FINRA
Financial Industry Regulatory Authority

September 30, 2014

Brent J. Fields
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090

Re: File No. SR-FINRA-2014-028 – Proposed Rule Change Relating to Revisions to the Definitions of Non-Public Arbitrator and Public Arbitrator; Response to Comments

Dear Mr. Fields:

The Financial Industry Regulatory Authority, Inc. ("FINRA") 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 is proposing to amend the Customer and Industry Codes of Arbitration Procedure to refine and reorganize the definitions of "non-public" and "public" arbitrator. The amendments would, among other matters, provide that persons who worked in the financial industry for any duration during their careers would always be classified as non-public arbitrators, and persons who represent investors or the financial industry as a significant part of their business would also be classified as non-public, but could become public arbitrators after a cooling-off period. The amendments would reorganize the definitions to make it easier for arbitrator applicants and parties, among others, to determine the correct arbitrator classification.[1]

The SEC received 22 comment letters on the proposed rule change.[2] Five commenters,

[1] See Securities Exchange Act Rel. No. 72491 (June 27, 2014), 79 FR 38080 (July 3, 2014) (File No. SR-FINRA-2014-028).

[2] The SEC received 22 comment letters on the proposed rule change, 21 of which were unique letters, and one of which, designated by the SEC as the "Type A" letter, was submitted on behalf of 295 independent financial advisors ("independent financial advisors"). The unique letters were submitted by: Philip M. Aidikoff, Aidikoff, Uhl and Bakhtiari, dated July 1, 2014 ("Aidikoff"); Steven B. Caruso, Esq., Maddox Hargett & Caruso, P.C., dated July 1, 2014 ("Caruso"); Ryan K. Bakhtiari, Aidikoff, Uhl and Bakhtiari, dated July 2, 2014 ("Bakhtiari"); Richard A. Stephens, Esq., dated July 6, 2014 ("Stephens"); Daniel E. Bacine, Barrack, Rodos & Bacine, dated July 18, 2014 ("Bacine"); Blossom Nicinski, dated July 20, 2014 ("Nicinski"); Christopher Mass, dated July 21, 2014 ("Mass"); Glenn S. Gitomer, McCausland Keen & Buckman, dated July 23, 2014 ("Gitomer"); Kevin M. Carroll, Managing Director and Associate General Counsel, Securities Industry and Financial Markets Association ("SIFMA"), dated July 24, 2014 ("SIFMA"); J. Burton LeBlanc, President, American Association for Justice ("AAJ"), dated July 24, 2014 ("AAJ"); George H. Friedman, George H. Friedman Consulting, dated July 24, 2014 ("Friedman"); Andrea Seidt, President, North American Securities Administrators Association ("NASAA"), Ohio Securities Commissioner, dated July 24, 2014 ("NASAA"); CJ Croll, Student Intern, Elissa Germaine, Supervising Attorney, and Jill I. Gross, Director, Investor Rights Clinic at Pace Law School ("Pace"), dated July 24, 2014 ("Pace"); Jason Doss, President,

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representing both investor and industry interests in the forum, support the proposed rule change in its entirety.[3] Investor advocate Gitomer states, for example, that the proposal "broadens the pool of qualified arbitrators, enhances the perception of neutrality and fairness of the FINRA arbitration forum, and includes, in the non-public pool, candidates of diverse backgrounds worthy of careful consideration in the arbitrator selection process." Industry advocate SIFMA states that the proposal should "help address and improve perceptions of fairness of the forum including among claimants, respondents, regulators, and third-party observers of the forum." Three commenters oppose the proposed rule change in its entirety.[4] The remaining commenters support the proposed rule change in part and/or raise concerns about aspects of the amendments. The following is FINRA's response, by topic, to the commenters' concerns.

