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April 9, 2008

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

Ms. Nancy Morris
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549

Re: File No. SR-FINRA – 2007-021

Dear SEC,

I am an attorney in Brooklyn, New York who has practiced in the field of securities arbitration since 1998. I am a member of the Public Investors Arbitration Bar Association (but my comments are not intended to reflect those of the organization as a whole, or, of its individual members) and I submit my comment on the above-captioned proposed rule as follows:

(1) I support FINRA's efforts to eliminate abusive pre-hearing dispositive motion practice. Investor-claimants are entitled to a hearing in mandatory arbitrations administered by the securities industry. Arbitration is a creature of contract, and the parties agree to submit these disputes to forums of equity. Investor-claimants are, in nearly all circumstances, precluded from submitting their disputes to court, where their claims could instead be heard publicly by a jury of their peers, with extensive discovery mechanisms and a reasonable chance for successful appeal when a finder of fact renders an unfavorable decision.

Arbitration, while designed to be more expedient than court proceedings, is a less formal, equitable proceeding where investor-claimants are not afforded the benefits of civil litigation. It has been my experience that respondent brokers routinely abuse this mandatory arbitration process by inserting dispositive pre-hearing motions that serve to mislead arbitration panels, needlessly delay arbitration proceedings, and greatly escalate investor-claimants' arbitration costs. And, should an investor-claimants' case be dismissed before a hearing, their chances of successfully vacating a pre-hearing motion to dismiss are slim to none.

However, while I laud FINRA's efforts to eliminate abusive pre-hearing dispositive motions, I am skeptical that this proposed rule may instead deliver into the forum a Trojan horse of codified motion practice, whereby respondents may guild themselves with the imprimatur of SEC approval to assault investor-claimants and unsuspecting arbitration panels with motions to dismiss during – or at the conclusion of - arbitration hearings. If the proposed rule enables

respondents to file their rote motions to dismiss at the *conclusion* of an investor-claimant's case, it is likely that arbitration hearings shall need to be continued (weeks, if not months later) protracting ultimate resolution, and, inflating costs in this equitable arbitration process. Moreover, such motions by respondents shall divert an arbitration panel's attention away from the important issues that had been vigorously argued at the scheduled arbitration hearings, creating a subsequent responsive hearing in which respondents advocate anew, as if they are claimants to the proceeding.

If this be the result of passage of SR-FINRA-2007-021, then I vote NO.

(2) SIFMA's April 7, 2008 comment to the proposed rule is misleading, inaccurate, and harmful. Clearing firms owe a legal duty to their clients. Investor-claimants are third party beneficiaries of clearing agreements between introducing and clearing firms. While SIFMA has cited nine (9) arbitrations where claimants have agreed to voluntarily dismiss their claims against clearing firms, it does not indicate whether any of these voluntary dismissals were the result of pre-hearing settlements, nor does SIFMA proffer any evidence that clearing firms are routinely named as respondents to FINRA proceedings.

SIFMA's comment states that "...the clearing firm is often dragged into the fray.". According to FINRA's Dispute Resolution Statistics, since 1994, over 80,000 arbitration cases have been filed. SIFMA, how many arbitrations have listed clearing firms as respondents? Show the SEC and the investing public verified numbers that support SIFMA's statement that *clearing firms are often dragged into the fray*.

Clearing firms may be listed as respondents in arbitrations where the introducing broker has been delisted from FINRA membership because of Enforcement actions, and because FINRA's own arbitration web page warns investors: "**Caution.** When deciding whether to arbitrate, bear in mind that if your broker or brokerage firm goes out of business or declares bankruptcy, you might not be able to recover your money-even if the arbitrator or a court rules in your favor. **Over 80 percent of all unpaid awards involve a firm or individual that is no longer in business**".

It is in those circumstances that clearing firms are the only viable arbitration entity left standing. And, notably, but for the crucial activities of clearing firms, miscreant brokers and broker-dealers would not have been able to trade and abuse investor holdings.

To permit *and encourage* FINRA clearing firms to continue to file pre-hearing motions to dismiss would promote abusive arbitration practice that controverts established FINRA arbitration awards, and, legal precedent. Clearing firms have, in fact, been held liable in arbitration and civil proceedings. Importantly, but not exclusively, the SEC should take note of [FINRA Arbitration Award 04-04259](#) (Kostoff vs. Vincent Cervone, Yankee Financial, and Fleet Securities, Inc) in which an arbitration panel awarded an investor-claimant compensatory damages of \$114,375.10; punitive damages in the amount of \$500,000; interests; costs; and, attorneys fees solely against a clearing firm. And, in the 11th Circuit, the clearing firm's motion to vacate was denied, and the arbitration award was confirmed, by the Honorable James D.

Whittemore of the United States District Court, Middle District of Florida (*see*, Case No. 8:05-CV-1341-T-27TGW, and, CASE No. 8:05-CV-1727-T-27TGW). These decisions are matters of public record.

Sadly, Claimant Kostoff died before the arbitration award was confirmed by the District Court Judge. SIFMA's request to permit and encourage clearing firms to submit dispositive motions would also result in the death of the important arbitration legacy established by Claimant Kostoff.

Discovery is crucial for an investor-claimant to obtain documents and information by which a clearing firm can be found to have exceeded its routine and ministerial clearing function. Pre-hearing motions to dismiss unquestionably undermine an investor-claimant's ability to build a case to submit before an arbitration panel at a full hearing on the merits whereby a clearing firm may rightfully be held liable for an investor-claimant's losses. Accordingly, the SEC should give no weight to SIFMA's comment.

Respectfully submitted,

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