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Via E-Mail: rule-comments@sec.gov
Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549

RE: Release No. 34-63250; File No. SR-FINRA-2010-053
Proposed Rule Change Relating to Amendments to the Panel Composition Rule

Dear Ms. Murphy:

I am a partner in the law firm Eppenstein and Eppenstein in New York, New York and respectfully submit this comment in support of FINRA's filing to amend its panel composition rule which would afford to the parties in customer-industry arbitrations the option of choosing an all public arbitration panel.

My legal practice has been concentrated in representing public investors and advocating for investor rights almost exclusively for over 25 years. When my firm represented the claimants in the landmark U.S. Supreme Court case Shearson/American Express v. McMahon, 482 U.S. 220 (1987), I argued against mandatory arbitration and the practice of including mandatory non-public ("industry") arbitrators on panels in customer cases, which was commonplace at the SRO's then.

I have testified before three Congressional Subcommittees against mandatory arbitration and the mandatory securities industry arbitrator and have expressed my views in support of investor rights before SICA (Securities Industry Conference on Arbitration) as a public member since 1998, advocating for the elimination of the mandatory industry arbitrator at that forum on several occasions when representatives of the SEC, NASAA, FINRA, NASD and NYSE were in attendance.

I have lectured at seminars in the U.S. and symposia abroad in which I made the case for elimination of the mandatory industry arbitrator and offered guidance on arbitrator selection methodology. I have also co-authored with my partner, Madelaine Eppenstein, various articles on arbitrator selection matters.

I have tried numerous customer arbitration cases over the past 25 years at the NYSE, NASD, FINRA, NFA and the AAA. Since the early 1990s I have been a member of PIABA (Public Investor Arbitration Bar Association).

Given my consistent stance in support of investor rights I wholeheartedly support FINRA's PAPP initiative and FINRA's proposed rule change. Indeed, two years ago and again in 2009 I proposed to SICA that FINRA should petition the SEC to make the program universal, not just voluntary, for all the broker dealer members of FINRA, and for the program to include the participation of all individual associated persons. After 2 years of review, FINRA has promulgated rule changes to include these proposed revisions.

The rationale in support of SEC's immediate approval of these amendments is compelling. The public's perception of the fairness of FINRA arbitration has been compromised, as documented in the 2008 SICA-commissioned study, "Perceptions of Fairness of Securities Arbitration: An Empirical Study," (J. Gross, B. Black). The concerns of investors are founded in part on the appearance of partiality inherent in the presence of a member of the securities industry sitting as one of three arbitrators in judgment in customer cases in which a member of that same industry is on trial, the proverbial "stacked deck."

There is no perceived benefit to investors for the mandatory inclusion of an industry arbitrator on FINRA arbitration panels. Public arbitrators with no industry connection by comparison are clearly more representative of the cross-section of the communities within which investor claimants live and work.

One of the concerns for investors is that the securities industry arbitrator may experience undue pressure to favor the industry respondent in a customer case rather than risk being blackballed by his colleagues for a high award to the customer, especially since awards are made public.

The opportunity for the public customer to obtain a fair result from an impartial panel is also in jeopardy if the presumptive "wisdom" of the industry arbitrator leads to undue influence on the other panel members in their private deliberations. As I have often noted, there is no

corresponding "investor" advocate on the panel to counter the industry designee.[1]

The public is also concerned that the industry panelist may more likely side with the respondent because the improper practice at issue in the arbitration may be prevalent at his own firm.

Conclusion

I urge the SEC to immediately approve FINRA's proposal to amend the Customer Arbitration Code and Panel Composition Rules to provide customers the option to choose an all public arbitration panel in all cases filed at FINRA, including those cases already filed in which a panel has not yet been appointed.

Respectfully,

Theodore G. Eppenstein

[1]This is not to suggest that every industry arbitrator is biased. There are many who are as fair-minded as public arbitrators, and under FINRA's proposed rule parties retain the opportunity to choose an industry panelist if both sides agree.