Permanent Classification of Industry Employees as Non-public

Currently, FINRA classifies persons who are, or were, associated with the industry as non-public arbitrators. However, FINRA permits these persons to serve as public arbitrators five years after they leave the industry, provided they have not retired from, or spent a substantial part of their careers in the industry.[5] Investor advocates raised concerns about the neutrality of the public arbitrator roster because they believe that these persons should not serve as public arbitrators. To address this concern, FINRA proposed eliminating the five-year cooling-off period, thereby providing that FINRA would classify persons who worked in the industry, at *any* point in their careers, for *any* duration, as non-public. Once classified as non-public, FINRA would not reclassify them as public.

AAJ, NASAA, PIABA, SIFMA,[6] and most of the investor advocates[7] who submitted comments, support the permanent classification of industry employees as non-public. Bakhtiari states that "the rule will be a substantial step towards ensuring that "Public" means "Public." SIFMA states that the proposal "would address criticism from claimants' [investors'] lawyers that some arbitrators presently classified as public have past ties to the industry and thus, could show bias in favor of the industry."

Public Investors Arbitration Bar Association ("PIABA"), dated July 24, 2014 ("PIABA"); David T. Bellaire, Executive Vice President & General Counsel, Financial Services Institute ("FSI"), dated July 24, 2014 ("FSI"); Richard P. Ryder, President, Securities Arbitration Commentator, Inc. dated July 24, 2014 ("SAC"); Gary N. Hardiman, dated July 24,2014 ("Hardiman"); Thomas Berthel, CEO Berthel Fisher & Company, dated July 24, 2014 ("Berthel"); Robert Getman, dated July 28, 2014 ("Getman"); Barry D. Estell, dated August 13, 2014 ("Estell"); and Walter N. Vernon III, dated August 21, 2014 ("Vernon").

[3] See the Aidikoff, Caruso, Bakhtiari, Gitomer, and SIFMA letters.

[4] See the Friedman, Ryder, and Estell letters. The Estell letter requests that the SEC require FINRA to make arbitrator disclosure reports public. The request is outside the scope of the proposed rule change. Therefore, FINRA declines to address it at this time.

[5] See current FINRA Rules 12100(p)(1) and (p)(2) and 13100(p)(1) and (p)(2).

[6] SIFMA conditioned its support for eliminating the cooling-off period on the SEC also approving the proposal to classify persons who represent investors as a significant part of their business as non-public arbitrators.

[7] See the Aidikoff, Caruso, Bakhtiari, Gitomer, and Stephens letters.

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Several commenters oppose the permanent classification of industry employees as non-public.[8] FSI, the independent financial advisors, and Berthel assert that public arbitrators who have some industry experience benefit the arbitration process because they can educate the other public arbitrators on a panel about industry practices and procedures. Pace recommends that FINRA adopt a proportional cooling-off period, with industry employees waiting one year for each year of industry employment before FINRA permits them to join the public arbitrator roster. Friedman suggests that FINRA ban persons with industry experience from arbitrator service at some point after they end their industry involvement. Vernon suggests that FINRA include a de minimis exception to the permanent non-public arbitrator classification. Finally, FSI, the independent financial advisors, and Getman believe the proposal would create an asymmetry in application of the arbitration rules.

Over the years, investor advocates have told FINRA that they do not want arbitrators with industry experience advising the other arbitrators on the panel. They have stated a clear preference for using expert witnesses and for making their own arguments to the arbitrators about industry practices and procedures. Moreover, they have told FINRA that they are not using expert witnesses more often than they did before FINRA amended its rules to allow parties to select an all public arbitration panel. For these reasons, FINRA declines to amend the proposed rule change.

FINRA recognizes that some investor advocates want an arbitrator with industry experience on the panel. FINRA award data for January through August 2014 show that some investor attorneys are choosing non-public arbitrators in customer cases. During this period, all public panels decided 84 cases, and mixed panels of public and non-public arbitrators decided 71 cases. FINRA staff believes that the proposal, as filed, provides flexibility for all forum users. Investor attorneys who do not want arbitrators with industry experience on their panel can strike them from the list of non-public arbitrators that FINRA sends them, and investor attorneys who want an arbitrator with some industry experience on their panel can rank them.[9] FINRA staff believes that if the SEC approves the proposed rule change, investor attorneys will carefully review the backgrounds of the arbitrators on the non-public list and will consider the qualifications of each arbitrator to determine which, if any, to strike. Therefore, FINRA declines to amend the proposed rule change.

