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December 3, 2010

VIA E-MAIL To: rule-comments@sec.gov
Ms. Elizabeth M. Murphy, Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549

Re: DF Title IX - Pre-Dispute Arbitration

Dear Ms. Murphy:

I thank the Commission for this opportunity to comment on pre-dispute arbitration clauses in furtherance of its review of such clauses pursuant to section 921 of the Dodd- Frank Wall Street Reform and Consumer Protection Act.

My law firm concentrates its practice on securities arbitration and litigation, representing customers who are the victims of negligence, fraud or other claims involving investments. I have been practicing securities law since 1988.

I request that the Commission further rulemaking that would eliminate pre-dispute arbitration agreements between retail customers and brokerdealers and their associated persons, but otherwise preserve the status quo with regard to a retail customer's ability to compel arbitration pursuant to current FINRA rules.

In sum, I request that customers be given the choice to pursue their claims in either court or arbitration after a dispute arises. We believe this can be done by either the Commission or FINRA enacting a rule or issuing an interpretive memo indicating that it is inconsistent with the just and equitable principles of trade for a member to include a pre-dispute arbitration clause in account opening agreements with retail customers, to condition opening or maintaining an account on behalf of a retail customer on the acceptance of a predispute arbitration agreement, or to enforce any existing pre-dispute arbitration agreements between retail customers and member firms.

THE HISTORY OF CUSTOMER CHOICE

The Landscape Pre-McMahon

The Federal Arbitration Act ("FAA") provides that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." The FAA "was designed to "allow parties to avoid 'the costliness and delays of litigation,' and to place arbitration agreements 'upon the same footing as other contracts.'" From the enactment of the FAA in 1925 until the Supreme Court's decision in *Wilko v. Swan* in 1953, pre-dispute arbitration clauses were given full effect in the securities industry.

However, *Wilko* effectively changed the face of securities arbitration. In that case, the Supreme Court held that claims brought by investors under the Securities Act of 1933 (the "'33 Act") could not be referred to arbitration through the use of pre-dispute arbitration clauses. In reaching this conclusion, the Court cited several flaws in the arbitration process, which included concern for the ability of arbitrators to decide legal issues, limited judicial review of arbitral decisions, and the circumvention of the anti-waiver provision in the '33 Act. Following *Wilko*, arbitration of claims brought under the '33 Act was strictly voluntary. During the years after *Wilko,* courts interpreted the Supreme Court's decision as also applicable to claims brought under the Securities Exchange Act of 1934 (the "'34 Act"). Moreover, in 1979, the Commission issued a release to brokerage firms advising them that "[r]equiring the signing of an arbitration agreement without adequate disclosure as to its meaning and effect violates standards of fair dealing with customers and constitutes conduct that is inconsistent with just and equitable principles of trade."

In 1983, Exchange Act Rule 15c2-2, "Disclosure Regarding Recourse to the Courts Notwithstanding Arbitration Clauses in Broker-Dealer Customer Agreements" was adopted "in order to address regulatory concerns arising from the inclusion in standard form customer agreements of pre-dispute arbitration clauses (i.e., agreements requiring customers to submit to arbitration all future disputes.)." Thus, two layers of protection existed after *Wilko*: pre-dispute arbitration clauses would not be enforced by the courts as to federal securities law claims, and if a firm did include a pre-dispute arbitration clause, it had the duty of fully disclosing the clause to the customer prior to the customer signing the agreement.

