Neal, Gerber and Eisenberg. I do not wish to burden the record by repeating those arguments, but I would like to recap their highlights.

1. ***Pre-hearing motions to dismiss are a fair and expeditious way to screen out stale or meritless claims.*** No legitimate interest is served by requiring evidentiary hearings on such claims. They burden FINRA DR and cause all parties needless expense. Requiring respondents to prepare for a merits hearing on a case that would be dismissed in court does nothing but increase the case's

settlement value for no reason related to its merit. The proposed rules provide for procedural safeguards (consideration by a full panel at an in-person or telephonic hearing; a unanimous, written award) that allow a claimant an added degree of protection against a hasty or ill-considered dismissal. We do not oppose these safeguards.

2. **Frivolous, repetitive or abusive motions to dismiss have no place in the arbitration process.** The proposed rules sensibly empower arbitration panels to take action against such tactics: costs must be shifted to the respondent for an unsuccessful motion, and sanctions are available against frivolous motions. (We note that there is no explicit sanction against a claimant who files a frivolous, abusive or repetitive claim.) There are also time limits to prevent routine motion filings with the answer, or on the eve of hearing. We would be amenable to a provision that all grounds for a dispositive motion be brought at once instead of serially; this is consistent with court practice. The threat of costs and sanctions may well chill the filing even of meritorious motions but, here as elsewhere, the FINRA DR rules tilt the balance in favor of a merits hearing. Again, we do not oppose these procedural protections for claimants.

3. **There is no reason to limit the grounds for seeking dismissal.** The proposed rules limit dispositive motions to two narrow grounds: claims that have been released and claims in which the movant was not associated with the account, securities or conduct at issue. We oppose this portion of the proposed rule as an imprudent limitation on the panel's ability to evaluate dispositive motions. By proposing this rule, FINRA DR substitutes its judgment for the judgment of its arbitration panels. The proposed rule declares entire categories of motions – those on grounds other than the two specified grounds – unworthy per se of a panel's consideration. The better approach, we believe, is to let panels consider all categories of motions, subject to the substantial procedural safeguards specified in paragraphs 1 and 2 above. FINRA DR makes no empirical showing that the proposed rules' specified grounds for dismissal are, as a group, more meritorious than other, non-specified grounds. A few examples illustrate this point.

    a. **Res judicata/arbitration and award.** The proposed rule sensibly allows a respondent to file a dispositive motion where, for instance, the respondent has settled the claim, paid money, and received a release. It makes no sense to deny that same avenue of relief to a respondent who wins a dismissal of a claim after a full hearing on the merits, but faces the same claim from the same party a second time. Yet the proposed rules would require a second merits hearing. A claimant should not be allowed to re-litigate a decided claim; a respondent should not be forced to re-try the claimant's case on the merits before asking a panel to dismiss it.

b. **Statutes of limitation.** No legitimate interest is served by entertaining stale claims. FINRA DR rules recognize this by providing for pre-hearing dismissal of claims that do not satisfy the six year eligibility rule, Rules 12206 and 13206. Yet the proposed rules deny respondents a substantive[1] dismissal under applicable statutes of limitation. There is no empirical evidence to suggest that arbitration panels can effectively apply the eligibility rule, yet are categorically unable to apply statutes of limitation. With respect to the latter, if there are disputed factual issues with respect to the statutes of limitation, the panel may conduct an evidentiary hearing on those issues alone, join the trial of those issues with the hearing on the merits, or simply deny the motion.

c. **Senior executives.** One of the more abusive tactics in the claimants' arsenal is the naming of senior officers of the broker-dealer who have had no direct connection or involvement with the claimant or the claimant's account. Claimants name such officers to drive up the settlement value of their claims. The proposed rule allows a motion to dismiss of a person not "associated with" the conduct at issue. To prevent the abusive naming of senior executives, the final rules should make clear that motions are permitted on behalf of any person against whom there are no factual allegations of misconduct relating specifically to the claimant or claimant's account. This clarification is especially necessary in light of the cost-shifting aspect of the proposed rules, and the possibility of sanctions.

4. **Permitting a dispositive motion at the end of claimant's case in chief does not avoid needless litigation.** Supporters of the proposed rule may argue that, if respondent prevails on a dispositive motion at the end of claimant's case, the respondent has saved itself the burden of putting on its own case in chief. But these "savings" are chimerical. Arbitration panels routinely permit a claimant to call a respondent's employees as adverse witnesses on claimant's case in chief. In many instances, by the time the claimant rests, the only witness left to be examined is the respondent's expert witness. By delaying dispositive motions until this juncture, the proposed rule would require the respondent to prepare for all witnesses – including the expert witness, who would have to testify if the dispositive motion were denied.

[1] Claims dismissed under Rules 12206 and 13206 may be litigated in court. A dismissal on statute of limitations grounds would preclude relitigation in court.

To summarize, Citigroup does not oppose the procedural safeguards and protections against abusive practices that the proposed rules provide. Citigroup does oppose the proposed rules' attempt to limit the grounds upon which a dispositive motion can be granted. These should be left to the sound discretion of the arbitration panels. Citigroup appreciates the opportunity to be heard on these important issues.

Sincerely,