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Via Electronic Filing

Ms. Nancy M. Morris
Secretary
United States Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

**RE: Release No. 34-57525; File No. SR-FINRA-2008-005
Notice of Filing of Proposed Rule Change Relating to Amendments to the Codes of
Arbitration Procedure to Permit Submissions to Arbitrators After a Case Has
Closed Under Limited Circumstances**

Dear Ms. Morris:

Thank you for the opportunity to comment on the Rule Proposal of the Financial Industry Regulatory Authority ("FINRA") to add Rule 12905 of the NASD Code of Arbitration Procedure for Customer Disputes ("Customer Code") and Rule 13905 of the NASD Code of Arbitration Procedure for Industry Disputes ("Industry Code") to permit submissions to arbitrators after a case has closed under certain circumstances (the "Proposed Rule"). The Cornell Securities Law Clinic (the "Clinic") is a Cornell Law School curricular offering in which law students provide representation to public investors and public education as to investment fraud in the largely rural "Southern Tier" region of upstate New York. See <http://securities.lawschool.cornell.edu>.

Two of the main benefits of the FINRA arbitration program, as stated by FINRA, are finality and efficiency:

"Arbitration is final and binding, subject to review by a court only on a very limited basis. Both mediation and arbitration benefit parties by providing prompt, inexpensive alternatives to litigation in the courts."¹

The Rule Proposal advances neither finality nor efficiency. As set forth below, the Rule Proposal conflicts with other NASD Code provisions governing finality of awards, may cause delay in the prompt payments of awards, is vague and likely to give rise to new avenues for

¹<http://www.finra.org/ArbitrationMediation/FINRADisputeResolution/WhatIsDisputeResolution/index.htm#answer1>

litigation, and contradicts existing law on the authority of arbitrators in the calculation of damages. Accordingly, the Clinic opposes the Proposed Rule.²

**A. There Is No Substantial
Need For the Rule Proposal**

The Rule Proposal adds a provision not presently found in the NASD Code of Arbitration Procedure (“NASD Code”) to provide guidance on the timing and circumstances under which FINRA staff must forward post-award submissions to the arbitrators. According to the Rule Proposal, FINRA seeks to permit submissions to arbitrators after a case has closed only under the following circumstances: (1) as ordered by a court; (2) at the request of any party within 30 days of service of an award or notice that a matter has been closed, for ministerial matters; or (3) if all parties agree and submit documents within 30 days of service of an award or notice that a matter has been closed.

It does not appear that there is a substantial need for the Rule Proposal. According to FINRA’s Statement of Purpose, “FINRA staff receives several requests each year from parties to submit documents to arbitrators (the panel) in cases that have been closed for long periods of time.” (Emphasis added.) Given the potential ramifications of the Rule Proposal, discussed below, we do not believe that the Rule Proposal is justified where the problem the Rule Proposal seeks to address occurs only several times a year. This number is small in the context of 986 FINRA cases closed after hearing in 2007, 1265 in 2006, and 1767 in 2005.³

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

Our greater concern is with the potential ramifications of the Rule Proposal. We have no quarrel with the provisions for submission by court order or by agreement of all parties. We are very concerned with the provision which permits unilateral post-award submissions

“at the request of any party within 30 days of service of an award or notice that a matter has been closed, for ministerial matters such as miscalculation of figures, mistake in the description of any person, thing or property referred to in the award, or if the award is imperfect in a matter of form that does not affect the decision on the merits.” (Emphasis added.)

The Rule Proposal does not indicate how many of the current post-closing submission requests would be permitted under the proposed rule. Presumably, since FINRA staff itself prepares the form of award, there will be few if any defects in the form of the award or the description of persons, things or property. It is reasonable to assume, in the absence of any

²While this comment letter addresses only the Rule Proposal as it affects customer cases, we believe our comments are equally applicable to the Rule Proposal as it affects industry cases.

³<http://www.finra.org/ArbitrationMediation/FINRADisputeResolution/Statistics/index.htm>

contrary evidence in the Rule Proposal, that most post-closing applications covered by the Rule Proposal would concern parties' dissatisfaction with calculations of damages in the award.

