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Re: File No. SR-FINRA-2008-005

I am an attorney who represents customers in FNRA arbitration. I write to comment on proposed Rule 12905 of the Code of Arbitration Procedure for Customer Disputes. On behalf of defrauded customers, I write to oppose this rule change as contrary to the protection of investors. It is the last of FINRA's abusive trifecta of motion practice proposals intended to further deny customers due process. Adoption of this rule with the others will give FINRA member firms the ability to increase motion practice in their home court forum far beyond the ability of individual investors to respond. Investors will be confronted with frivolous motions to dismiss prior to hearing, twice during the hearing and with this proposal, motions to alter an award after the hearing.

In fact, there doesn't even have to be an evidentiary hearing or award. A member will be able to move to alter a dismissal based on a prior motion to dismiss without hearing. What a deal! A customer can be defrauded of her retirement funds, forced into industry run arbitration where her claim is dismissed without an opportunity to present evidence or examine the broker, and the broker can then move to alter the dismissal to include expungement of the complaint against the broker; all done in secret without meaningful oversight.

The Proposed Rule Would Increase Motion Practice and Attorney Fees

This rule will extend the endless motion practice in arbitration to the post arbitration period. It will increase attorney fees for customers who prevail in arbitration (a decided minority) and encourage ex parte proceedings to expunge claims when the customer is denied any relief (the majority). A public customer who has already been denied relief at the cost of thousands of dollars in forum fees will be subject to additional coercion and financial duress through continuing motions demanding expungement and/or the award of additional forum and attorney fees against the customer after the case is closed.

The Rule is Contrary to Law and Current Practice

FINRA's filing concedes that, "the law generally provides that the arbitrator's authority ends when the arbitrators render their decision." This is recognized in *The Arbitrator's Manual,* a publication of the Securities Industry Conference on Arbitration (SICA) as a guide for arbitrators which states that, "generally the arbitrators' authority ends when the award is rendered." Yet FINRA proposes to involve arbitrators in an

entirely new post-arbitration motion practice that is entirely for its members' benefit and further abuses customers. The only stated problem this rule proposes to solve is several requests each year from parties in cases that have been closed for long periods of time. The rational response to those motions is that the case is closed. But it appears that FINRA is incapable of telling its member "NO" under any circumstances. Instead it files a new rule to further disadvantage customers with a continuing motion practice even after they have been denied relief.

The Rule Will Be Used to Expunge Broker CRD Records

The crux of the proposal is that a party may request changes in the award for 30 days after the case has closed. It is proposed for ministerial matters, but the examples given are that parties file these requests "to obtain expungement relief that a party failed to request during the life of the case, to correct what a party perceives to be a mistake in the award, or to request that forum fee allocations be changed." That is an overly broad interpretation of the term "ministerial" and leads to the logical conclusion that members want to badger and coerce customers for expungement after the case is closed.

At present, customers lose 63% of FINRA arbitrations, receiving no award, usually with thousands of dollars of forum fees assessed against them. This rule would provide member firms an opportunity to further bleed those losing customer. At the certainty of additional attorney fees and risk of added forum fees, the customer would have little choice but to agree to broker expungement or allow an ex parte hearing on the matter without opposition. The public disclosure of individual broker records would become a further sham and state regulators would be denied a record of customer arbitration complaints. There is already an instance of one registered representative with over 20 claims expunged. This rule could make that a standard practice.

In addition to a party moving to alter an award or dismissal, the proposed rule provides for motions under two other circumstances. The first - "if all parties agree" – is completely unnecessary except as the provision used to file coerced agreements. Arbitration is a contractual agreement, although normally a contract of adhesion. As such, the parties may agree to anything they want without the need to file motions and agreements and pay additional forum fees unless it is an agreement to expunge the award from the broker's CRD record. This "agreement" will be in exchange for the member assuming the customer's forum fees or simply the threat of further forum and attorney fees after the customer has already lost.

The other circumstance allowing the continuing motion practice - "as ordered by a court" - would unnecessarily create a bifurcated process. It is unnecessary except to gain expungement after the 30 days has passed for the other two provisions. Because the time to confirm an arbitration award is a year, member firms would have that time to coerce or buy an expungement agreement from a customer. In the confirmation proceeding, the parties could request that the award be sent back to the panel for an agreed expungement which a court could not order on its own authority. Otherwise, the

section makes no sense. Both the Federal Arbitration Act and the states' Uniform Arbitration Act provide for modification or correction where the award has an evident miscalculation or material mistake or is imperfect in a matter of form. For a truly ministerial issue, there would be no reason to return to the arbitrators a matter the court is already authorized to hear.

The Last Benefit of Arbitration to Customers Would be Lost

Even winning customers will be subject to harassment and coercion. The 37% who "win" seldom receive full recovery and in many instances the small awards are substantially consumed by forum fees prior to other costs. A post-award motion practice with the attendant attorney and forum fees to argue additional issues would aggravate the problem and set the stage for the member to negotiate the award down even further to avoid the additional expense. That is contrary to the quick, fair and inexpensive resolution advertised. It removes the only remaining benefit of alternative dispute resolution for the customer; that of finality. FINRA arbitration is not fast, it is not fair, and it is expensive. With this rule, it won't even be final.

The Rule Should Be Rejected

As FINRA and SICA have said, the law generally provides that the arbitrator's authority ends when the arbitrators render their decision. It would be improper for FINRA to preempt generally accepted state and federal law by rule. There is no likely benefit to the investing public and a high probability of abuse. This rule should be rejected outright. If a rule is needed, it should be that once an award is issued, the case is closed and further motions by the parties will be summarily returned.