FINRA staff does not believe that the Pace proposal to adopt a proportional cooling-off period is viable. It also does not support a de minimis exception as suggested by Vernon. FINRA held several discussions with forum constituents who did not reach a consensus on a cooling-off period or on a de minimis exception. Under a proportional approach, a person who worked for 19 years in the industry could qualify to serve as a public arbitrator after waiting 19 years. Although rare, this scenario is possible in the case of a new retiree with industry and non-industry experience who applies to become a FINRA arbitrator. Allowing a person with 19 years of industry experience to become a public arbitrator would not alleviate the perceptions of investors or their attorneys about industry bias. FINRA constituents agreed that a cooling-off period for industry

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[8] See the FSI, independent financial advisors, Friedman, Ryder, Pace, Getman, Estell and Vernon letters.

[9] Under FINRA Rule 12403 relating to panel selection in customer cases with three arbitrators, FINRA cannot guarantee that it will appoint a non-public arbitrator to a case. If a customer ranks non-public arbitrators on the list, but the parties collectively strike all of them, or a non-public arbitrator they select is not available to serve and there aren't any ranked non-public arbitrators left on the list, FINRA will appoint a public arbitrator to the case. However, if the parties agree that they want a non-public arbitrator on the panel, they can ask FINRA to send a supplemental list of non-public arbitrators for their review, and FINRA will accommodate the request.

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employees would always leave a perception of unfairness for some advocates. Further, the proposed bright-line test for classification as a public arbitrator is easily understood and more efficient for staff, parties, and arbitrator applicants. Therefore, FINRA declines to amend the proposed rule change.

Friedman suggests that FINRA ban persons with industry experience from arbitrator service at some point after they end their industry involvement. FINRA staff believes that former industry employees have valuable knowledge and experience and that removing them from arbitrator service would not benefit forum users. Any party in a customer case may strike any or all of the arbitrators on the non-public list if the party determines that an arbitrator is too far removed from the industry. In the case of an intra-industry dispute, parties may exercise their limited strikes if they do not want a particular arbitrator to serve on a case. Therefore, FINRA declines to amend the proposed rule change.

Finally, FSI, the independent financial advisors, and Getman raised a concern that the proposal to classify industry employees permanently as non-public would create an asymmetry in application of the arbitration rules since FINRA is proposing to allow investor attorneys to return to the public roster five years after they stop representing investors. FINRA respectfully disagrees with this assertion. The permanent classification as non-public would apply only to those individuals who worked in the industry, not to those who provide services to the industry.[10] The proposed rule change provides a five-year cooling-off period for both investor attorneys and industry attorneys, among others, who provide services to parties in disputes concerning investment accounts or transactions,[11] and it provides a five-year cooling-off period for industry attorneys, and others, who provide any services to industry entities and employees.[12] Thus, the proposed rule assures parallel treatment for those who represent the industry and those who represent investors. In addition, individuals who provide services either to investors or the industry would remain on the non-public roster if they provide those services for 15 or more years.[13]

Classifying Investor Representatives as Non-Public

Currently, attorneys and other professionals who regularly represent or provide services to investors in disputes concerning investment accounts or transactions may serve as public arbitrators. Industry constituents raised concerns about the neutrality of the public arbitrator roster because they believe that these persons should not serve as public arbitrators. To address this concern, FINRA proposed removing these persons from the public arbitrator roster, and reclassifying them as non-public arbitrators.

SIFMA, FSI, the independent investment advisors, and several individual commenters support the proposed amendment.[14] FSI states that the proposal "makes significant progress in

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[10] See proposed FINRA Rules 12100 (p)(1) and 13100 (p)(1).

[11] See proposed FINRA Rules 12100 (p)(3) and 13100 (p)(3).

[12] See proposed FINRA Rules 12100 (p)(2) and 13100 (p)(2).

