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April 10, 2008

Nancy M. Morris, Secretary  
Securities and Exchange Commission  
100 F. Street, N.E.  
Washington, D.C. 20549-0609

Re: Proposed Revision to Rules 12206 and 12504 of the NASD Code of Arbitration  
Procedure – Motions to Dismiss  
SR-FINRA-2007-021

Dear Ms. Morris:

I am an attorney in the state of Illinois and I have been practicing in the area of security arbitration since 1992 – originally representing the industry and now predominantly representing consumers. During my legal career, the use of meritless motions to dismiss has increased dramatically. Where motions to dismiss used to be the exception, they have become the rule? Often, the bases for the motion itself is indeterminate. I object to this rule primarily because it codifies a practice that should be eliminated entirely from the arbitration forum.

While, Rules 12206 and 12504 attempt to create limitations on the filing of pre-hearing motions to dismiss, the rules are written in such a manner that they leave many loopholes that will still allow for such dispositive motions.

First, as it is written, Rule 12206 opens the door for motions far beyond simply alleging ineligibility. While the rule specifies that motions to dismiss on grounds of eligibility should be decided first, it also invites other types of motions in providing that if the panel denies the dismissal on grounds of eligibility, it shall then rule on the other bases for the motion. By allowing respondents to combine eligibility motions with other bases for dismissal, the rule is still giving the respondent the opportunity to poison the well and raise substantive issues that are not appropriate for dismissal in the arbitration forum.

Second, although such motions are “discouraged in arbitration,” Rule 12206 and 12504 still

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allow the arbitrators to rule on motions to dismiss prior to the conclusion of the party's case in chief. While the rules provide some procedure for the arbitrators to follow in making such rulings, they do not provide the arbitrators with the substantive bases for such rulings. For example, unlike the civil rules of procedure, the proposed rules fail to set forth the elements to state causes of action and fail to provide any formal pleading requirements. Likewise, the rules fail to provide procedures for discovery and presentation of evidence related to the motion to dismiss.

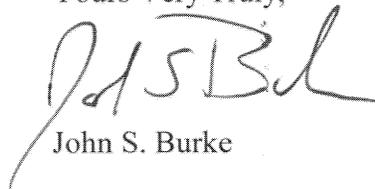
Furthermore, although the arbitrators are presumed to have the knowledge and capability to hear securities claims; they are not judges and are not necessarily trained in the law. Arbitrators are primarily lay individuals who lack the experience and knowledge necessary to make rulings on legal motions to dismiss based on factual and substantive matters.

Third, the allowance of motions to dismiss in the arbitration forum contravenes the entire purpose of arbitration, and create an uneven playing field for claimants. Arbitration is considered to be less expensive, more efficient, and less formal than civil court proceedings. This is evident by the rules that limit discovery and the allowance of depositions. However, by permitting respondents to file motions to dismiss, while at the same time limiting discovery, the rules are being skewed grossly in favor of the industry.

Finally, the broad drafting of Rule 12504 (a)(6)(B) can be read to exclude parties in a supervisory position and control person liability, including when a broker dealer is defunct. This section of the rule should be specifically addressed in a comment or elsewhere to provide that the rule is not meant to exclude such parties.

Thank you for your consideration of my comments regarding the proposed revisions to the rules.

Yours Very Truly,

A handwritten signature in black ink, appearing to read "J. S. Burke". The signature is written in a cursive, somewhat stylized font. The first letter "J" is large and loops around the "S". The "B" is also large and loops around the "K". The signature is positioned above the printed name "John S. Burke".

John S. Burke