Jeffrey B. Pape*
Scott R. Shewan

* Certified Specialist by the State Bar of California Board of Legal Specialization in Taxation Law

BORN, PAPE & SHEWAN, L.L.P.
ATTORNEYS AT LAW

642 Pollasky Avenue, Suite 200
Clovis, California 93612

Timothy Born (Retired)

Telephone: (559) 299-4341
Facsimile: (559) 299-0920

April 1, 2008

Via E-Mail to rule-comments@sec.gov

Nancy M. Morris, Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-0609

Re: Proposed Rules 12905 and 13905 of the FINRA Code of Arbitration Procedure—Post-Award Submissions
SR-FINRA-2008-005

Dear Ms. Morris:

I am writing to oppose the above-referenced rule proposal concerning post-award filings in FINRA arbitrations. The rule does nothing to level the playing field for those parties who are required to take on the powerful securities industry in arbitration; rather, the rule is likely to lead to unfortunate, unintended consequences.

A significant portion of my legal practice is devoted to the representation of public investors against brokers and broker-dealers in FINRA arbitrations. I have also handled several arbitrations on behalf of individual registered representatives against broker-dealers. Accordingly, I have a great interest in the procedural rules which govern the proceedings in which my clients seek redress.

The proposed rule is a solution in search of a problem. I believe FINRA had the best of intentions in proposing this rule; however, I fear that the rule will cause more problems than it will solve. It appears that the rule is intended to provide an administrative framework for dealing with applications filed by parties after an award is issued. It seems unlikely that this situation arises that often, and FINRA tells us in its filing that the panels rarely reopen the case and grant the requested relief. The rule would prohibit post-award submissions except in narrow circumstances which are already provided by law in most jurisdictions. The rule also would prohibit all filings more than 30 days after the award has been made, absent a court order or agreement of the parties.

While the rule is couched in terms of a prohibition, my concern is that the rule codifies a procedure for filing post-award motions where no such procedure currently exists. I fear that industry respondents will see this rule as an avenue for getting a second bite at the apple when a panel awards damages to a claimant, and for seeking expungement when the award is in favor of the broker respondent.

At the root of the problem is the term "ministerial." While I acknowledge that the term is used in most statutes referring to post-award proceedings, there is simply no clear definition of the term. Is a request for expungement ministerial? If such a position could be taken with a straight face, post-award expungement requests may become the rule, rather than the exception. To make matters worse, these expungement requests would be arriving after the public customer has lost his or her case. By that time, the investor would have no incentive to even weigh in on the expungement request, and it might be treated as unopposed. The end result would be the further degradation of the CRD system, whose integrity is already in serious question.

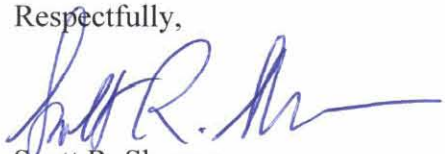
The examples provided by the rule in an effort to clarify the meaning of the term "ministerial" are unhelpful. One of the examples is the "miscalculation of figures." It is not hard to foresee regular post-award filings by industry respondents questioning the "miscalculation" of a damages award in favor of an investor. From the respondent's standpoint, this is a free second bite at the apple on the issue of damages. Similarly, in Industry Cases where the panel awards only a portion of the damages requested on a promissory note case, we can expect respondents to insist in a post-award filing that the damages were "miscalculated."

Moreover, it is unclear from the proposed rule exactly who will make the determination as to whether an issue is "ministerial." Presumably this decision will not be made by FINRA staff. As a result, we will undoubtedly see uneven application of the term "ministerial" by different panels, thereby leading to an appearance of arbitrariness in handling of post-award submissions.

These post-award filings might well have an effect on the finality of FINRA awards. When a post-award filing is made, is the award final? Can these post-award filings be used to delay payment of awards?

While well-intentioned, this rule is likely to cause significant problems while solving an insignificant problem. I urge the Commission to reject this proposed rule.

Respectfully,



Scott R. Shewan