**1. The Rule Proposal Conflicts With Other
NASD Code Provisions Governing Finality of Awards**

The Rule Proposal conflicts with existing provisions of the NASD Code which promote finality. NASD Code § 12608 provides that no submissions may be made by parties after the record has closed (a point in time prior to issuance of the award):

"(a) The panel will decide when the record is closed. Once the record is closed, no further submissions will be accepted from any party.

(b) In cases in which no hearing is held, the record is presumed to be closed when the Director sends the pleadings to the panel, unless the panel requests, or agrees to accept, additional submissions from any party. If so, the record is presumed to be closed when the last such submission is due.

(c) In cases in which a hearing is held, the panel will generally close the record at the end of the last hearing session, unless the panel requests, or agrees to accept, additional submissions from any party. If so, the panel will inform the parties when the submissions are due and when the record will close." (Emphasis added.)

Similarly, NASD Code § 12609 allows the panel (not the parties unilaterally) to re-open the record, but only prior to issuance of an award: "The panel may reopen the record on its own initiative or upon motion of any party at any time before the award is rendered, unless prohibited by applicable law." (Emphasis added.) NASD Code §12904 (b) also makes clear that awards are final: "Unless the applicable law directs otherwise, all awards rendered under the Code are final and are not subject to review or appeal." (Emphasis added.) Indeed, FINRA acknowledges that "the law generally provides that the arbitrators' authority ends when the arbitrators render their decisions." (Rule Proposal, at 5)

FINRA is incorrect when it states in its justification for the Rule Proposal that "the Customer and Industry Codes do not contain deadlines for such submissions and, indeed, do not address the matter." (Rule Proposal, at 4) Under the current NASD Code, and absent some superseding court order requiring clarification of an award (see, e.g., Federal Arbitration Act, 9 U.S.C. §§ 10, 11), FINRA should not be forwarding post-award submissions to the arbitrators, even if a party disagrees with the damages. The simple answer to the alleged problem of post-award submissions is for FINRA to follow current NASD Code provisions barring such submissions.

While some post-award submissions now take place notwithstanding the clear prohibition in the NASD Code, the lack of authorization in the NASD Code for such submissions has kept this practice rare. If FINRA is concerned that its staff is put in an uncomfortable position several times a year because of dilatory post-hearing submissions, such discomfort will be multiplied by FINRA staff having to determine dozens or hundreds of times a year whether a post-hearing

submission addresses “ministerial matters” (which go to the arbitrators) or non-ministerial matters (which do not go to the arbitrators).

2. The Rule Proposal Threatens The Prompt Payment of Awards

The Rule Proposal also would undermine the finality of awards by providing parties with a means of demanding an explanation as to the calculation of damages. Indeed, since the NASD Code is deemed incorporated into every arbitration agreement between member firms and customers (NASD Code § 12101(b)), a party may argue that the Rule Proposal constitutes just such a contractual requirement that the calculation of damages be explained by arbitrators if challenged after the award by a party.

The authorization of post-hearing submissions also will create confusion as to the parties’ respective rights with regard to the award. For example, if an award were subject to challenge on the ground of miscalculation, must the member firm pay the disputed amount of the award within 30 days, or may the member firm await the arbitrators’ post-award decision (which could be up to 20 days beyond the 30 day deadline for filing submissions)? Currently, there is no lack of clarity; a member firm must pay the award within 30 days unless a motion to vacate has been filed with a court of competent jurisdiction. (NASD Code §12904(i)) It is considered a violation of the NASD Conduct Rules for a member firm or associated person to fail to pay an award when due. (NASD IM-10100(d)). With a provision in the NASD Code specifically authorizing such post-award submissions, these principles of finality will be called into question, leading to confusion and litigation as to whether an award subject to NASD Code post-award submissions requires payment in the absence of vacatur proceedings.

3. The Term “Ministerial Matters” Is Vague And Will Give Rise To Post-Award Litigation

The Rule Proposal also does not promote efficiency. The lack of any clearly limited definition of what constitutes “ministerial matters” will turn this provision into a license for all sorts of post-award submissions and related litigation.

