

March 28, 2012

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

Re: File No. SR-FINRA-2011-075 – Proposed Rule Change to Amend Rule 13204 of the Code of Arbitration Procedure for Industry Disputes to Preclude Collective Actions from Being Arbitrated under the Industry Code; Response to Comments No. 1 and Partial Amendment No. 1

Dear Ms. Murphy:

The Financial Industry Regulatory Authority, Inc. (FINRA) hereby responds to the comment letters received by the Securities and Exchange Commission (SEC) with respect to the above rule filing. In this rule filing, FINRA would amend Rule 13204 of the Code of Arbitration Procedure for Industry Disputes (Industry Code) to preclude collective action claims under the Fair Labor Standards Act (FLSA), the Age Discrimination in Employment Act (ADEA), or the Equal Pay Act of 1963 (EPA) from being arbitrated under the Industry Code.¹ The SEC published the proposal in the *Federal Register* on January 11, 2012; the comment period expired on February 1, 2012.

The SEC received two comments on the proposal.² The PACE Comment supports the proposal 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.”³

¹ See Securities Exchange Act Rel. No. 66109 (January 5, 2012), 77 FR 1773 (January 11, 2012) (File No. SR-FINRA-2011-075, Notice of Filing of Proposed Rule Change to Amend the Code of Arbitration Procedure for Industry Disputes to Preclude Collective Action Claims from Being Arbitrated).

² Comments on the proposal were submitted from: Kevin M. Carroll, Managing Director and Associate General Counsel, Securities Industry and Financial Markets Association, February 1, 2012 (SIFMA Comment) and Jill I. Gross, Director, Edward Pekarek, Assistant Director, and Genavieve Shingle, Student Intern, Pace Investor Rights Clinic, February 1, 2012 (PACE Comment).

³ PACE Comment at 1.

The SIFMA Comment states that it does not object to the proposed rule change.⁴ However, SIFMA's Comment indicates that it has concerns with some of the proposed rule language and provides suggested revisions. This letter responds to SIFMA's concerns and proposes to amend the proposal to clarify the applicability of some aspects of the proposal.

Scope of the Collective Action Proposal

SIFMA contends that the proposed rule language in Rule 13204(b)(2) could be interpreted to include multi-party litigation outside of the collective action context.⁵ SIFMA recommends that FINRA amend the proposed rule language to clarify FINRA's intent that the proposed rule would apply to collective actions only.⁶

First, as SIFMA notes, FINRA's intent is to limit the application of the rule to the collective action context. The proposed rule language in Rule 13204(b)(2) states that, any claim that involves plaintiffs who are similarly-situated against the same defendants as in a court-certified collective action or a putative collective action, or that is ordered by a court for collective action at a forum not sponsored by a self-regulatory organization, shall not be arbitrated under the Code, if the party bringing the claim has opted-in to the collective action. The proposal provides the criteria for those claims that would be prohibited from being arbitrated in FINRA's forum, and would apply only if the party bringing the claim opts in to a collective action. Thus, FINRA believes the proposed rule limits the scope of applicability to those parties who opt in to a collective action, and precludes those claims from being arbitrated in FINRA's forum only.

Second, SIFMA's recommendation to amend the proposal to clarify the intent of proposed Rule 13204(b)(2) would remove proposed rule language that includes the term "similarly-situated." However, the FLSA uses that term to describe party plaintiffs in collective actions under the statute.⁷ Therefore, FINRA believes this criterion should remain in the proposed rule language to define the parties to whom the proposal would apply.

For these reasons, FINRA declines to amend the proposal as suggested.

Collective Actions in Other Arbitration Fora

SIFMA contends that FINRA members agree to arbitrate collective actions in arbitration fora other than FINRA's dispute resolution forum, and that these agreements are valid and enforceable.⁸ SIFMA recommends that FINRA amend the proposal to

⁴ SIFMA Comment at 1.

⁵ Id.

⁶ Id.

⁷ See 29 U.S.C. § 216(b).

⁸ SIFMA Comment at 2.

broaden the language to acknowledge that arbitration fora, other than FINRA's forum, accept collective action claims.⁹

As FINRA is proposing to expressly prohibit collective action claims from being arbitrated in its forum, FINRA members and their employees may agree to address collective action claims either by filing them in a court of competent jurisdiction or arbitrating them in other arbitration fora. Thus, FINRA proposes to amend proposed Rules 13204(b)(3) and (b)(4) as SIFMA recommends. Proposed new language is underlined; deletions are in brackets.

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13204. Class Action & Collective Action Claims

(a) Class Actions

No change.

(b) Collective Actions

(1) No change.

(2) No change.

(3) The Director will refer to a panel any dispute as to whether a claim is part of a collective action, unless a party asks the court or other forum hearing the collective action to resolve the dispute within 10 days of receiving notice that the Director has decided to refer the dispute to a panel.

(4) A member or associated person may not enforce an[y arbitration] agreement to arbitrate in this forum against a member of a certified or putative collective action with respect to any claim that is the subject of the certified or putative collective action until the collective action certification is denied or the collective action is decertified.

Remainder of the rule – no change.

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FINRA's Jurisdiction

SIFMA states that firms can and do agree to arbitrate claims solely on an individual basis in arbitration fora other than FINRA, and that these agreements are valid and enforceable.¹⁰

⁹ Id.

¹⁰ SIFMA Comment at 2.

FINRA believes this comment is outside the scope of this proposal. However, as the statement may have implications concerning FINRA's jurisdiction under FINRA IM-13000¹¹ and FINRA Rules 13200¹² and 13312,¹³ FINRA will submit a separate response to the SEC to address these issues.

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If you have any questions, please contact me on (202) 728-8151 or at mignon.mclmore@finra.org.

Very truly yours,

Mignon McLemore
Assistant Chief Counsel
FINRA Dispute Resolution

¹¹ See FINRA IM-13000 (Failure to Act Under Provisions of Code of Arbitration Procedure for Industry Disputes).

¹² See FINRA Rule 13200 (Required Arbitration).

¹³ See FINRA Rule 13312 (Multiple Claimants).