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WRITER'S DIRECT INFORMATION:

April 9, 2008

Ms. Nancy Morris
Secretary
Securities Exchange & Commission
100 F Street, NE
Washington, DC 20549

**Re: File No. SR-FINRA-2007-021**
**Proposal Amending Rules 12206 and 12504 of the Customer Code and Rules 13206 and 13504 of the Industry Code to Address Motions to Dismiss**

Dear Ms. Morris:

Bressler, Amery & Ross, P.C. ("BA&R") appreciates the opportunity to comment on the above-referenced rule proposal (the "Proposal") submitted to the Commission by the Financial Industry Regulatory Authority ("FINRA"). BA&R has been representing clients in the securities industry for over 25 years with a significant part of that practice participating in self-regulatory organization arbitrations.

FINRA's effort to provide guidance to participants in the arbitration process is welcomed and appreciated. FINRA's arbitration rules, however, should not be narrowly written so as to penalize parties for pursuing the dismissal of a meritless matter prior to a plenary hearing. Further, FINRA's rules should be consistent with well established legal principals and public

policy. Proposed Rules 12206(b)(5), (8) and (9) and 12504(a)(6)(A) and (B), (7), (9) and (10)[1] impede an arbitration Panel's discretion and provide too narrow a framework under which a party must act in order to move to dismiss an otherwise meritless claim.

We recommend that the proposed rules not be adopted as written and that FINRA rework its proposal to construct a more practical rule regarding motions to dismiss.

## I. The Restrictions Proposed Under Rule 12504(a)(6)(A) and (B) Regarding Motions to Dismiss Promote Inefficiencies and the Filing of Meritless Claims

A claim which is legally deficient or otherwise meritless should not be permitted to proceed to a plenary hearing. Such a process runs counter to the underlying principal of arbitration which is to promote an efficient, equitable and cost-effective method of dispute resolution. There are a number of instances where a claim would be deficient on its face, yet permitted to proceed to an evidentiary hearing at significant expenditure of time and resources.

### A. Clearing Firm Liability

The law regarding clearing firm liability is well established and consistently applied by the courts. A clearing firm is generally not liable for the conduct of an introducing firm and the introducing firm's registered representatives.[2] Despite this overwhelming legal precedent and specific industry rules which permit the allocation of responsibilities between a clearing firm and an introducing firm (NYSE Rule 382; NASD Conduct Rule 3230), a clearing firm would have no recourse other than to proceed through the full discovery process and a claimant's evidentiary hearing before being in a position to move to dismiss. Such a scenario does not promote efficiency, cost-effectiveness or equity. To the contrary, such a scenario encourages the filing of meritless claims against clearing firms with the hope of extracting a settlement.

### B. Previously Litigated Issues

The proposed rule permits a motion to dismiss under the limited circumstance where a previously signed settlement agreement or release exists. The rule ignores a number of practical scenarios where a claim would not be viable by law or common sense, but would be permitted in a FINRA arbitration to go to a hearing. For instance, in a class action a plaintiff who did not elect to opt out would not have signed a settlement agreement or release. By court order and

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[1] The comments contained in this letter also apply to the similar provisions of Proposed Rules 13206 and 13504.

[2] See, e.g., Carlson v. Bear Stearns & Co., 906 F.2d 315 (7th Cir. 1990); Flickinger v. Harold C. Brown & Co., 947 F.2d 595, 599 (2nd Cir. 1991); Ross v. Bolton, 904 F.2d 819 (2d Cir. 1990); Edwards & Hanly v. Wells Fargo Sec. Clearance Corp., 602 F.2d 478, 484 (2d. Cir. 1979); Cromer Finance Ltd. v. Berger, 137 F. Supp.2d 452 (S.D.N.Y. 2001); Goldberger v. Bear Stearns & Co., [200-2001 Transfer Binder] Fed. Sec. L. Rep. (CCH) P91,287 (S.D.N.Y. Dec. 28, 2000); Riggs v. Schappell, 939 F. Supp. 321 (D.N.J. 1996); Connolly v. Havens, 763 F. Supp. 6,10 (S.D.N.Y. 1991); Slander v. Financial Clearing & Servs. Corp., 730 F. Supp. 1282, 1298 (S.D.N.Y. 1990); Antinoph v. Lavarell Reynolds Sec., Inc., 703 F. Supp. 1185, 1189 (E.D. Pa. 1989); Cacciola v. Kochcapital, Inc., 1997 WL 407867 (Wash. App. Jul. 1997); Mars v. Wedbush Morgan Securities, Inc., 283 Cal. Rptr. 238 (Ct. App. 1991); Petersen v. Sec. Settlement Corp., 277 Ca. Rptr. 468, 473 (Ct. App. 1991).

NASD Rule 12204, that plaintiff would be precluded from pursuing claims in arbitration. If that plaintiff filed an arbitration without the required submission under Rule 12204(b), however, and it was only later determined that the claimant had in fact participated in a class action, the proposed FINRA rule would require a respondent to proceed through discovery and claimant's case in chief before being in a position to move to dismiss.[3]

Similarly, where a party may have previously litigated an issue or claim, but a signed settlement agreement or release was not generated as a result of that litigation, a party would be able to file an arbitration. The responding party, again, would not have recourse to move to dismiss that claim until going through full discovery and claimant's case in chief at a hearing. These scenarios illustrate the inefficiencies which would result if the proposed rules are adopted as drafted. These scenarios also illustrate how parties would be encouraged to bring meritless claims with the hope of extracting some form of settlement, knowing that a respondent must go through the entire process before having any right to move to dismiss.