Because *Wilko* affected claims brought under the federal securities laws but not state law claims, an issue arose as to whether cases containing both federal and state law claims should be heard together in court or be bifurcated with the state law claim being referred to arbitration. Until 1985, courts were generally split, with some requiring the claims to be tried together and others bifurcating the claims by referring the state law claims to arbitration. In 1985, the Supreme Court decided *Dean Witter Reynolds, Inc. v. Byrd.* In that case, a customer brought suit in federal district court alleging violations of both state and federal securities laws by his broker-dealer. The broker-dealer moved to compel arbitration of the state law claims, which was denied by the district court and subsequently affirmed on appeal. The Supreme Court granted certiorari and overturned the appellate court's decision. Although the Court recognized the issue of intertwining, and the effects it could have on a case, namely "arbitration of an 'intertwined' state claim might precede the federal proceeding and the factfinding done by the arbitrator might thereby bind the federal court through collateral estoppel" and that there may be "redundant efforts to litigate the same factual questions twice," the Court held that "the Arbitration Act requires district courts to compel arbitration of pendent arbitrable claims when one of the parties files a motion to compel, even where the result would be the possibly inefficient maintenance of separate proceedings in different forums." Hence, *Byrd* affirmed the validity of arbitration clauses as to state law claims, and in some cases, customers were forced to either pursue their claims in two forums, or to forego certain aspects of their claims.

In 1968, FINRA (then NASD) adopted the Code of Arbitration Procedure. Section 12 of the Code was entitled "Required Submission" and provided that, upon the demand of a customer, a member and associated person was required to submit any dispute, claim, or controversy to arbitration. Today this rule exists in substantially similar form as FINRA Rule 12200. Although brokerage firms were not permitted to enforce pre-dispute arbitration agreements with respect to federal securities law claims pursuant to *Wilko*, pursuant to FINRA rules, customers were able to compel brokerage firms to arbitrate any claims. From 1968 through today, in the absence of a pre-dispute arbitration agreement, customers have had the option of choosing either court or arbitration to resolve their claims, and firms have no say in the choice.

Erosion of Customer Choice with McMahon

In 1987, the Supreme Court decided *Shearson/American Express v. McMahon*[16], which revisited the issue of whether pre-dispute arbitration clauses were enforceable pursuant to investor claims under the '34 Act. The Court effectively reversed decades of precedent that prohibited the enforcement of predispute arbitration clauses in claims brought under the '34 Act and cited the increasing prevalence of arbitration in the securities industry as its basis. The Court also addressed the concerns set out in the *Wilko* decision and found that "there is no reason to assume at the outset that arbitrators will not follow the law; although judicial scrutiny of arbitration awards is necessarily limited, such review is sufficient to ensure that arbitrators comply with the requirements of the statute," thus reinforcing the legitimacy of an arbitral award. However, *McMahon* was a 5-4 decision that resulted in a most significant dissenting opinion authored by Justice Blackmun.[19] Specifically, Justice Blackmun objected to the majority's decision on two bases. First, he noted that the majority erred in reading the *Wilko* decision as being decided solely on the basis of perceived inadequacy in the arbitration process.[20] Second, he criticized the majority's blind acceptance that the problems with arbitration cited in *Wilko* no longer exist.

With a prescient assertion that foreshadows the current state of affairs, he criticized Commission oversight of the securities arbitration process: "[T]he Court's complacent acceptance of the Commission's oversight is alarming when almost every day brings another example of illegality on Wall Street." It is difficult to argue that Wall Street's conduct has improved in the years since *McMahon*. Shortly after *McMahon*, the Supreme Court officially overruled the *Wilko* decision in *Rodriguez de Quijas v. Shearson/American Express*. As a result of *McMahon* and *Rodriguez*, brokerage firms have the unhindered ability to compel arbitration of customer claims through the inclusion of a simple pre-dispute arbitration clause in all customer brokerage account agreements. The once voluntary submission to arbitration had become an industry mandate, leaving aggrieved customers with no other choice than to arbitrate their claims.

