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Ms. Elizabeth M. Murphy, Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549

Re: *Proposed Rule Change- Elimination of FINRA-DR Mandatory Industry Arbitrator Pursuant to Commission Rule of Practice SR-FINRA-2010-053*

Dear Ms. Murphy:

I submit this comment letter in support of the pending rule change proposal to eliminate the requirement that an arbitrator affiliated with the securities industry sit on all public investor cases arbitrated before the Financial Industry Regulatory Authority ("FINRA") in which the amount in controversy exceeds $100,000. The FINRA rule proposal essentially permits that parties to investor security arbitration disputes be given the **choice** to decline the presence of an industry arbitrator on panels that hear and decide their cases.

As you are aware, the FINRA-Dispute Resolution ("FINRA-DR") rules currently mandate that an industry arbitrator sit on a panel in all investor claims wherein the amount of damages sought exceeds $100,000.

My office represents the interests of individual/institutional investors who have lost money as the result of the wrongdoing of the financial industry, primarily broker-dealers. Potential claimants are invariably perplexed when informed that an industry member must sit on their panels. Without exception, these claimants, who have been burned by the 'professionals' in the industry, immediately recognize the unfairness of the rule.

The mandatory industry arbitrator with respect to investment disputes has deep roots. In 1817, The New York Stock & Exchange Board drafted its constitution to provide that all questions of dispute involving the purchase of stocks were to be decided by a majority of the Board of Directors. The New York Stock Exchange constitution, as it existed in 1872, permitted members from the general public to submit claims to arbitration and required members to honor and be bound by the process. The industry arbitrator requirement likely became officially enshrined in the area of securities arbitration in the period between 1976 and 1984 when a number of self regulatory organizations ("S.R.O.'s") sought to develop written procedures and a uniform code for resolving disputes in arbitration.

It's important to observe that at the time of the adoption of the S.R.O. arbitration codes, arbitration was largely viewed as voluntary on the part of the investor. As such, the general investing public had little input into the formulation of the rules of the S.RO.'s. Since that time, the internet has fostered the widespread dissemination of information making the rule change process more transparent—today the investing public has a voice in matters concerning their rights. It should also be noted that the S.E.C. took a limited role in the oversight of the arbitral forums at the time of the adoption of most of the S.R.O. arbitration rules.

In 1953, the Supreme Court of the United States ruled in *Wilko v. Swan* (346 U.S. 427) that disputes involving the statutory investor protections set forth in the Securities Act of 1933 could not be compelled to arbitration pursuant to pre-dispute arbitration agreements. In deciding the case, the Supreme Court recognized the inadequacies of arbitration as compared to court proceedings with respect to resolving investment disputes. Following the *Wilko* decision, securities arbitration for resolving investor disputes arising out of the Securities Acts of 1933 and 1934 was viewed as voluntary on the part of the investor.

In 1987, the Supreme Court considered the issue of whether investors could be compelled to arbitrate claims involving statutory violations of the Securities Act of 1934[1] pursuant to pre-dispute arbitration agreements in the landmark case *Shearson/American Express, Inc. v. McMahon* (428 U.S. 220 (1987)). In reversing the long held position that investors could not be compelled to arbitrate these statutory claims, the Supreme Court issued a 5-4 decision ruling that pre-dispute arbitration agreements could be enforced with respect to these claims. Since the decision in *McMahon*, it has become generally accepted that the securities industry may compel individual investors to their arbitral forums through arbitration clauses contained in brokerage account agreements. As the result of the *McMahon* decision, securities arbitration transformed from a largely voluntary process to a mandated requirement for most aggrieved investors. It's often overlooked, however, that the dissenting opinion in *McMahon* raised serious concerns regarding the fairness of the industry sponsored securities arbitration process.

