I write in support of the proposal by FINRA finally to rid us of the mandatory industry arbitrator.

I am Professor of Law at the Zicklin School of Business, Baruch College, CUNY. I am also a member of Deutsch & Lipner, a Garden City New York law firm which represents aggrieved investors in arbitration. I am a two-time past-President of the Public Investors Arbitration Bar Association ("PIABA"), and I have served on the NASD's National Arbitration and Mediation Committee. I am a long-time author and commentator on securities arbitration, and I write a column at Forbes.com on investor protection and securities arbitration.

Most importantly for this Comment, I am a long-time practitioner in the field. The law firm in which I am a member has filed and participated in hundreds of arbitrations over the last 25 years. In the last year, we have filed dozens of cases in the existing FINRA All-Public Arbitrator Pilot. A few of these cases have now proceeded to award; others have settled. In addition, we have filed cases that, for various reasons, that were not eligible for the Pilot.

FINRA is to be commended for proposing to eliminate the requirement that each 3-person arbitration panel include an industry representative. The change is long-overdue. Wall Street should not be judging Wall Street.

This concern about self-policing is especially acute at this moment. Wall Street's recklessness and greed were directly responsible for destroying the U.S. economy, and for destroying some investors' wealth. It is morally wrong to have managers from, for example, Citibank, judging whether UBS or JPMorgan or Lehman Brothers screwed up. They all screwed up! How do we know they won't just give each other a pass?[1]

The presence of so-called "non-public arbitrators"[2] on every panel creates problems on many levels. The brokers, brokerage firm lawyers, branch managers and other employees of brokerage firms who serve on panels are just too close to the industry to serve as impartial jurists.

Too many industry arbitrators work for firms whose sales practices and investment products are the same as those being challenged in the arbitration (e.g. variable annuities, structured products). Such arbitrators simply cannot be impartial. Visions of foxes and hen houses abound.

Every industry arbitrator has, at some point in his/her career, earned a livelihood working in or for the securities industry. Most of them probably hope to continue to do so in the future.

---

[1] I recently experienced this phenomenon in at least two cases. In these cases, the defense asserted that the product about which our client complained was also sold the same way by other firms, including the firm for which the industry arbitrator worked. The first case resulted in a zero-award for the client; the second settled for less than it otherwise would have.

[2] The term "non-public arbitrators" is, of course, a euphemism. The term used by everyone else is "industry arbitrator." That term is far more descriptive.

Such economic conflicts create bias – sometimes real, sometimes subconscious – but biases nonetheless.

This is not to condemn all industry arbitrators. In some cases (depending on the facts), the proximity problem (and its influence on the arbitrator) may not be as strong as it is in other cases. Some industry arbitrators may be able to rise above it. Some may even be extra-tough on their own industry. But many are biased against investors who are complaining, and others may just be soft on their compatriots. When we select arbitrators for cases, we have no way to tell who are the unbiased, tough industry arbitrators and who, because of their employment, may be biased in favor of brokers and brokerage firms.[3]

The mandatory inclusion of industry arbitrators also creates the potential to skew the deliberative process. An industry arbitrator's background (or gravitas) can give that person an out-sized say in the outcome, especially if the other panelists are weak, confused or uncertain. Such people will sometimes defer to an industry arbitrator's profession of knowledge and experience. Industry arbitrators are also more likely to make decisions based on career experience, rather than on the evidence offered. But each arbitrator's influence on the outcome should be equal, and decisions should be based on evidence presented, not pre-conceived notions. The FINRA proposal will advance these aims.

Last, as an advocate who has (now) appeared before several all-public panels (under the Pilot), I will attest that the tenor of these proceedings is better. Our clients feel better about the apparent fairness of the panel. And we are able to better represent our clients and be candid with the Panel about the wrongdoing. We do not have to tip-toe around issues that might challenge the bona fides of an industry-wide practice or product.[4]

FINRa's statistics (and our few cases) show positive results coming from the Pilot. More awards for Claimants, more "full" awards for Claimants. While some on Wall Street may view these results as a negative, I believe it shows that aggrieved investors who were forced to labor under the existing system sometimes suffered bad awards as a by-product of bias.

The SEC should right this wrong as quickly as it can. I urge the SEC to approve the

---

[3] Even when an industry arbitrator is truly neutral, the perception of unfairness emanating from his/her presence hurts the process. Too often, an investor who lost in arbitration will believe that the panel must have been biased; having an industry arbitrator on every panel needlessly adds fuel to that belief.

[4] We recently encountered this problem in an arbitration. The case involved a charity that had bought Fannie Mae Preferred Stock in January 2008; the Respondent had served as an underwriter of that security. The industry arbitrator in the case was a senior executive of another firm that had co-underwrote (with the Respondent firm) a nearly-contemporaneous other issuance of Fannie Mae Preferred Stock. As a result, we had to tip-toe around the due-diligence issues, and we were inhibited from making allegations of and offering testimony that industry-wide procedures were across-the-board substandard. (The case settled)

FINRA proposal on an expedited basis, and to encourage FINRA to implement it immediately for any case in which arbitrators have not been yet been selected. With such actions, securities arbitrations will immediately be rendered more fair than they are today.