The Landscape After McMahon

When *McMahon* was decided, the Commission found in a survey that "98% of the margin accounts, 95% of the options accounts and 39% of the cash accounts" were subject to pre-dispute arbitration clauses.[24] This means that at the time, over 60% of accounts were not subject to pre-dispute arbitration clauses. In every one of these accounts, because of FINRA rules, customers were free to choose between court and arbitration if a dispute arose. The survey did indicate a movement toward placing these provisions in cash account agreements. Commission Chairman Ruder testified to Congress:

I expressed vocally and vociferously my opposition to that trend. I believed then, and I believe now, that customer choice is an exceedingly important aspect of this industry and the movement apparently to push these clauses on the public so that they couldn't trade at all without them was in my mind simply terrible. The industry responded by assuring the Commission that it had no intentions of imposing arbitration clauses in cash accounts and depriving American investors of any choice. In essence, firms were accepting of the fact that customers could choose the forum in which they wanted to resolve their disputes. Based on these assurances at the time, the Commission decided not to seek legislation prohibiting pre-dispute arbitration clauses, although it could have if it believed that firms intended to deprive customers of choice. Over the years this situation dramatically changed. Notwithstanding the concerns voiced by the Commission in 1988, little has been done to curb the widespread inclusion of pre-dispute arbitration clauses in customer account agreements. Although the industry assured the Commission that it had no intention of including such clauses in customer account agreements, today virtually every brokerage firm in America includes a mandatory arbitration provision in its new account documentation for every type of account. Practically speaking, the provisions are non-negotiable. The result is that if customers want to buy a stock or a bond or seek to participate in the capital markets in America, they must give up their Constitutional right to a jury trial by an independent and impartial judiciary and agree to mandatory arbitration. Of course, most customers do not realize this when they open their accounts. Many times, they are told by brokers that the new account documents are routine and must be signed in order to open an account with the firm.

The number and types of Americans who invest have also changed since the pre-*McMahon* years. The number of households holding stocks has increased more than three-fold since the early 1980s. Half of all U.S. households own shares of stock or equity mutual funds. Capital markets are no longer just for the wealthy; the stock markets hold the retirement hopes and financial security for Americans from all walks of life. Investors are increasingly older; indeed, seniors are the fastest-growing segment of investing consumers.

Seniors are also the most vulnerable to abuse by financial advisors and to unjust and unfair outcomes in mandatory arbitration. Everyone of us will be a senor citizen some day; fairness must start now.

Customer choice has been eroded in other ways as well. Today, the only remaining SRO-sponsored forum is FINRA. Requiring arbitration before a single forum is a dramatic change from the arbitration alternatives in place when *McMahon* was decided. At the time of *McMahon* there were at least ten different arbitration forums. Most stock exchanges and the Chicago Board of Options

Exchange provided arbitration forums. Many arbitration clauses, and the rules of the American Stock Exchange, gave investors the option of avoiding arbitrating in an arbitration forum associated with the securities industry altogether by allowing arbitration before the American Arbitration Association. So while customers may have had to arbitrate in response to *McMahon*, they could still choose among various arbitration forums, including at least one that was entirely independent of the securities industry. Different forums had different rules, different policies, different administrators and, most importantly, different pools of arbitrators. These options were essential in attempting to obtain fair processes and just outcomes for customers.

Now all these choices are effectively gone for customers. Over the last decade, we have seen a consolidation of the American securities markets, which culminated in the 2007 NYSE-NASD merger. Customers with pre-dispute arbitration clauses (virtually all customers) are forced into the only game left in town, an association run by an organization made up of securities firms. FINRA now has a total monopoly on investor arbitration. There is no competition, and there is no alternative. Twenty-three years ago, a defrauded customer could pursue claims in court, or choose between numerous arbitral forums. In a relatively short time span, America's savers and investors have seen their 'choices' dwindle to one.

Concerns Regarding Maintaining the Status Quo

Perceptions of the System

In 2005, amid concerns about the fairness of the arbitration process, the Securities Industry Conference on Arbitration ("SICA") conducted a study of perceived fairness in the arbitration process. It consisted of a survey that was sent to over 30,000 participants with questions assessing perception of the arbitration process. Particular emphasis was placed on the following: fairness of the SRO arbitration process; competence of arbitrators to resolve investors' disputes with their broker-dealers; fairness of SRO arbitration as compared to their perceptions of fairness in securities litigation in similar disputes; and fairness of the outcome of arbitrations. Not surprisingly, the SICA study found that the overall perception of the securities arbitration process was negative.

