Financial Industry Regulatory Authority

June 2, 2008

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

Re: File No. SR-FINRA-2008-009 – Proposed Rule Change Amends the Chairperson Eligibility Requirements under the Code of Arbitration Procedure for Customer Disputes and the Code of Arbitration Procedure for Industry Disputes; Response to Comments

Dear Ms. Morris:

The Financial Industry Regulatory Authority, Inc. (FINRA) (formerly known as the National Association of Securities Dealers, Inc. (NASD)) hereby responds to the comment letters received by the Securities and Exchange Commission (SEC) with respect to the above rule filing. In this rule filing, FINRA[1] is proposing to amend the chairperson eligibility requirements under the Code of Arbitration Procedure for Customer Disputes (Customer Code) and the Code of Arbitration Procedure for Industry Disputes (Industry Code) (collectively, the Codes). The proposal would amend Rules 12400(c) and 13400(c) of the Codes to ensure that all arbitrators who want to become chairs of arbitration panels must take the required chair training course. Specifically, the proposal would remove the alternative to mandatory chairperson training for arbitrators wishing to serve as chairs. Under the current alternative, arbitrators may be eligible to become chairs without the chairperson training, if they can demonstrate substantially equivalent training or experience.[2]

The SEC received five comment letters on the proposal.[3] Three oppose;[4] one reserves opinion pending further study;[5] and one offers no opinion on the proposal.[6]

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[1] Although some of the events referenced in this response to comments occurred prior to the formation of FINRA, this response refers to FINRA throughout for simplicity.

[2] *See* Securities Exchange Act Rel. No. 57529 (March 19, 2008), 73 FR 15817 (March 25, 2008) (File No. SR-FINRA-2008-009, Notice of Filing of Proposed Rule Change to Amend the Chairperson Eligibility Requirements).

[3] Comment letters were submitted by Scot Bernstein, dated April 4, 2008 ("Bernstein Letter"); William A. Jacobson, Esq., Associate Clinical Professor, Cornell University Law School, dated April 15, 2008 ("Jacobson Letter"); Laurence S. Schultz, Esq., President, Public Investors Arbitration Bar Association, dated April 16, 2008 ("PIABA Letter"); Karen Lockwood, dated May 12, 2008 ("Lockwood Letter"); and Barry D. Estell, Esq., dated May 22, 2008 ("Estell Letter").

[4] Bernstein, PIABA, and Estell Letters.

[5] Jacobson Letter.

[6] Lockwood Letter.

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The commenters who oppose the proposal argue that the amendments would narrow the pool of arbitrators who could be eligible to serve as chair by removing the "substantially equivalent training or experience" criterion (hereinafter, "substantially equivalent") from the rule.

FINRA does not believe that the proposal will narrow the pool of arbitrators who could be eligible to serve as chair. In the year since the Codes were approved,[7] the substantially equivalent criterion has proved irrelevant to creating and maintaining the chairperson roster. All arbitrators currently coded as chairpersons have completed the FINRA Chairperson Training course (chair training); FINRA has never waived the chair training for an arbitrator under the substantially equivalent criterion. Thus, this criterion has had no impact on FINRA's ability to maintain or expand the chairperson roster, and is not necessary.

The commenters who oppose the proposal also contend that by removing the substantially equivalent criterion, FINRA would be, in effect, implementing a mandatory arbitrator training requirement, which would give FINRA undue control over the arbitrators who may serve as chairs.[8]

FINRA believes that, contrary to the view of the opposing commenters, the proposal would result in less staff discretion because staff would no longer be assessing the arbitrator's prior experience or training to determine whether it was substantially equivalent to FINRA chair training. Under the proposal, arbitrators would be required to take the online chair training to become chair eligible – a requirement that is easily measured. FINRA believes this requirement would make chair eligibility determinations more objective, because staff would not have to decide whether an arbitrator's experience meets the substantially equivalent threshold. Therefore, FINRA believes that the proposed amendments to the chair eligibility standards are reasonable and, along with the rule's other criteria, will provide investors with access to well-trained and well-qualified arbitrators.

One commenter suggests that chair training should not be a prerequisite to appointment as chair.[9] The commenter suggests that FINRA could require that arbitrators, appointed as chair, complete the training prior to the initial pre-hearing conference (IPHC).[10]

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[7] *See* Securities Exchange Act Release No. 55158 (January 24, 2007); 72 FR 4574 (January 31, 2007) (File Nos. SR-NASD-2003-158 and SR-NASD-2004-011).

[8] *See* note 4.

[9] Jacobson Letter at fn.2.

[10] A pre-hearing conference is a hearing session that takes place before the hearing on the merits. Rule 12100(t) of the Customer Code and Rule 13100(t) of the Industry Code.

FINRA has considered this suggestion, but notes that it would be unworkable in its forum. Prior to creating the chairperson roster, FINRA surveyed arbitrators who were chair eligible to determine whether they were interested in being included in the chairperson roster. All arbitrators currently coded as chairpersons indicated a willingness to serve as chair on the survey. Under the commenter's suggested method, however, there could be instances in which an arbitrator is appointed as chair, but does not want to serve as the chair. In another scenario, an arbitrator may be appointed as chair, but then may refuse to take the chair training, or delay taking the training and not complete it by the time of the IPHC. In such instances, the case would be delayed while either the arbitrator is removed and another is appointed, or the IPHC is re-scheduled to give the arbitrator additional time to take the training. Moreover, this suggestion would create a significant administrative burden on staff, as staff would be required to monitor continuously the arbitrators' training reports to ensure that they have completed the chair training prior to IPHCs. For these reasons, FINRA declines to amend the proposal to implement this suggestion.

The same commenter requests access to FINRA's arbitrator selection records, beyond information publicly available from the Arbitration Awards Online database, so that he may conduct a statistical analysis of such data.[11]

FINRA's arbitrator selection records are proprietary and confidential. The arbitrator selection records are generated during the resolution of a private matter between parties and contain the parties' confidential information, such as their striking and ranking choices. FINRA does not make this information available to the public, because it could inhibit the parties' decisions during the arbitration process, which would compromise the integrity of the arbitration process. For these reasons, FINRA declines to make this information available.

Finally, four commenters object to the existence of the separate chair roster.[12] FINRA is not proposing to amend the structure of its arbitrator rosters in this rule filing. Moreover, these same concerns have been addressed by FINRA in connection with the revision of the Code of Arbitration Procedure,[13] and the changes to the arbitrator rosters were approved by the SEC.[14] These comments are, therefore, outside the scope of the rule filing.

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[11] Jacobson Letter.

[12] Bernstein, PIABA, Jacobson, and Estell Letters.

[13] *See* Response to Comments and Amendment No. 5, May 4, 2006 (File No. SR-NASD-2003-158), at 21-22; *see also* Response to Comments and Partial Amendment 7, August 15, 2006 (File No. SR-NASD-2003-158), at 8.

[14] *See supra* note 7.

If you have any questions, please contact me on (202) 728-8151 or at mignon.mclemore@finra.org.

Very truly yours,

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