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April 10, 2008

VIA EMAIL

Mr. Nancy M. Morris
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549-7553
Email: rule-comments@sec.gov

Re: File No. SR-FINRA-2007-021
Proposed NASD Customer Code Rule 12504 (Motions to Dismiss)

Dear Ms. Morris:

I write in opposition to proposed NASD Customer Code Rule 12504 (Motions to Dismiss).

1. There is no need for the proposed rule.

As the saying goes, "don't fix what ain't broke." In my 30+ years representing litigants in customer/broker disputes, I have not observed abuse of the motion to dismiss practice in arbitrations. Furthermore, I am unaware of any empirical evidence demonstrating abuse of the process. Certainly, given the coordination of the claimant's bar, if panels found that frivolous motions to dismiss were being frequently filed, those orders would be routinely attached to the opposition to motions to dismiss—they are not.

If frivolous motions to dismiss are being filed, they can easily be handled by a panel in awarding costs against the offending party. A rule that throws the baby out with the bath water seems to be a Draconian measure.

2. Elimination of Motions to Dismiss Frivolous Claims Results in Additional Time and Expense for All Parties.

Frivolous claims and those claims joining unnecessary parties only for tactical reasons, ultimately have little or no chance for success on final hearing. Precluding the panel from dismissing claims on undisputed facts after a full opportunity by each party to argue its position

only results in additional expense and delay for both sides. This expense and delay not only harms the respondent, but also creates additional costs for claimants in hiring experts, obtaining documents, etc. This proposed rule will hurt, not help, reduce the costs of litigation.

An early resolution of frivolous claims will also permit FINRA to focus its resources on legitimate claims and shorten the time to resolution of those claims.

3. The Proposed Rule Eliminates the Only Viable Alternative to Cost Effective Resolution of Clearly Barred Claims.

FINRA arbitrations are intended to be a quick, cost effective way of resolving legitimate disputes. The proposed rule runs counter to the purpose of arbitration. Everyone who has a long history of involvement in the arbitration process has examples of wild claims that should never have been brought to begin with. The proposed rule prevents any cost effective way of dealing with these claims.

Additionally, many claims and defenses are most efficiently handled by motions to dismiss. These cases include claims that are barred by the statute of limitations on the face of the statement of claim, claims barred by res judicata where a dissatisfied customer asserts serial claims first against the firm, then the broker and then the supervisor until he gets the result he wants, and frequently claims against clearing firms where there is no assertion of any involvement by the clearing firm in any action other than its clearing function.

In conclusion, I do not believe the proposed rule should be adopted. Rules governing arbitration should be fair to all parties. Numerous courts have affirmed the right of arbitrators to grant pre-hearing dismissal and found that they are fair. This rule appears one-sided and precludes respondents from one of their only tools to quickly resolve unmeritorious claims.

Very truly yours,

Rodney Acker

RA/cm