Over sixty percent of customers perceived the process as unfair, with nearly half perceiving arbitral panels as being biased. And, most significantly, three out of every four customers found securities arbitration to be "very unfair" or "somewhat unfair" when compared with the judicial system. Moreover, over one-third of customers confronted with a predispute arbitration clause in the brokerage agreement were not aware of its existence. The SICA study demonstrates that the rationale set out in *McMahon* is flawed. *McMahon* supported its decision in part on the opinion that "we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals should inhibit the enforcement of the [FAA] in controversies based on statutes." *McMahon* rejected *Wilko*'s distrust of arbitration panels, stating that "the reasons given in *Wilko* reflect a general suspicion of the desirability of arbitration and the competence of arbitral tribunals – most apply with no greater force to securities disputes than to the arbitration of legal disputes generally." The *McMahon* court trusted the integrity of the arbitration process; however, the results of the SICA study prove that there are inherent problems with the system. These problems are compounded by the fact that a disturbing number of customers were not even aware that they had consented to proceed in this system and to forego their right to a jury trial.

Customer Recovery Statistics

In 2007, Edward S. O'Neal and Daniel R. Solin published a study assessing customer recoveries in the securities industry. The study compiled data from arbitrations conducted in the NYSE and NASD arbitral forums between the years 1995 and 2004. Perhaps the two most striking conclusions arrived at in the course of the study were: (1) the "win percentage" published by arbitration providers is not an accurate reflection of how customers actually fare in arbitration; and (2) there is an increasing trend towards customers receiving less of their requested claims when the claim is brought against a top-twenty firm. Both of these findings undermine the claim of fairness in the current securities arbitration system. The predominant "win percentage" calculation offered by FINRA takes into consideration solely whether the investor received any amount of monetary reward for its claim. For the purposes of industry statistics, a customer receives a "win" regardless of whether the award is $1 or $1,000,000. The authors advance that the "expected recovery percentage" would be a more accurate statistic in providing guidance in terms of assessing the likely outcomes in arbitration. The expected recovery percentage is achieved by multiplying the "win percentage" by the amount of the award as a percentage of the amount requested. Accordingly, published statistics from arbitration providers do not paint an accurate picture of how investors actually fare in the arbitration process, thereby masking the true likelihood of success in the forum.

There is also an increasing trend towards the customer's expected recovery percentage decreasing as the size of the respondent-brokerage firm increases and as the size of the requested damages increases. For example, if a customer were to bring a claim against one of the top-twenty brokerage firms requesting damages exceeding $250,000, the expected recovery percentage would range between 10- 13%, while overall it is 26%. If the same customer were to bring a claim against the same top-twenty firm requesting damages of $100,000, the expected recovery percentage would range between 18-21%, as compared to 40% overall. Finally, if the customer brought a claim for less than $10,000 against the same top-twenty firm, the expected recovery percentage would be approximately 28% as compared to 37% overall. Thus, the expected recovery percentage is a product of both the size of the claim as well as the size of the respondent firm. These variances in results may be explained in part by the impact repeat players, i.e. the large brokerage firms, may have on an arbitrator's decision, as well as the inclusion of industry arbitrators on three-person panels. Arbitrators may be influenced by their desire to be chosen as an arbitrator in future cases and the fear that a large award may prevent that from happening. Industry arbitrators may have additional pulls on their independence such as the desire for future employment at a firm appearing before them.

