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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. 34-57529; File No. SR-FINRA-2008-009
Proposed Rule Change to the Code of Arbitration Procedure for Customer Disputes
and the Code of Arbitration Procedure for Industry Disputes to Amend the
Chairperson Eligibility Requirements**

Dear Ms. Morris:

Thank you for the opportunity to comment on the Rule Proposal of the Financial Industry Regulatory Authority ("FINRA") to Change to the Code of Arbitration Procedure for Customer Disputes and the Code of Arbitration Procedure for Industry Disputes to Amend the Chairperson Eligibility Requirements (the "Proposed Rule").¹ 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>.

The Rule Proposal seeks to modify the factors which may be considered in determining whether an arbitrator is eligible to be Chairperson of a panel ("chair-qualified") by requiring that only arbitrators who have completed FINRA Chairperson training are eligible. We have a serious concern that the Rule Proposal further perpetuates a fragmented arbitrator selection system which is contrary to the public interest. Accordingly, we request that decision on the Rule Proposal be held in abeyance pending further study.

The changes which have taken place in FINRA arbitrator selection over the past two decades have focused by and large on expanding the pool of potential arbitrators to minimize or eliminate statistical or other biases by which a relatively small number of arbitrators appeared with great frequency on cases. FINRA implemented computerized random selection while at the same time taking steps to increase the size of the pool of arbitrators. FINRA also introduced "list

¹ While 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.

selection,” whereby separate random lists of arbitrators were generated for the two non-industry slots, and the industry slot, respectively. The move to random list selection using a larger pool of arbitrators generally was a positive step. FINRA initially gave parties an unlimited ability to strike arbitrators from the respective lists without cause, but then changed to the present system which allows limited not-for-cause strikes per list. We also view the limitation on not-for-cause strikes as a positive development.

Notwithstanding these positive developments, FINRA also has implemented a “chair-qualified” system which we do not view as positive. Under the present system, the public slots are separated into two separate lists, one for the Chairperson of the panel (consisting of public arbitrators who are “chair-qualified”) and one for the non-Chairperson public slot. A public arbitrator who is chair-qualified is included in the random selection for both public slots, although such person cannot appear on two lists in a single case. Reputable analyses have demonstrated, at a minimum, that there is substantial reason to believe that the segmentation of the selection process through the creation of a “chair-qualified” slot has the effect of creating a bias in the selection process in favor of chair-qualified arbitrators, since such persons are eligible for two lists. In short, random list selection no longer is random. *See*, Comment Letter of Scot Bernstein, <http://www.sec.gov/comments/sr-finra-2008-009/finra2008009-1.pdf>, and the authorities cited therein. The continuation of the chair-qualified slot is contrary to the reasons why FINRA introduced random arbitrator selection in the first place, which was to eliminate statistical or other biases which caused some arbitrators to be appointed more often than others.²

The allowance of not-for-cause strikes potentially exacerbates the negative effects of the chair-qualified system. Since the dawn of modern securities arbitration in 1987, conventional wisdom has been that any arbitrator who awards punitive damages or very large compensatory damages to a public investor will be stricken by the industry in future cases. Allowing not-for-cause strikes effectively eliminates such arbitrators from appointment to cases. With the fragmentation of the lists and the decrease in the randomness of selection through a chair-qualified slot, this concern is heightened. At a minimum, the chair-qualified system combined with the ability to strike arbitrators without cause creates a perception that arbitrators who grant punitive or large compensatory damages effectively are eliminated from serving on future cases, contrary to FINRA’s statement of purpose to “enhance investor confidence in the fairness and neutrality of FINRA’s arbitration forum...” (Rule Proposal, at 5)

Whether the conventional wisdom as to the use of not-for-cause strikes is statistically provable would require FINRA to make available for analysis FINRA’s arbitrator selection records (not just the Award database, which reflects only arbitrators who survived not-for-cause

² There may be a benefit to having a Chairperson of a panel who has completed FINRA Chair training (which we believe to be a completely online process). Such training, however, need not be a prerequisite to appointment as Chairperson. FINRA could simply require that persons appointed Chairperson complete the training prior to the Initial Pre-Hearing Conference (if such person has not already done so), thereby achieving the training purpose without compromising random list selection.

Ms. Nancy M. Morris

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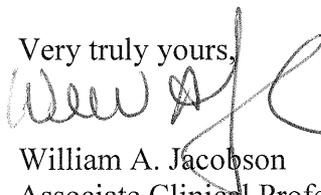
Page 3

strikes).³ With the appropriate data, it may be possible to determine whether arbitrators who award punitive or large compensatory awards are appointed to cases with less frequency due to strikes from industry parties, and whether the fragmentation of the random selection process through a chair-qualified slot exacerbates the problem. We urge FINRA voluntarily to make such data available, or if FINRA will not do so, for the SEC to require that such data be made available.

Conclusion

The implementation of any further changes in the chair-qualified selection system is unwarranted unless and until there is a proper analysis of (i) whether the chair-qualified system narrows the available pool of public arbitrators, or has other negative effects, and (ii) the effect of not-for-cause strikes.

Very truly yours,



William A. Jacobson
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³ The data could be made available without the use of arbitrator names since FINRA assigns an arbitrator number to each arbitrator.