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January 3, 2012

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

U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549
Attn: Elizabeth M. Murphy, Secretary

Re: File No. SR-FINRA-2011-067
Proposed Rule Change Relating to Whistleblower Claims in Arbitration

Dear Secretary Murphy:

The Securities Industry and Financial Markets Association (SIFMA),[1] through its Arbitration Committee, appreciates the opportunity to comment on FINRA's proposed rule change relating to whistleblower claims in arbitration (the "Proposal").[2] To the extent the Proposal simply aligns FINRA's rules with Dodd-Frank Act Section 922, and other federal statutes that do not require parties to arbitrate whistleblower claims, SIFMA supports the proposed change.

However, we have concerns with certain language in the Proposal. Accordingly, we recommend the following revisions to address these concerns and otherwise clarify the scope and applicability of the proposed rule changes:

1) "dispute" versus "claim." The Proposal would amend FINRA Rules 13201 and 2263 to address a "dispute arising under a whistleblower statute." We think the word "dispute" should be replaced with "claim" in every instance in new section (b) of Rule 13201 and new item (3) of Rule 2263. First, as a practical and definitional matter, there can be no "dispute" unless and until the parties join issue in an ongoing legal proceeding by disagreeing about the facts, the law, or both. A "claim," on the other hand, is the mere assertion of a right, in this case under a

[1] SIFMA brings together the shared interests of hundreds of securities firms, banks and asset managers. SIFMA's mission is to support a strong financial industry, investor opportunity, capital formation, job creation and economic growth, while building trust and confidence in the financial markets. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association. For more information, visit www.sifma.org.

[2] Notice of Filing of Proposed Rule Change Relating to Whistleblower Claims in Arbitration (Dec. 6, 2011), Release No. 34-65896; File No. SR-FINRA-2011-067, available at http://www.gpo.gov/fdsys/pkg/FR-2011-12-12/pdf/2011-31761.pdf.

statute. Thus, in this context, what we really mean is a claim (and not necessarily a dispute) under the relevant whistleblower statute.[3]

Second, by using the term "dispute," there is a risk, and thus a concern, that a party could raise a whistleblower retaliation defense or otherwise assert some counterclaim under a whistleblower statute in an effort to improperly remove the *entire* case (i.e., dispute) from arbitration. The Proposal should clarify that it applies only to a bona fide whistleblower *claim*, that such a claim may be severed and removed from securities arbitration, and by doing so, the Proposal is not intended to, and does not in fact, allow parties to avoid arbitrating other claims in the case that are properly subject to securities arbitration. Replacing "dispute" with "claim" would help provide necessary clarity and certainty on this point.

2) federal versus state whistleblower claims. As currently drafted, the proposed rule would seemingly apply to all whistleblower statutes, both federal and *state* (if any) that carve-out whistleblower claims from arbitration. The Federal Arbitration Act ("FAA"), however, generally preempts state statutes that invalidate arbitration agreements[4] and thus, would generally preempt state statutes (if any) that remove whistleblower claims from arbitration. As a result, the Proposal, as currently drafted, could be read to expand upon U.S. Supreme Court jurisprudence and current law, and frustrate federal preemption under the FAA. The Proposal should be amended to clarify that such is not the purpose or intent. Accordingly, we recommend inserting the word "federal" before "whistleblower statute" in new section (b) of Rule 13201 and new item (3) of Rule 2263 to clarify that the rule's application is limited to *federal* whistleblower claims which are not subject to arbitration.

3) effective date. We recommend that the Proposal include an effective date. As you know, the U.S. Supreme Court, and U.S. jurisprudence generally,[5] have a long-standing presumption against retroactive rules as they can lead to unjust results. Moreover, the Dodd-Frank statute that underpins this particular rule change does not provide for retroactive application of this particular rule. Accordingly, we recommend that the Proposal be amended to clarify that the proposed rule changes do not apply retroactively, but have only prospective effect.

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[3] We recognize that Dodd-Frank Section 922 uses the term "dispute," as in "[n]o predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a ***dispute*** arising under this section" [emphasis added]. As discussed above, however, such is not the best or most precise term to use in this context.

[4] *See, e.g.*, 9 U.S. C. § 2; *Allied-Bruce Terminex Cos., Inc. v. Dobson*, 513 U.S. 265, 272 (1995), *citing Southland Corp.*, 465 U.S. 1, 15-16 (1984).

[5] *See, e.g.*, *Sacks v. SEC*, No. 07-74647 (9th Cir. Filed Feb. 22, 2011), available at http://www.ca9.uscourts.gov/datastore/opinions/2011/02/22/07-74647.pdf.

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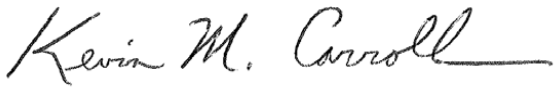
Thank you for giving SIFMA the opportunity to comment on the Proposal. If you have any questions regarding this comment or any related issues, please contact the undersigned SIFMA staff advisor to the Arbitration Committee, Kevin Carroll, at 202.962.7382 or kcarroll@sifma.org.

Sincerely,



Kevin M. Carroll
Managing Director and
Associate General Counsel

cc: Linda D. Fienberg, President, FINRA Dispute Resolution
George H. Friedman, Executive Vice President, FINRA Dispute Resolution
Robert W. Cook, Director, Division of Trading and Markets, SEC