The Arbitration Fairness Act Congressional Findings

In April 2009, the Arbitration Fairness Act ("AFA") was introduced in Congress with the purpose of amending the FAA.[43] Section two of the proposed legislation includes seven findings that support the elimination of pre-dispute arbitration agreements:

(1) The [FAA] was intended to apply to disputes between commercial entities of generally similar sophistication and bargaining power.

(2) A series of United States Supreme Court decisions have changed the meaning of the Act so that it now extends to disputes between parties of greatly disparate economic power, such as consumer disputes and employment disputes. As a result, a large and rapidly growing number of corporations

are requiring millions of consumers and employees to give up their right to have disputes resolved by a judge or jury, and instead submit their claims to binding arbitration.

(3) Most consumers and employees have little or no meaningful option whether to submit their claims to arbitration. Few people realize, or understand the importance of the deliberately fine print that strips them of rights; and because entire industries are adopting these clauses, people increasingly have no choice but to accept them. They must often give up their rights as a condition of having a job, getting necessary medical care, buying a car, opening a bank account, getting a credit card, and the like. Often times, they are not even aware that they have given up their rights.

(4) Private arbitration companies are sometimes under great pressure to devise systems that favor the corporate repeat players who decide whether those companies will receive their lucrative business.

(5) Mandatory arbitration undermines the development of public law for civil rights and consumer rights, because there is no meaningful judicial review of arbitrators' decisions. With the knowledge that their rulings will not be seriously examined by a court applying current law, arbitrators enjoy near complete freedom to ignore the law and even their own rules.

(6) Mandatory arbitration is a poor system for protecting civil rights and consumer rights because it is not transparent. While the American civil justice system features publicly accountable decision makers who generally issue written decisions that are widely available to the public, arbitration offers none of these features.

(7) Many corporations add to their arbitration clauses unfair provisions that deliberately tilt the systems against individuals, including provisions that strip individuals of substantive statutory rights, ban class actions, and force people to arbitrate their claims hundreds of miles from their homes. While some courts have been protective of individuals, too many courts have upheld even egregiously unfair mandatory arbitration clauses in deference to a supposed Federal policy favoring arbitration over the constitutional rights of individuals. Findings one through three illustrate the concern that pre-dispute arbitration agreements are, notwithstanding the decision in *McMahon*, contracts of adhesion. Disparity in bargaining power in the contracting stage of a relationship undermines the voluntary nature of contracts. Pre-dispute arbitration agreements are so pervasive throughout the brokerage industry that it is virtually impossible for customers to open accounts without agreeing to waive their right to a trial by jury, before they even know the nature of their dispute. Customers do not have a meaningful opportunity to object to the inclusion of a pre-dispute arbitration clause in their account documents. Moreover, as demonstrated above by the SICA study, a number of customers do not even appreciate that they have signed a pre-dispute arbitration agreement.

Findings four through seven highlight the concerns of customers being pushed into a single arbitration forum which is run by an organization made up of the same firms they are suing. The findings of the O'Neal and Solin study illustrate the fear that industry control over the process has an effect on outcome. A customer has a smaller expected recovery percentage against a top-twenty firm, which presumptively brings more repeat business to the arbitration forum than other firms. More generally, there is a concern that the presence of an industry arbitrator on an arbitration panel may affect the outcome of the hearing. FINRA is attempting to address this concern by proposing a rule that would give customers the option of having an all public panel. However, as demonstrated by the results of the SICA study, there is a widespread perception among customers that there is bias within the arbitration process that extends beyond the presence of an industry arbitrator on the panel.

There are some protections present in the securities arbitration process that are not present in other consumer arbitration forums. The Commission has approved rules in the past that impact a firm's ability to include pre-dispute arbitration clauses in customer agreements. For example, NASD Rule 3110 sets out specific requirements that firms must follow when including a pre-dispute arbitration clause in customer agreements.[47] Firms are required to highlight the predispute arbitration clause as well as precede the clause with language explaining its practical effects on the parties. Similarly, pre-dispute arbitration clauses cannot attempt to circumvent certain procedural safeguards, including: providing limitations on the rules of the self-regulatory organization; imposing limitations on the investor's ability to file a claim in arbitration; and preventing or limiting an arbitrator from rendering a particular award. Moreover, these rules apply regardless of whether the underlying claim arises from a federal statute or state law. As such, it is clear that the Commission and FINRA have the ability to enact rules that are all encompassing with regard to claims brought by customers.