[13] See proposed FINRA Rules 12100 (u)(2) and 13100 (u)(2), and proposed FINRA Rules 12100 (u)(3) and 13100 (u)(32).

[14] See the Aidikoff, Caruso, Bakhtiari, Gitomer, and Berthel letters.

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returning the perception of fairness and neutrality to the arbitration process." The independent investment advisors call the proposal "a welcome and important change to restore balance to the classification of these individuals."

NASAA, PIABA, Pace, and several individual commenters oppose reclassifying persons who regularly represent or provide services to investors in securities disputes as non-public,[15] with some commenters asserting that FINRA has not demonstrated a need for the proposed amendment.[16] NASAA, for example, states that persons "who help retail investors recoup their losses and redress perceived wrongdoings of the industry should not be lumped in with industry representatives and classified as non-public. These individuals provide a distinctly public perspective to arbitration claims and should be allowed to serve on panels as public arbitrators, as has always been the case." Friedman suggests that FINRA adopt a classification system with two categories of arbitrators – those affiliated with the securities industry, and those not affiliated with the industry. Under Friedman's approach, FINRA would ban all other persons from serving in any capacity. Friedman also raised a concern that industry parties would not want these persons included on the non-public roster. Pace believes that FINRA should define a non-public arbitrator as an "industry-funded" arbitrator. Finally, Nicinski suggests that FINRA stop classifying arbitrators altogether.[17]

As stated in the rule filing, FINRA has amended its arbitrator definitions several times over the years to address constituent perceptions of fairness, enhancing user confidence in the arbitration forum. FINRA believes that it has received sufficient feedback from industry constituents relating to industry perceptions about the neutrality of the public arbitrator roster to warrant removing from the public roster persons who provide services to investors in disputes concerning investment accounts or transactions. While FINRA believes it must address the industry's perception, given these persons' experience and knowledge, FINRA staff continues to believe that forum users would benefit by allowing them to serve as arbitrators in some capacity. To date, FINRA has limited the non-public roster to persons who have worked in the industry, or have provided services to industry firms and employees. FINRA is proposing to expand the scope of the non-public roster to include persons who provide services to investors in disputes concerning investment accounts, because in the course of regularly representing investors in securities disputes, these individuals gain substantial knowledge about the financial industry. This knowledge would be established by the rule's qualifying requirement that these persons devote 20 percent or more of their professional time to representing or providing services to parties in disputes concerning investment accounts or transactions. Moreover, as we explain in more detail later in this letter, the proposal would not affect a significant number of arbitrators. FINRA estimates that approximately 100 arbitrators (out of 3,567 public arbitrators) would be reclassified as non-public as a result of this provision. Finally, in their comment letters, SIFMA, FSI, and the independent financial advisors do not express any opposition to reclassifying these individuals as non-public. Therefore, FINRA declines to amend the proposed rule change.

In FINRA's most recent discussions with the National Arbitration and Mediation Committee (NAMC) and other forum constituents on the arbitrator definitions, we encouraged interested persons to raise their concerns about the definitions and to make suggestions on how to improve

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[15] See the Friedman, Ryder, Stephens, Bacine, Hardiman, and Mass letters.

[16] See the Stephens, PIABA, Hardiman, and Pace letters.

[17] Nicinski also requests that FINRA review arbitrators periodically for fitness. As this comment is outside the scope of the proposed rule change, FINRA declines to respond to the suggestion at this time.

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them. During this series of discussions, the NAMC did not suggest that FINRA eliminate arbitrator classifications altogether as suggested by Nicinski, or remove additional classes of arbitrators from service as suggested by Friedman. In addition, in light of the positive feedback that FINRA received on the rule amendments that ensure that any party may select an all public arbitration panel, FINRA does not believe that eliminating arbitrator classifications is a good approach to panel selection. Since the selection lists are populated randomly, eliminating classifications could lead to investors with a choice of only non-public arbitrators in a particular case. This clearly would be unacceptable to investors and would undermine many of FINRA's recent changes to the arbitrator selection rules. Therefore, FINRA declines to amend the proposed rule change.

