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April 10, 2008

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Via Email: Rule-comments@sec.gov

Ms. Nancy M. Morris
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 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:

As a lawyer who has handled securities arbitrations for over 32 years, I appreciate the opportunity to comment on the above-referenced rule proposals submitted to the Commission by the Financial Industry Regulatory Authority ("FINRA"). As discussed below, I urge the SEC to decline to approve the proposed amendments as drafted.

I. INTRODUCTION

The proposed Amendments to Rules 12206 and 12504 of FINRA's Customer Code and Rules 13206 and 13504 of the Industry Code are unnecessary, unwarranted and do not promote the interests of justice. If approved, the amendments would supplant the role of duly-appointed FINRA arbitrators to control arbitration proceedings and to evaluate meritorious dispositive motions in the cases before them. In addition, the proposed rules would ensure that in many cases, matters that should be dismissed on a pre-hearing motion will proceed to a

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full evidentiary hearing on the merits, thus wasting all parties' time and money, as well as the arbitral resources of FINRA. This drastic reduction in the arbitrators' authority and the concomitant increased risk of patently frivolous claims proceeding to futile and wasteful hearings is not justified by the proposed rules' stated purpose, the prevention of frivolous motions. Moreover, the proposed amendments would directly undermine one of the central goals of arbitration, "to promote the expeditious resolution of claims." Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 220 (1985).

Under the current rules, FINRA arbitrators already have ample power to discourage the filing of unmeritorious motions by imposing sanctions for frivolous or bad faith motions. The appropriate solution is to enforce those rules, as opposed to wholesale rule changes which take discretion completely away from the arbitrators. At the very least, the proposed rule amendments should ensure that arbitrators retain a modicum of authority to hear and rule on dispositive motions in appropriate circumstances.

II. THE COURTS RECOGNIZE THE PROPRIETY OF ARBITRATORS HEARING AND RULING ON DISPOSITIVE MOTIONS

It is broadly recognized that arbitrators in commercial disputes generally have the legal authority to hear and grant dispositive motions in appropriate cases. For example, in Sheldon v. Vermonty, 269 F.3d 1202, 1206 (10th Cir. 2001), the Tenth Circuit held that NASD arbitration panels have the authority to grant motions to dismiss meritless claims without allowing discovery and conducting a full factual hearing. Similarly, in Miller v. Prudential Bache Sec., 884 F.2d 128, 129 (4th Cir. 1989), the Fourth Circuit affirmed an arbitration award in which the arbitration panel granted the respondent's motion to dismiss on statute of limitations grounds after a hearing before the arbitration panel.

These Court of Appeals decisions are not isolated results. Indeed, as stated in a United States General Accounting Office ("GAO") report: "***The case law consistently has recognized the authority of arbitrators to grant prehearing motions to dismiss.***" G.A.O. Doc. No. 03-162R, at 7 (2003) (emphasis added). The GAO report further stated "***we have not found any cases that do not recognize arbitrators' authority to grant prehearing motions to dismiss.***" (emphasis added).

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There is no question that the proposed amendments would deprive
FINRA arbitrators of legal authority they clearly otherwise possess.

III. THE INTERESTS OF JUSTICE WOULD BE UNDERMINED IF ARBITRATORS ARE STRIPPED OF THEIR CURRENT AUTHORITY

During my three decades of securities arbitration practice, I have
observed numerous matters where it was appropriate for arbitrators to hear and
grant motions to dismiss.¹ Among the more common examples are cases involving
meritorious statute of limitations defenses, legally-deficient claims against clearing
brokers, patently frivolous claims against individual respondents, and claims which
are legally impossible. In particular, pre-hearing dismissals based on time-bars
make sense in both Court and arbitration. By way of example, why should a
claimant be rewarded for waiting years to file a claim until his or her broker died? I
arbitrated just such a case late last year. In addition to the unavailability of
witnesses, relevant documents may be lost or inaccessible due to the passage of
time. Requiring full evidentiary hearings for claims such as these leads not only to
unnecessary expense and delay but also detracts from truly meritorious claims that
unquestionably should proceed to an evidentiary hearing.

The proposed rules should be amended at the very least to allow pre-
hearing dispositive motions as to legally-stale claims, regardless of whether they
are barred by the FINRA six-year eligibility rule. While such motions can, in
individual cases, present problematic facts that militate against the granting of a
pre-hearing dispositive motion, arbitrators should not be stripped of the power and
authority to hear and rule on such motions.

IV. ARBITRATORS ALREADY HAVE THE POWER TO DISCOURAGE FRIVOLOUS MOTIONS

FINRA arbitrators are currently empowered to sanction parties for bad
faith conduct, including bad faith in connection with the filing of a motion to

¹ The Courts have routinely held that due process is satisfied when parties are granted a hearing
before the arbitrators in connection with a motion to dismiss. Schlessinger v. Rosenfeld, Meyer &
Susman, 40 Cal. App. 4th 1096, 1106 (1995).

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dismiss. Among other things, arbitrators may assess costs and attorneys' fees against a party making a frivolous motion. See, e.g., Rule 12212 of the Customer Code. Thus, no change to the rules is required to discourage frivolous conduct.

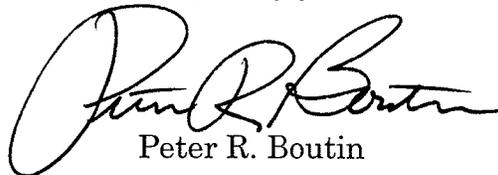
V. CONCLUSION

The proposed rules do not promote fairness, the interests of justice or the expeditious resolution of claims. The reality is that there are numerous circumstances (too many to list and too fact-intensive to describe) in which duly-appointed arbitrators should have the authority to dismiss cases when it is clear that allowing the case to proceed to a full evidentiary hearing would be futile. The proposed amendments will only handcuff arbitrators and encourage the filing and continued prosecution of unmeritorious claims.

If the existing rules are amended, they should at the very least allow dispositive motions as to (1) time-barred claims, (2) patently frivolous claims against individual respondents, (3) legally-deficient claims against clearing firms, and (4) legally impossible claims. Expressly providing for dispositive motions in these situations would further the dual goals of preventing truly frivolous motions and allowing arbitrators to exercise their legitimate authority to fashion appropriate relief.

I appreciate your consideration of this letter.

Very truly yours,



Peter R. Boutin

PRB:pem (KYL_SF461405)