C. Stale Claims

Precluding a party from moving to dismiss a matter early in the proceeding based on statutes of limitations, poses another example of the inefficiencies and the increased potential for the filing of legally deficient claims under the proposed rule. Statutes of limitations are based on a strong public policy against the litigation of stale claims.[4] The rule as proposed runs contrary to that public policy, requiring the litigation of stale claims. Further, while a panel is empowered to make a time sensitive determination regarding eligibility, the proposed rule removes the panel's discretion to decide a statute of limitation question early in a matter. Under proposed Rule 12206, and the Supreme Court decision of Howsam v. Dean Witter Reynolds, Inc., 123 S. Ct. 588, 537 U.S. 79 (2002), an arbitration panel is delegated the decision making authority to determine whether a claim is viable under the six-year eligibility rule. A Rule 12206 determination is to be made by the panel at the outset of the matter. Proposed Rule 12504, however, strips the arbitration panel of the ability to make a decision whether a matter is time barred under the applicable statute of limitations until the claimant has presented its case in chief. Requiring the panel to make a timing determination under the eligibility rule, while denying the panel the discretion to conduct a timing analysis under an applicable statute of limitations is inconsistent and runs contrary to the efficient, cost-effective and equitable foundation underlying the arbitration process.

D. Form U-5 Defamation Claims

Under New York law, absolute immunity exists to a defamation claim premised on the filing of a Form U-5. Rosenberg v. Metlife, Inc., 8 N.Y.3d 359 (2007). The principal of

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[3] Proposed Rule 12504 does not reference Rule 12204.

[4] Blanco v. American Tel. & Tel. Co., 90 N.Y.2d 757, 666 N.Y.S.2d 536, 689 N.E.2d 506 (1997); McCarthy v. Volkswagon of Am., 55 N.Y.2d 543, 450 N.Y.S.2d 457, 435 N.E.2d 1072 (1982); and Wood v. Carpenter, 101 U.S. 135, 25 L. Ed. 807 (1879).

absolute immunity is based on, among other things, the fact that the securities industry is highly regulated and requires the disclosure of events on Forms U-4 and U-5. A party filing a defamation claim based on a Form U-5 filing, however, would be permitted to subject respondents to the full discovery process and the case in chief before respondents would be able to move to dismiss such a meritless claim. Subjecting respondents to such a proceeding, especially where the underlying law is based on the regulatory environment of the securities industry, would be inefficient and inequitable.

## II. Procedural Safeguards Exist Rendering the Requirements of Proposed Rules 12206(b)(5), (8) and (9) and 12504(a)(7), (9) and (10) Unnecessary

### A. Unanimity (12206(b)(5); 12504(a)(7))

Any decision regarding the merits of a parties' claims is an integral part of the arbitration process. A distinction between a decision on a motion to dismiss versus an award at the conclusion of a hearing is one without a difference. The requirements on a motion to dismiss should be the same as the requirements for a final award, a majority vote.

### B. Mandatory Imposition of Fees and Sanctions (12206(b)(8) and (9); 12504(a)(9) and (10))[5]

The premise that motion practice does, or may cause undue delay, while unsubstantiated, can be dealt with under Rule 12500. The purpose of the initial prehearing conference under Rule 12500 is to construct a scheduling order. "The IPHC gives the panel and the parties an opportunity to organize the management of the case, set a discovery cut-off date, identify and establish a schedule for potential motions, schedule hearing dates . . . ." SEC Release No. 34-51856. The panel has control of the process by setting forth a motion schedule, including motions to dismiss in the scheduling order. A party who fails to move within the time period set forth in the scheduling order losses that right. Further, a party that violates the scheduling order by filing a motion to dismiss out of time is subject to potential fees and sanctions under existing Rules 12902 and 12212 respectively.

Like the unsubstantiated delay rationale, the increased cost issue is also an unsubstantiated myth. The vast majority of claims pursued in arbitration by claimants are handled on a contingent fee basis. The principal costs to a claimant are those incurred by sessions with the panel and retention of an expert witness. Requiring claimants to go to a full hearing, only to be subject to dismissal at the close of claimant's case in chief only increases the potential costs to a claimant, not to mention the significant cost incurred by respondents. A claimant will not benefit from incurring the cost of retaining an expert and proceeding through three days of hearing only to have their claim dismissed on *res judicata* or statute of limitation's grounds.

[5] A Panel already has the power to assess costs and sanctions under Rules 12902 and 12212.

**Conclusion**

BA&R respectfully urges against adoption of proposed Rules 12504(a)(6), (7), (9) and (10) and 12206(b)(5), (8) and (9) which, as drafted, unjustifiably limit the substantive grounds for prehearing dispositive motions. FINRA's concerns regarding abuse of motion practices can be dealt with in a less restrictive manner and through existing rules and the other proposed rule amendments.

Sincerely,

Brian F. Amery

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