This problem is made all the worse by the use of the words “such as miscalculation of figures” which follows the words “ministerial matters.” The structure of the provision makes clear that “miscalculation of figures” is an example of, but not a limitation on, the term “ministerial.” The language in the Rule Proposal is broader than the language in the Federal Arbitration Act, 9 U.S.C. § 11(a) which allows a court to modify or correct an award “[w]here there was an evident material miscalculation of figures” (Emphasis added.) Similarly, New York Civil Practice Law & Rules § 7509 authorizes a post-award application to arbitrators for modification of an award within 20 days after delivery of the award based upon the grounds of CPLR § 7511(c)(“miscalculation of figures”). By significantly broadening the basis upon which parties may make post-award submissions challenging the terms of an award, the Rule Proposal likely will increase post-award litigation.

Moreover, the use of a 30-day deadline in the Rule Proposal, as opposed to the FAA 3-month deadline for seeking to vacate or correct an award, will create a multitude of potential areas for post-award litigation over whether the NASD Code provisions constitute a contractual agreement which must be enforced notwithstanding the FAA. One can envision protracted court litigation where a party seeks to modify an award within the FAA 3-month deadline, and the other party invokes the 30-day NASD Code limitation for challenging “ministerial” problems in the award. We recognize that there already is litigation over whether the FAA deadlines preempt state deadlines. Adding yet another potentially conflicting contractual deadline aggravates, rather than ameliorates, the problem.

Worse yet, parties may argue that granting the right to arbitrators to determine ministerial defects in an award, including “miscalculation,” divorces the courts of authority over such issue. Years of litigation took place over whether arbitrators or courts were to determine compliance with the “eligibility” provisions of the NASD Code. That issue made its way to the U.S. Supreme Court, which ultimately determined that such issues were for the arbitrators, not the courts). Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 85, 123 S.Ct. 588, 593 (2002)(“the NASD arbitrators, comparatively more expert about the meaning of their own rule, are comparatively better able to interpret and to apply it”). While we express no opinion on how the courts would resolve the issue, given the narrow scope of the problem giving rise to the Rule Proposal, opening new avenues for post-award litigation hardly seems merited.

4. The Rule Proposal Is Contrary To Existing Law As To Arbitrator Authority

The Rule Proposal also could give rise to challenges to the arbitrators’ discretion in calculating damages. As a matter of law, arbitrators are not restricted to a particular damage calculation, and even can award relief not requested by a party. E.g., Advest, Inc. v. McCarthy, 914 F.2d 6, 10-11 (1st Cir. 1990)(“arbitrators possess latitude in crafting remedies as wide as that which they possess in deciding cases”). Moreover, arbitration awards are not subject to challenge for errors of law. Hall Street Associates, L.L.C. v. Mattel, Inc., ___ S.Ct. ___, 2008 WL 762537 (U.S.). The Rule Proposal flies in the face of this clear law by providing parties a potential contractual avenue to challenge damage calculations as a “miscalculation.”

5. It Is Against The Public Interest to Encourage Post-Award Expungement Submissions

As one of the grounds for the Proposed Rule, FINRA notes that one of the common reasons parties file for post-award relief is “to obtain expungement relief that a party failed to request during the life of the case.” (Rule Proposal, at 4) The issue of expungement is the subject of another proposed FINRA rule (SR-FINRA-2008-010). Neither current practice, nor the proposed expungement rule, provides any post-closing procedure for expungement applications. To the contrary, the proposed expungement rule requires a hearing by the arbitrators (which by definition is pre-closing of the case). If a party has failed to request expungement prior to the closing of the case (under current practice or the proposed expungement rule), that party has

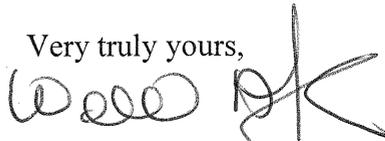
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waived its right to request such relief. FINRA should not be providing opportunities for parties to make requests for relief that they did not make prior to case closing.

Conclusion

The Rule Proposal is well-intentioned, but a cure which is far worse than the disease. We request that the SEC reject the Rule Proposal.

Very truly yours,

A handwritten signature in black ink, appearing to read "W. A. Jacobson". The signature is stylized with a large, sweeping flourish on the right side.

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