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February 1, 2012

VIA ELECTRONIC SUBMISSION

Elizabeth M. Murphy, Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090

Re: Release No. 34-66109; File No. SR-FINRA-2011-075 – Proposed Rule Change to Amend the Code of Arbitration Procedure for Industry Disputes to Preclude Arbitration of Collective Action Claims

Dear Ms. Murphy:

The Investor Rights Clinic at Pace Law School, operating through John Jay Legal Services, Inc. ("PIRC"),[1] welcomes the opportunity to comment on FINRA's proposed amendment to Rule 13204 of the Code of Arbitration Procedure for Industry Disputes ("Industry Code") to preclude arbitration of collective claims by employees of FINRA members that arise under the Fair Labor Standards Act, the Age Discrimination in Employment Act, or the Equal Pay Act of 1963 ("the proposed rule change").[2] We support the proposed rule change because it codifies long-standing FINRA staff interpretative guidance which permits individual employees of FINRA member firms to vindicate important federal statutory rights in what we agree is the appropriate forum to resolve those disputes.

Current Industry Code 13204

Currently, Industry Code 13204 provides that "class actions may not be arbitrated under the [Industry] Code."[3] Under this Rule, a FINRA member firm "may not enforce any arbitration agreement against a member of a certified or putative class action with respect to any claim that

[1] PIRC opened in 1997 as the nation's first law school clinic in which J.D. students, for academic credit and under close faculty supervision, provide *pro bono* representation to individual investors of modest means in arbitrable securities disputes. *See* Barbara Black, *Establishing A Securities Arbitration Clinic: The Experience at Pace*, 50 J. LEGAL EDUC. 35 (2000); *see also* Press Release, Securities Exchange Commission, *SEC Announces Pilot Securities Arbitration Clinic To Help Small Investors - Levitt Responds To Concerns Voiced At Town Meetings* (Nov. 12, 1997), *available at* http://www.sec.gov/news/press/pressarchive/1997/97-101.txt. While the primary function of PIRC is investor protection, we are commenting on this proposed rule change, although it does not directly pertain to investors, because it promotes the interests of individuals in the securities industry at the expense of financial institutions by providing members of collective actions with courthouse access.
[2] 29 U.S.C. § 201, *et seq*. (FLSA); 29 U.S.C. § 621, *et seq*. (ADEA); 29 U.S.C. § 206(d) (EPA).
[3] Rule 13204, *available at* http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=4207.

is the subject of the certified or putative class action until" class certification is denied, the class is decertified, or the member is precluded, opts out or withdraws from the class.[4]

Long-standing interpretative guidance from FINRA staff emphasizes the pertinent Rule intended to include collective action claims brought under federal law, and senior SRO staff understood the term "class action" under the Rule to encompass all group actions.[5] However, two federal court judges in New York recently declined to defer to that guidance,[6] holding that collective actions are not class actions within the meaning of Industry Code 13204 and forcing two separate sets of plaintiffs to arbitrate their FLSA claims.[7] Those judges also left little doubt that, if FINRA intended for collective actions to be included in Rule 13204, it would have to seek a formal amendment to the Rule.[8] The proposed rule change seeks that formal amendment.

Courts are better suited to handle group actions

Group actions have existed in the justice system for almost a millennium.[9] Rule 23 of the Federal Rules of Civil Procedure was substantially transformed in 1966, creating the "opt-out" class action standard as we know it today and ushering in the modern class action era.[10] Four decades later, Congress enacted the Class Action Fairness Act of 2005, in which it established class actions as "an important and valuable part of the legal system when they permit the fair and efficient resolution of legitimate claims of numerous parties by allowing the claims to be aggregated into a single action against a defendant that has allegedly caused harm."[11] Collective