Impact of the Proposed Rule Change on the Number of Public Arbitrators

Friedman, Ryder, NASAA, and FSI expressed concerns about whether FINRA would have enough public arbitrators on its roster to meet the demands on the forum if the SEC approves the proposed rule change. Friedman and Ryder requested a cost-benefit analysis of the proposal on the public arbitrator roster.[18] Ryder suggests that the analysis be location specific. He points out, for example, that FINRA's arbitrator roster in Puerto Rico is small and there has been a recent surge in arbitration case filings in Puerto Rico relating to bond fund disputes. NASAA believes that FINRA may need to expend additional resources to recruit new public arbitrators, and suggested that FINRA advertise in AARP publications and American Arbitration Association newsletters or consider presenting and/or exhibiting at the American Bar Association ("ABA") annual meeting.

FINRA agrees that a cost-benefit analysis is helpful and conducted a review of its public roster. However, the only way to determine the exact number of public arbitrators who would be affected by the proposed rule change would be to survey every arbitrator on the public roster. If the SEC approves the proposed rule change, FINRA will conduct such a survey. As an interim step, FINRA staff conducted a review of the public arbitrator roster to estimate the number of arbitrators who might be reclassified as non-public under the proposed rule change. In connection with the proposal to classify persons who worked in the financial industry permanently as non-public, a search of the arbitrator database revealed that 374 public arbitrators out of 3,567 (approximately 10 percent) had a Central Registration Depository® (CRD®) number at some point in their careers, or listed an affiliation with a firm that had a CRD number.[19] The CRD number tends to indicate that FINRA would reclassify the arbitrator as non-public under the proposed rule change. Regarding the proposal to reclassify investor attorneys as non-public, a search of the arbitrator database for an affiliation with PIABA, which would indicate that an attorney likely identifies as an investor advocate, revealed that the proposal might impact approximately 100 public arbitrators.

FINRA is confident that it has enough public arbitrators to meet user demand on the forum. FINRA Dispute Resolution's Neutral Management team devotes significant resources to recruiting new arbitrators for the public arbitrator roster. For example, FINRA has advertised with AARP and the ABA, among others, and has exhibited at AARP and ABA meetings, also among others.

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[18] Friedman also suggests that FINRA analyze the impact of eliminating predispute arbitration agreements. This suggestion is outside the scope of the proposed rule. Therefore, FINRA declines to respond to the suggestion at this time.

[19] CRD is the central licensing and registration system for the U.S. securities industry and its regulators. It contains the registration records of more than 6,800 registered broker-dealers and the qualification, employment, and disclosure histories of more than 660,000 active registered individuals.

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FINRA has taken a proactive approach to ensuring that there are a sufficient number of arbitrators to handle its immediate needs. As just one example, in the case of the Puerto Rican bond fund disputes, FINRA staff conducted recruitment activities in Puerto Rico and also asked arbitrators in hearing locations in the Southeast Region[20] and Texas if they would be willing to serve in Puerto Rico. As a result of these efforts, as of August 2014, FINRA has increased the number of arbitrators who have agreed to hear cases in San Juan from approximately 70 to over 800, including many from San Juan. Finally, FINRA recently filed for SEC approval to increase the arbitrator honoraria.[21] If the SEC approves the proposed rule change, FINRA believes that it will help FINRA to recruit new public arbitrators.

Cooling-off Period for Professionals Who Represent the Industry

NASAA opposes the five-year cooling-off period for persons who represent the financial industry as a significant part of their business, stating that "the same logic that applies to industry employment should apply to industry affiliation." As stated above, FINRA has drawn a distinction between persons who work in the financial industry and persons who provide services to the industry; to ensure fairness to all forum users, FINRA believes that it must take a consistent approach to applying its cooling-off periods. Therefore, FINRA would apply a five-year cooling-off period for all attorneys, accountants, expert witnesses and other professionals who devote a significant amount of their professional time to providing services to parties in disputes concerning investment accounts or transactions, or employment relationships, regardless of whether the representation is for investor or industry parties. Therefore, FINRA declines to amend the proposed rule change.