In partially dissenting in the *McMahon* case, Justice Blackmun called into question the basic fairness of the arbitration forums operated by the securities industry. In particular, the dissenting justices questioned whether the promised oversight by the S.E.C. of the S.R.O. sponsored arbitral forums adequately ensured that investors could be assured that their claims could be fairly heard. The opinion specifically referenced the

[1] The *Wilko* decision did not specifically address claims under the Securities Act of 1934. However, it had widely been believed that the reasoning of the *Wilko* decision concerning the 1933 Act also applied to the 1934 Act. Additionally, the S.E.C. had indicated that broker-dealers could not seek to enforce pre-dispute arbitration agreements for claims alleging violations of the Securities Acts (See NASD notice 83-73 regarding the adoption of S.E.C. Rule 15c2-2).

presence of the industry arbitrator in connection with respect to the fairness of the arbitration process:

> "Furthermore, there remains the danger that, *at worst*, compelling an investor to arbitrate securities claims puts him in a forum controlled by the securities industry. This result directly contradicts the goal of both securities Acts to free the investor from the control of the market professional . . . **because of the background of the arbitrators, the investor has the impression, frequently justified, that his claims are being judged by a forum composed of individuals sympathetic to the securities industry and not drawn from the public . . . The uniform opposition of investors to compelled arbitration and the overwhelming support of the securities industry for the process suggest that there must be *some* truth to the investors' belief that the securities industry has an advantage in a forum under its own control**." 428 U.S. at 260 [Emphasis Added]

Writing for the majority in the *McMahon* case, Justice O'Connor noted that the decision was based, in large part, on the perceived notion that the S.E.C. would oversee the rules of the S.R.O. arbitration forums. Beyond overseeing the rules of the forums, Justice O'Connor also noted that the S.E.C. should mandate the adoption of any rules that it deemed necessary to advance investor protection. It should be noted that the dissenting justices were critical of the fact that the S.E.C. had not conducted a study of the perceived inadequacy of the S.R.O. arbitration system as it existed in 1987.

Subsequent to the *McMahon* decision, the Commission itself stressed the importance of public investor choice of arbitration forums and the competitive benefit to all parties derived from such choices. *See* SEC *amicus* brief in *Roney v. Goren*, 875 F.2d 1218 (6th Cir. 1989), at pages 16-21. Today only one arbitral forum essentially remains for hearing the claims of public investors, FINRA-DR. Indeed, if FINRA obtains jurisdiction over registered investment advisors, even more claims could be swept under its umbrella. Thus, it is imperative that this forum provide a fair opportunity for claims to be heard before truly impartial arbitrators.

I applaud FINRA-DR for advancing the rule change proposal. The SEC must bear in mind that, essentially, this is the first time that the mandatory industry arbitrator rule has come under its scrutiny. Any claims by the financial industry that the mandatory industry arbitrator is fair- should be scrutinized as absurd on their face.

My only limited objection to the proposed rule is the requirement that a party affirmatively to notify FINRA within thirty-five days of the service of the statement of claim that it wants to take advantage of the Majority Public Panel option. This provision creates an unneeded administrative/procedural step in applying the rule. Additionally, it sets a trap for practitioners who do not regularly practice in the area of securities arbitration and/or *pro se* claimants. An investor should not be deprived of the option of excluding a mandatory industry arbitrator from a panel due to missing a deadline.

Additionally, the proposed rule is vague as to whether a claimant can request that the Majority Public Panel rule be applied to a case at the time of filing a statement of claim. The rule appears preclude the ability of an investor to request it be applied to a case at the time of filing, forcing the claimant to wait until the statement of claim has actually been served. Due to the vagaries of FINRA-DR procedure, it's often unclear when the statement of claim has actually been served.

I feel that the proposed rule should be redrafted to indicate that it applies to all customer cases filed unless a claimant specifically requests to opt out of the rule (i.e.- the customer requests that a mandatory industry arbitrator sit on their arbitration panel). Such a rule would eliminate notification deadlines for customers while simultaneously lessening the burden of the FINRA-DR case administrators with respect to following up on the application of the rule.

Thank you for your kind consideration herein.

Sincerely,

Dayton P. Haigney