EUROPEAN LAW SUPPORTS ELIMINATION OF PRE-DISPUTE ARBITRATION AGREEMENTS

A number of foreign jurisdictions have eliminated or limited the use of predispute arbitration clauses. For example, in 1993 the European Union issued Council Directive 93/13, which addresses unfair terms in consumer contracts.

The pertinent language of this legislation is as follows: Article 2(b): 'consumer' means any natural person who, in contracts covered by this Directive, is acting for purposes which are outside of his trade, business or profession. Article 3(1): A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer. Article 3(2): A term shall always be regarded as not individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term, particularly in the context of a pre-formulated standard contract. Article 3(3): The Annex shall contain an indicative and nonexhaustive list of the terms which may be regarded as unfair. Annex (q): excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions . . .

EU member states were required to achieve the purpose of the Directive, which is to "ensure that contracts concluded with consumers do not contain unfair terms."[51] The United Kingdom adopted the terms of EC 93/13 verbatim in the UK Unfair Terms in Consumer Contracts Regulations of 1999.[52] France implemented the directive of EC 93/13 in Section L, Article 132-1 of the French Consumer Code. The language used varies slightly from the language of the EC directive, stating that "unfair terms are deemed to be null and void" and defines as an unfair term: "canceling or impeding the institution of legal proceedings or means of redress by the consumer, in particular, by obliging the consumer to exclusively refer the case to an arbitration panel not covered by legal provisions…".[53] Germany has interpreted EC 93/13 more as a requirement of good faith and, thus, requires that certain safeguards be utilized to protect parties entering into the typical standard form contract.[54]

Thus, there is support for elimination of pre-dispute arbitration agreements throughout Europe. Elimination of these agreements would put the US on even footing with other parts of the financial world, and should not restrict the ability of brokerage firms to compete effectively in the global marketplace.

TWO-WAY CHOICE IS UNFAIR TO CUSTOMERS- ARBITRATION WITH FAIR RULES SHOULD BE MAINTAINED

Despite its shortcomings, FINRA arbitration should be maintained as an option for customers. Indeed, if customers are allowed to choose between court and arbitration, thereby encouraging FINRA to address the perceived inadequacies with the forum, FINRA arbitration has the potential to be the fair and neutral forum which is necessary to comply with due process and ensure investor protection.

However, if two-way choice is adopted, i.e. if FINRA Rule 12200 is eliminated in its entirety, the default forum will be court. When the customer expresses an interest in arbitrating a claim, the industry defendant will have the ability to determine whether or not it should agree to arbitrate. The end result is that the industry will have the opportunity to assess its best interests in deciding whether a case should be arbitrated. However, there are cases that, from the customer's perspective, are appropriate for arbitration. Indeed, it is possible that, should investor choice be adopted, the vast majority of cases will still be submitted to FINRA arbitration instead of court. There are a number of reasons for this.

Cost

Arbitration has always been touted as an efficient, cost-effective way to resolve disputes. While the hearing fees, fees which would not attach in a court proceeding, can be fairly substantial for larger cases, arbitration allows the parties to avoid the time and expense associated with court discovery procedures. Interrogatories, a time-consuming endeavor in court, are not permitted in FINRA arbitration. Absent a compelling reason, depositions are also not permitted. A customer should be permitted to weigh the cost of court discovery against the benefits of substantially lower court fees and court supervision, once the dispute arises.