Suggested Replacement text for FINRA Rules 12100 (p) and 13100 (p)

PIABA asserts that "there are additional categories of individuals with substantial ties to the securities industry who would still escape the proposed "non-public" definition and be allowed to be classified as "public" despite having close ties to the financial services industry." PIABA suggests that FINRA replace proposed Rules 12100 (p) and 13100 (p) with the following text:

> "1. any persons who engaged in, or who were employed by, or who were affiliated with, any business that directly, or indirectly through affiliates, offered or sold securities, public or private, including but not limited to stocks, bonds, mutual funds, hedge funds, limited partnerships, tenant in common investments, real estate debt or equity investments, debt or equity instruments of any nature, or any other type of investment that was offered, sold or syndicated to individual or institutional investors.
> 2. Persons who served as attorneys, accountants or otherwise provided other professional consulting services of any nature to any of the persons described in Paragraph 1 above."

FINRA staff believes that PIABA's proposed definition is vague and does not provide the specificity needed to ensure that FINRA staff, arbitrators, parties, and other interested persons understand how to classify an individual. Moreover, FINRA believes that most of the persons described in

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[20] The Southeast Region includes Atlanta, GA; Baltimore, MD; Birmingham, AL; Boca Raton, FL; Charlotte, NC; Columbia, SC; Jackson, MS; Jacksonville, FL; Little Rock, AR; Memphis, TN; Miami, FL; Nashville, TN; New Orleans, LA; Norfolk, VA; Orlando, FL; Raleigh, NC; Richmond, VA; San Juan, PR; Tampa, FL; Washington, DC; and Wilmington, DE.

[21] See SR-FINRA-2014-026.

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PIABA's definition would be classified as non-public under the proposed rule change. One significant difference between PIABA's suggested text and the proposed rule change is that it appears that PIABA would permanently classify as non-public attorneys, accountants and other professionals who devote any of their professional time (as opposed to the 20 percent in the proposed rule change)[22] to serving industry entities and persons. As explained above, FINRA does not believe that persons who provide services to the industry should be permanently classified as non-public and has made a consistent distinction between those who are employed in the industry and those who provide services to the industry or to parties in investment disputes. FINRA believes that fairness requires it to propose a uniform five-year cooling-off period for both industry and investor representatives. Under the proposed rule change, FINRA would permanently classify as non-public only those persons who provide services to the industry for a substantial period of time – defined as 15 or more years. For the reasons stated, FINRA declines to amend the proposed rule change.

Clerical and Ministerial Industry Employees

Stephens asked FINRA to clarify that the non-public arbitrator definition does not include "clerical and ministerial" industry employees and Vernon suggests that it be restricted to persons "who worked in a capacity for which testing and registration is required." Clerical and/or ministerial industry employees rarely apply to serve as arbitrators at the forum. However, if FINRA receives an application from a clerical or ministerial industry employee, and the applicant meets the qualifications to serve as a FINRA arbitrator, FINRA would classify the arbitrator as non-public. FINRA staff believes that investor concerns about the neutrality of the public arbitrator roster apply to all industry employees, including non-registered employees and others who serve in clerical and ministerial positions. Therefore, FINRA does not believe it would be appropriate to exclude these individuals from the non-public roster. For these reasons, FINRA declines to amend the proposed rule change.

Chairperson Eligibility in Customer Cases

Stephens and Bacine raised concerns about the proposed reclassifications to the non-public roster because the reclassified arbitrators would no longer be permitted to serve as chairpersons on customer arbitration cases. Bacine requested that FINRA amend the proposed rule change to allow arbitrators with investor relationships to serve as chairpersons in customer cases. Throughout the proposed rule change, FINRA has sought to provide parallel treatment to those who represent the industry and those who represent investors. Allowing non-public arbitrators who provide services to investors to serve as chair persons in customer cases would nullify this effort. In addition, the suggestion would require FINRA to amend the arbitrator selection rules and would add complexity to the arbitrator selection process. It would also require significant programming changes to FINRA's computer systems. For these reasons, FINRA declines to amend the proposed rule change.