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[4] *Id*.
[5] *See* Letter from NASD Assistant General Counsel, Jean I. Feeney to Cliff Palefsky, Esq. (Sept. 21, 1999), *available at*: http://www.finra.org/Industry/Regulation/Guidance/InterpretiveLetters/P002521; *see also* Letter from NASD Executive Vice President, Dispute Resolution, Director of Arbitration, George H. Friedman (Oct. 10, 2003).
[6] While we recognize that FINRA staff letters are not binding law, PIRC is troubled that two federal judges declined to respect an SRO forum's interpretation of its own rules. *Cf. Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 85 (2002) (concluding that "NASD arbitrators, comparatively more expert [than judges] about the meaning of their own rule, are comparatively better able to interpret and to apply it"). We believe FINRA staff interpretations are entitled to substantial deference.
[7] *See Velez v. Perrin Holden & Davenport Capital Corp.*, 769 F.Supp. 2d 445 (S.D.N.Y. 2011); *Gomez v. Brill Sec., Inc*., No. 10 Civ. 3503 (JSR), 2010 U.S. Dist. LEXIS 118162 (S.D.N.Y. Nov. 2, 2010); *see also Velez v. Ph.D. Capital Corp*., No. 10 Civ. 3735 (SHS), 2011 U.S. Dist. LEXIS 16678 (S.D.N.Y. Feb. 3, 2011). Other federal judges reached the same conclusion. *See, e.g., Suschil v. Ameriprise Fin. Servs., Inc*., No. 07 Civ. 2655, 2008 WL 974045, at *5 (N.D. Ohio Apr. 7, 2008); *Chapman v. Lehman Bros., Inc.*, 279 F.Supp.2d 1286, 1290 (S.D. Fla.2003).
[8] *Velez*, 769 F.Supp.2d at 445, 447 (noting "[i]f FINRA wanted to prohibit arbitration of collective action claims, FINRA is certainly able to amend its rules to do so," and citing *FINRA Rulemaking Process, available at* http://www.finra.org/Industry/ Regulation/FINRARules/RulemakingProcess (Feb. 2, 2010)); *Gomez*, 2010 U.S. Dist. LEXIS 118162, at *4 ("…FINRA, could have enacted a rule that barred arbitration of collective actions as well as class actions, but it did not do so.").
[9] *See* Stephen C. Yeazell, *The Past and Future of Defendant and Settlement Classes in Collective Actions*, 32 ARIZ. L. REV. 687 (1997) (noting that the earliest believed reported example of such a group action is *Master Martin Rector of Barkway v. Parishioners of Nuthampstead*, adjudicated around the year 1199); *see also* Susan Spence, *Looking Back . . . In a Collective Way: A short history of class action law*, ABA BUSINESS LAW TODAY, Vol. 11, No. 6 - July/August 2002, *available at* http://apps.americanbar.org/buslaw/blt/2002-07-08/spence.html.
[10] Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 391 (1967); *see also* Stephen C. Yeazell, *From Medieval Group Litigation to the Modern Class Action* 229 (1987) (tracing group action evolution in common law throughout the centuries).
[11] CLASS ACTION FAIRNESS ACT OF 2005, Pub. L. No. 109-2, 119 Stat. 4 (2005) (codified at 28 U.S.C. §1715).

actions, utilized for some statutory labor disputes,[12] are similar to Rule 23 class actions.

FINRA has long recognized its arbitration forum is not necessarily the appropriate forum to resolve all industry-related disputes, particularly group actions. Twenty years ago, FINRA's predecessor, the National Association of Securities Dealers ("NASD"), proposed a rule change to: 1) exclude class action matters from arbitration, and 2) require pre-dispute arbitration agreements to include a notice that such group actions could not be arbitrated.[13] The Securities and Exchange Commission ("SEC") roundly supported the proposal, and concluded "the judicial system has already developed the procedures to manage class action claims," and "[e]ntertaining such claims through arbitration . . . would be difficult, duplicative and wasteful."[14] A few years later, the NASD, New York Stock Exchange ("NYSE") and Boston Stock Exchange all modified their respective rules, lifting the requirement that registered employees must submit statutory employment discrimination actions to arbitration, including sexual harassment claims, based on waiver language in an earlier version of the Form U-4.[15]

The proposed rule change rightly allows group actions to be administered by courts, which have accumulated vast experience using specialized procedures to preside over complex multi-party litigation, whether collective or class, while preserving the benefits of arbitration and mediation for resolution of bilateral customer and labor disputes. Without the proposed rule change, many of the procedural protections Congress crafted within the federal acts discussed here–duly legislated rights and remedies–would be vitiated.[16] While some may view the arbitral process as a way to "relieve court congestion, and [ ] provide parties with a speedier and less costly alternative to litigation,"[17] it is not the best suited forum for every action. The proposed rule change eliminates what would otherwise be a "difficult, duplicative and wasteful" system, and instead properly locates collective actions in court with their class action cousins.