Similarly, thanks in large measure to recent reforms, motions are strictly limited in arbitration. Pre-hearing motions to dismiss are discouraged and may be granted only for tightly circumscribed reasons; an improper motion to dismiss subjects the industry defendant to potential sanctions.[57] This ramification makes sense, as the customer is not entitled to the same discovery rights and procedural safeguards as he would get in court.

In view of the streamlined nature of arbitration, a customer is able to retain an attorney for smaller cases and to pursue those claims in an efficient manner. In most cases (though not all), the firm has greater financial resources than the investor and is able to base its decision whether or not to arbitrate on the size of its war chest. With two-way choice, industry defendants would be able to refuse arbitration in order to make it uneconomical for customers to pursue smaller claims.

In short, the industry can flex its economic muscle to the detriment of its own clients. This would be an appalling result for the small public investor.

Substantive Law/Rules

Arbitration is an equitable forum in which the technicalities that generate so much of the motion practice in court are put to the side. Indeed, arbitrators can allow recoveries for violations of SRO rules which are designed for the protection of customers, such as the suitability rule. In contrast, many courts deny a private right of actions for such rules violations or, if they consider the rules as evidence of a standard of care, may require expert testimony to establish the standard and the violation thereof. It is reasonable and fair that an arbitration forum exist where customers who have been injured by deviations from securities industry standards be allowed to recover for such violation.

Time

Generally, arbitration leads to a quicker result than court proceedings. According to FINRA's statistics, the average turnaround time for cases filed in its forum has been about 12 months since the beginning of 2009. Most courts are unable to match this record. Arbitration is not dependent on a judge having availability in the court calendar. In arbitration, the parties have the ability to set a schedule for their case that meets their needs. Where an elderly investor desperately needs to replace funds lost through broker misconduct, the ability to get a case heard and decided quickly may be of great significance. Additionally, in 2004, FINRA instituted procedures for expediting cases involving senior or seriously ill customers, ensuring that these cases are handled as efficiently as possible.

Finality

FINRA awards are rarely subject to reversal on vacatur motions. This is closely related to the time issue. While there are advantages to having appellate rights, as a customer has in court, it is an undeniable fact that appeals add at least a year to the finality of a judgment. In contrast, customers have some comfort in knowing that if they are successful in arbitration, there are few grounds upon which an unsuccessful firm can challenge the award.

Enforcement

Article XIII, Section 1(c) of FINRA's Corporate Bylaws provides that a member or associated person may be disciplined for failure to pay an arbitration award or written settlement agreement. Article VI, Section 3 permits summary suspension upon 15 days' written notice of a member or associated person who fails to pay. Recently, FINRA limited the defenses a firm or associated person may raise to prevent the suspension: (1) that the firm or person paid the award in full; (2) the customer has agreed to installment payments or has otherwise settled the matter; (3) the firm or person has filed a timely motion to vacate or modify the arbitration award and such motion has not been denied; and (4) the firm or person has filed a petition in bankruptcy and the bankruptcy proceeding is pending, or the bankruptcy court has discharged the award.[59] Previously, a firm or associated person was able to claim a general inability to pay the award. As a result, it is relatively uncommon for a customer to have to resort to court enforcement procedures to ensure that the arbitration award is paid in a timely manner.

The Pro Se Claimant

Many customers choose to represent themselves in FINRA arbitration proceedings, especially in smaller cases. While pro se claimants often do not fare well, they do at least get their opportunity to attempt to resolve their grievances. FINRA offers comprehensive resources and an easy to follow

Code of Arbitration Procedure to help navigate pro se claimants through the process. By contrast, a pro se plaintiff in litigation is likely to get lost in the maze of court procedures, and may not be able to get past a dispositive motion. Accordingly, customers may be more likely to pursue a smaller claim, even when they cannot retain an attorney to represent them.

