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April 10, 2008

Nancy M. Morris
Secretary
Securities and Exchange Commission
100 F Street, NE, Washington, DC 20549-1090.

Re: File Number SR-FINRA-2007-021

Dear Ms. Morris

As an attorney who has been representing investors, brokers and brokerage firms in customer and employment disputes for nearly 25 years, I appreciate the opportunity to comment on FINRA's proposed rule change, which would effectively ban dispositive motions in arbitration proceedings. I respectfully submit that the rule is completely unnecessary, and will unnecessarily increase the costs of arbitrations.

I agree with the detailed comments submitted by SIFMA, and will not repeat those comments and suggestions here.

It is important to keep in mind that dispositive motions, whether motions to dismiss or motions for summary judgment, when properly administered, promote efficiency in the arbitration process, by eliminating claims that do not require a hearing – at a minimum, claims that are premised upon legal theories – such as the statue of limitations, *res judicata*, absolute privilege and similar legal claims. There are often times when there simply are no factual matters in dispute, and a dispositive motion can resolve those factual issues, without the time and expense of a hearing.

FINRA's repeated attempts to tinker with the arbitration process, and to overrule state and federal law, have done nothing to speed up arbitrations, or to make them more equitable. To the contrary, recent rule changes have increased delays and costs for

the parties – witness the effect of the expungement rule, and the ban on subpoenas. Both rules were overbroad, tossed the baby out with the bathwater, and increased costs for brokers and their firms seeking expungement, and costs and delays for all parties regarding subpoenas. This latest rule change will have a similar effect.

There is no evidence that such a rule is necessary. While FINRA has stated that motions to dismiss are being abused and causing delays, FINRA has not provided any documentation or statistics to support such a statement. Until such time as we are certain there is a problem, we should not be adding new rules.

Anecdotal evidence of delays and abuse is an insufficient reason to ban motions. I am certain that there have been abusive motions filed, and we can all cite one or two or even three examples of such motions. However, there are tens of thousands of arbitrations filed over the past few years. How many of those tens of thousands have had abusive motions filed? With 28% of the cases with awards having a motion to dismiss, it is clear that the cases with abusive motions are significantly less. With 50% of all cases not reaching an award, I would suspect that there are an insignificant number of cases with abusive or frivolous motions. However, we simply do not know.

FINRA has again offered no supporting documentation for its claim that motions to dismiss are causing delays in the proceedings, and it is respectfully submitted that if there are any delays in a proceeding because of a motion to dismiss, the fault for that delay falls squarely upon FINRA, not the moving party. FINRA arbitrations take 10 to 14 months to complete. FINRA rules call for a prehearing conference with the arbitrators, where scheduling matters are addressed, and a scheduling order put in place. That scheduling order includes time frames for "dispositive motions," including motions to dismiss. If such motions are causing delays, then the problem is in the scheduling order, not the conduct of the movant. The solution is not to ban motion practice, the solution is to instruct arbitrators to schedule motions to dismiss well in advance of the hearings, and the problem of delay, if it exists at all, will disappear.

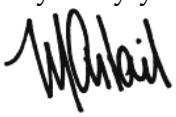
FINRA claims that parties are making frivolous and repetitive motions. Again, FINRA offers no support or statistics for such a claim. The solution is not to ban all motions, but to incorporate a provision in the scheduling order that only one motion to dismiss or for summary judgment will be permitted in the case, and it will be submitted on the schedule set forth in the order. If the party chooses to make a motion to dismiss early on in the case, then that will be their one motion. If there is a reason to have another motion, for example, if discovery is needed to decide a particular issue, the

arbitrators can always deny the motion, with leave to file a second motion, on limited grounds.

The second prong of dealing with abusive motions is to impose sanctions. While giving arbitrators unbridled (and unappealable) power to sanction a party will create another series of problems, arbitrators do have that power, and the fact that they do not exercise that power tells me that this abusive motion practice does not truly exist to any significant degree.

The old adage, "if it ain't broke, don't fix it" holds true here. There is no evidence that motions to dismiss are a problem in arbitrations. Given the lack of sanctions, the evidence suggests that these motions are not an issue. FINRA should attempt to enforce existing rules and respect the knowledge and ability of its own arbitrators, before completely abolishing a procedural rule that the courts have acknowledged exists in arbitration, for the protection of the parties, and the process itself.

Very truly yours,



Mark J. Astarita

MJA/ac