[22] Proposed Rules 12100(p)(2) and 13100(p)(2) provide that FINRA would classify as non-public an attorney, accountant, or other professional who has, within the past five years, devoted 20 percent or more of his or her professional time to industry entities and employees.

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Use of the Term "Professional Time"

Under the proposed rule change, FINRA uses the term "professional time," as opposed to the term "professional work," in provisions relating to specified professional services because FINRA believes that time would be more easily quantified by professionals applying to serve as arbitrators, and by arbitrators checking their business mix periodically to determine whether their current classification is appropriate.[23] Pace opposes the use of the term "professional time" and requests that FINRA use the term "professional work," tying the calculation into firm revenue. Pace states that since a non-public arbitrator should be a person whose professional activities "are funded in whole or in part by the industry" the proper measure of work is annual revenue. During the discussions FINRA held with the NAMC on the arbitrator definitions, Committee members considered a revenue calculation as it is part of the current public arbitrator definition, and discussed specifically whether to change the term work to time. Attorneys routinely record and calculate their work on an hourly basis, not on a revenue basis. Thus, the NAMC determined that it was best to change the calculation to time because the term time added clarity to the rule text, was simpler to apply, and would result in more accurate calculations by arbitrator applicants and arbitrators reviewing their business mix. Therefore, FINRA declines to amend the proposed rule change.

Arbitrator Qualifications

Berthel states that every panel should have panel members that have a strong background in securities rules and law and that the chair should be a judge or hold a law degree. As FINRA is not proposing to amend the rules relating to arbitrator qualifications, the comment is outside the scope of the proposed rule change. However, FINRA Rules 12400(c) and 13400(c) currently provide that, to be eligible for the chairperson roster, an arbitrator must have a law degree and be admitted to the bar in at least one jurisdiction, and have served on at least two arbitrations in which a hearing was held. In the alternative, the arbitrator must have served as an arbitrator through award on at least three arbitrations. Moreover, more than 75 percent of the public chair-qualified arbitrators are attorneys. FINRA believes that the qualifications are sufficient as they currently stand. Therefore, FINRA declines to amend the proposed rule change.

Dispute Resolution Task Force

In July 2014, FINRA formed a new Dispute Resolution Task Force to consider possible enhancements to its arbitration forum to improve the transparency, impartiality and efficiency of FINRA's securities arbitration forum for all participants. Friedman suggested that the Task Force review the proposed rule change. The proposed rule change is the culmination of FINRA's comprehensive review of the arbitrator definitions. As stated in its rule filing, FINRA met with the NAMC and interested groups several times to discuss the definitions. FINRA believes that the proposed rule change reflects a balanced approach on classifying arbitrators that will enhance forum users' perceptions of fairness of the forum. Therefore, FINRA does not believe it would be in the best interest of forum users to delay action on the proposed rule change and requests that the SEC reject the suggestion.

[23] See proposed FINRA Rules 12100 (p)(2) – (3), (u)(2) – (3) and (u)(6) – (7), and FINRA Rules 13100 (p)(2) – (3), (u)(2) – (3) and (u)(6).

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Conclusion

FINRA believes that the proposed rule change addresses concerns raised about the fairness and neutrality of FINRA's public arbitrator roster. If the SEC approves the proposed rule change, FINRA will assess the effect of the amendments. First, staff will determine how many public arbitrators were reclassified as non-public in each location, and will concentrate its recruitment efforts on hearing locations that appear to need additional public arbitrators. Second, FINRA will continue to solicit feedback from the NAMC and other forum constituents relating to their perceptions of arbitrator neutrality. For the reasons stated above, FINRA requests that the SEC approve the proposed rule change as filed.

If you have any questions, please contact me by telephone at (212) 858-4481 or by email at margo.hassan@finra.org.

Very truly yours,

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