Simplified Proceedings
FINRA provides a simplified procedure for cases under $25,000. Many courts only provide simplified proceedings for small claims cases, whose jurisdictional limits may be as low as $5,000. Under the simplified procedures, customers may elect to have their cases heard solely on the basis of documents submitted to the arbitrator. Besides having the potential to be cost effective, elderly customers may avoid the stress of a several day hearing, or the need to travel to the hearing location.

Case-Specific Issues
From a customer's standpoint, there are several cases which simply make more sense in arbitration. It is impossible to delineate all of the case-specific issues which may argue for arbitration over litigation. By way of example, however, FINRA has stated that its rules of conduct may be enforced by an arbitration panel. In such a case, a customer may decide to seek redress in arbitration, rather than through the courts.

Another consideration arises in product cases. The passage of the Securities Litigation Uniform Standards Act ("SLUSA") in 1998 has resulted in preemption of state law in cases where there are 50 or more claimants asserting the same relief. Moreover, such cases are removed to federal court and subjected to federal pleadings standards and the mandatory stay of discovery. Thus, a customer with a product case which involves numerous plaintiffs may prefer to file the case in arbitration, where removal to federal court may be avoided. Finally, there is the issue of the statute of limitations. In many states, statutes of limitations do not apply to private arbitration proceedings. Therefore, a case which may be subject to a motion for summary judgment in court may be heard on the merits in a FINRA arbitration.

A Return to Customer Choice

It is time to reconsider the place pre-dispute arbitration clauses have in the securities arbitration process. At the time *McMahon* was decided, pre-dispute arbitration clauses were used in a limited nature – customers only encountered such clauses upon entering into more complex brokerage agreements. However, in the years since *McMahon*, firms have increasingly utilized these clauses, to the point that virtually every brokerage agreement now requires the investor to submit all claims to industry-sponsored arbitration. The requirement that customers submit to arbitration as a precondition to investing their wealth undermines the integrity of the securities arbitration process and violates the principles of contract law.

Brokerage firms have the resources necessary to resolve disputes in both the judicial and arbitral settings and, thus, are more capable of adjusting their strategy than customers. Therefore, the brokerage firm, rather than the customer, should bear the burden of uncertainty in forum selection. Firms will not be unduly burdened if customers have the ability to choose between court or arbitration once a dispute arises.

There is support for a return to customer choice. For almost twenty years between the time FINRA first enacted its Code of Arbitration Procedure and the *McMahon* decision, customers had a choice between court and arbitration. Even following *McMahon*, until pre-dispute arbitration agreements became pervasive throughout the industry, customers retained choice in terms of forum selection. We believe it is possible to return to this standard by either the Commission or FINRA enacting a rule or issuing an interpretive memo indicating that it is inconsistent with the just and equitable principles of trade for a member to include a pre-dispute arbitration clause in account opening agreements with retail customers, to condition opening or maintaining an account on behalf of a retail customer on the acceptance of a pre-dispute arbitration agreement, or to enforce any existing pre-dispute arbitration agreements between retail customers and member firms. There is ample support for the Commission to be able to take this action. Section 921 of Dodd-Frank addresses the Commission's ability to enact legislation affecting pre-dispute arbitration agreements for disputes arising under the federal securities laws, the rules and regulations thereunder, or the rules of self-regulating organizations.

However, the Commission has always had the ability to regulate firms with regard to state law claims. To the extent the Commission enacts rules limiting a firm's use of pre-dispute arbitration clauses, it should be clear that these rules affect both federal and state law claims, as have the other SRO rules governing pre-dispute arbitration clauses. We should not return to the unfortunate predicament that *Byrd* explicitly endorsed, where customers could find themselves bound to try their case in two separate forums if they chose to advance all claims they were entitled to advance.

We urge the Commission to recognize, as it did in 1988, the importance of customer choice. We thank the commission for the opportunity to share our views on this topic. To the extent the Commission has any questions or would like any further information, please do not hesitate to contact me.

Respectfully submitted,
Sonn & Erez PLC.

Jeffrey R. Sonn, Esq.