The AT&T Mobility legacy

PIRC also supports the proposed rule change because it prevents FINRA member firms from inserting enforceable collective action waivers in their employment agreements, contrary to what consumer services companies can now do with impunity in their consumer contracts. The

[12] 29 U.S.C. § 216(b).
[13] *See* SEC Order Approving Proposed Rule Change Relating to the Exclusion of Class Actions from Arbitration Proceedings, Rel. No. 34-31371, 52 S.E.C. Docket 2189, 1992 WL 324491 (proposed Oct. 28, 1992). Today's version of that rule, Rule 13204, is the subject of the current proposed rule change.
[14] *Id.* at *3.
[15] *See* NASD Order Granting Approval to Proposed Rule Change Relating to the Arbitration of Employment Discrimination Claims, SEC Rel. No. 34-40109, 67 S.E.C. Docket 824, 1998 WL 327716 (proposed June 22, 1998); Order Approving Proposed Rule by the New York Stock Exchange, Inc. Relating to Arbitration Rules, SEC Rel. No. 34-40858, 68 S.E.C. Docket 2491, 1998 WL 907943 (proposed Dec. 29, 1998); Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change by the Boston Stock Exchange, Inc. Relating to its Arbitration Rules, SEC Rel. No. 40861; File No. SR-BSE-98-14, 64 FR 1039-01, 1999 WL 3306 (proposed Jan. 7, 1999).
[16] For example, according to the Department of Labor, the EPA "[p]rohibit[s] sex-based wage differentials between men and women employed in the same establishment who perform jobs requiring equal effort, skill, and responsibility. These provisions are enforced by the Equal Employment Opportunity Commission (EEOC)." United States Department of Labor: Wages, *available at* http://www.dol.gov/dol/topic/wages/minimumwage.htm (last visited Jan. 31, 2012).
[17] *Stout v. J.D. Byrider*, 228 F.3d 709, 714 (6th Cir. 2000).

Supreme Court's recent decision in *AT&T Mobility v. Concepcion*,[18] preempting a California state law that voids unconscionable class action waivers within pre-dispute arbitration clauses of adhesive consumer contracts, reflects a willingness by the Court to enforce arbitration agreements, even when doing so deprives individual litigants of their ability to pursue class relief. According to Justice Breyer, writing in dissent, if class arbitration is barred and lower courts must now enforce adhesive class arbitration waivers, this would "have the effect of depriving claimants of their claims."[19]

In contrast, for individual securities industry employees with statutory claims that may only be pursued realistically as group claims, and unlike the holding in *AT&T Mobility*, FINRA permits them to vindicate their statutory rights by directing their group claims to court. The need to preserve courtroom access for FLSA collective action claims is illustrated by the recent decision of another federal trial judge from New York, the Honorable Kimba Wood, who recently reaffirmed her earlier invalidation of an employment agreement waiver that would have precluded putative FLSA collective litigation.[20] Relying on the arbitration doctrine that an agreement to arbitrate is unenforceable if it precludes a party from "effectively vindicating her statutory rights,"[21] Judge Wood refused to enforce the disputed agreement because it would "operate as a waiver of Sutherland's right to pursue her statutory remedies pursuant to FLSA."[22] The proposed rule change permits employees to vindicate statutory rights by directing them to the forum most appropriate for resolution of their labor disputes.

Conclusion

For the reasons stated above, PIRC strongly supports the proposed rule change precluding collective actions in FINRA arbitration.

Respectfully submitted,

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[18] *AT&T Mobility v. Concepcion*, 131 S.Ct. 1740 (2011).
[19] *Id.* at 1761. Justice Breyer asked the *AT&T Mobility* majority, "What rational lawyer would have signed on to represent the Concepcions in litigation for the possibility of fees stemming from a $30.22 claim?" *Id.*, citing and quoting *Carnegie v. Household Int'l, Inc*., 376 F.3d 656, 661 (7th Cir. 2004) (recognizing that "…only a lunatic or a fanatic sues for $30" and the "*realistic* alternative to a class action is not 17 million individual suits, but zero individual suits...").
[20] *See Sutherland v. Ernst & Young LLP*, 10 Civ. 3332, Slip Copy, 2012 WL 130420 (S.D.N.Y. Jan. 17, 2012); *see also Sutherland v. Ernst & Young LLP*, 768 F.Supp.2d 547 (S.D.N.Y. 2011).
[21] *Sutherland*, 2012 WL 130420, *at *17.* That doctrine stems from *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, in which the United States Supreme Court reasoned that arbitration is an acceptable option "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985).
[22] *Sutherland*, 2012 WL 130420, at **14.*