FINRA

Financial Industry Regulatory Authority

April 13, 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. 2

Dear Ms. Murphy:

The Financial Industry Regulatory Authority, Inc. (FINRA) hereby responds to a comment letter 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] 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

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[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.

[4] SIFMA Comment at 1.

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proposed rule language and provides suggested revisions. On March 28, 2012, FINRA filed its Response to Comments No. 1 and Partial Amendment No. 1 (Response and Partial Amendment No. 1).[5] In it, FINRA proposed to amend proposed Rules 13204(b)(3) and (b)(4) to clarify that firms may resolve collective action claims in a forum other than FINRA. Thus, the proposed changes would permit FINRA members and their employees to agree to address collective action claims either by filing them in a court of competent jurisdiction or arbitrating them in other arbitration fora.[6] In Response and Partial Amendment No. 1, FINRA declined, however, to amend proposed Rule 13204(b)(2) to clarify its applicability to collective actions only. FINRA believes the rule language limits effectively 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.[7] On April 9, 2012, the SEC approved the proposal.[8]

In Response and Partial Amendment No. 1, FINRA also reserved the right to submit a separate response to the SEC to address a statement in the SIFMA Comment that may have implications concerning FINRA's jurisdiction under FINRA IM-13000[9] and FINRA Rules 13200[10] and 13312.[11] This Response to Comments No. 2 addresses the jurisdiction issue.

SIFMA's comment 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.[12] (Emphasis added.)

FINRA disagrees with SIFMA's statement to the extent it implies that firms may prohibit employees from arbitrating their disputes with the firm in FINRA's dispute resolution forum. FINRA has learned that some brokerage firms are using employment agreements that require employees to waive their rights to arbitrate disputes with the firms in FINRA's forum.

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[5] See Response to Comments No. 1 and Partial Amendment No. 1 to Proposed Rule Change to Amend Rule 13204 of the Industry Code to Preclude Collective Action Claims From Being Arbitrated Under the Industry Code (File No. SR-FINRA-2011-075), from Mignon McLemore, Assistant Chief Counsel, FINRA Dispute Resolution, available at http://www.finra.org/Industry/Regulation/RuleFilings/2011/P125334.

[6] Id. at 3.

[7] Id. at 2.

[8] See Securities Exchange Act Rel. No. 66774 (April 9, 2012), 77 FR 22374 (April 13, 2012) (Notice of Filing of Amendment No. 1 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 1, Amending Rule 13204 of the Code of Arbitration Procedure for Industry Disputes to Preclude Collective Action Claims from Being Arbitrated).

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

[10] See FINRA Rule 13200 (Required Arbitration).

[11] See FINRA Rule 13312 (Multiple Claimants).

[12] SIFMA Comment at 2.

FINRA notes that under the FINRA By-Laws, application for FINRA membership includes, among other things, an agreement to comply with the federal securities laws, the rules and regulations thereunder, the rules of the Municipal Securities Rulemaking Board and the Treasury Department, the By-Laws of the Corporation, NASD Regulation, or NASD Dispute Resolution.[13]

The Industry Code is a set of FINRA Dispute Resolution[14] rules, which governs, among other things, the jurisdiction of disputes between and among FINRA members and associated persons. Specifically, FINRA Rule 13200 states that disputes must be arbitrated under the Industry Code if they arise out of the business activities of a member or an associated person and is between or among members, members and associated persons, or associated persons.[15] FINRA's position is that, under this rule, a member firm's employment agreement cannot prohibit a dispute that meets the criteria of the rule from being arbitrated in FINRA's forum. Therefore, a member's employment agreement that requires its employees to waive their right to arbitrate these disputes in FINRA's forum violates FINRA Rule 13200, and may also violate FINRA IM-13000.[16]

Further, FINRA believes SIFMA's statement also may imply that firms may require employees to waive their rights to bring collective action claims in any forum. FINRA disagrees with this implication.

The Industry Code recognizes that collective action claims are permitted in other fora. For example, Rule 13204(b)(1)[17] states that collective action claims under the FLSA, the ADEA, or the EPA may not be arbitrated under the Code. Thus, the rule

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[13] See FINRA By-Laws of the Corporation, Art. IV (Membership), Sec. 1 (Application for Membership). See also FINRA By-Laws of the Corporation, Art. V (Registered Representatives and Associated Persons), Sec. 2 (Application for Registration) (containing similar language pertaining to an associated person's registration).

[14] On July 30, 2007, NASD and the New York Stock Exchange (NYSE) consolidated their member firm regulation and dispute resolution operations into a combined organization, FINRA. See Securities Exchange Act Release No. 56145 (July 26, 2007), 72 FR 42169 (August 1, 2007), as amended by Securities Exchange Act Release No. 56145A (May 30, 2008), 73 FR 32377 (June 6, 2008) (File No. SR-NASD-2007-023). On May 21, 2009, the SEC approved amendments to FINRA Regulation's By-Laws to adopt changes to conform the FINRA Regulation By-Laws to the FINRA By-Laws, and to reflect the corporate name change, among other things. See Securities Exchange Act Rel. No. 59962 (May 21, 2009), 74 FR 25792 (May 29, 2009) (Order Proposed Rule Change Relating to the FINRA Regulation Board Composition and Conforming Changes to the FINRA Regulation By-Laws).

[15] See supra note 10.

[16] See FINRA IM-13000 (stating that "[i]t may be deemed conduct inconsistent with just and equitable principles of trade and a violation of Rule 2010 for a member to require associated persons to waive the arbitration of disputes contrary to the provisions of the Code of Arbitration Procedure.)

[17] While the SEC has approved the rule, it is not yet effective.

recognizes that parties may file collective action claims to address their disputes; they would be required, however, to file them in a forum other than FINRA. Other references in the rule indicate that FINRA recognizes that collective action claims are permitted *in* other fora. For example, proposed Rule 13204(b)(3) requires the Director to refer disputes as to whether a claim is part of a collective action *to a panel, unless a party* asks a court or other forum to decide the issue. Further, proposed Rule 13204(b)(4) prohibits member firms or associated persons from enforcing an agreement to arbitrate in FINRA's forum against a member of a certified or putative collective action until certain events have occurred. Thus, any language in a member firm's employment agreement that requires employees to waive their right to file or participate in a collective action against a member firm in other fora is contrary to the provisions of the Industry Code. A member firm's use of such language that limits employees' rights, and contradicts Rule 13204(b), would violate IM-13000,[18] and may also violate FINRA Rule 2010.[19]

Finally, FINRA disagrees with SIFMA's statement as it may imply that firms may prohibit employees from joining multiple claims together in FINRA's arbitration forum. Under the Industry Code, one or more parties may join multiple claims together in the same arbitration if the claims contain common questions of law or fact and, the claims assert any right to relief jointly and severally or the claims arise out of the same transaction or occurrence, or series of transactions or occurrences.[20] Rule 13312(a) thus provides employees with the ability to join multiple claims together in FINRA's arbitration forum under certain circumstances. A member firm's employment agreement that contains contradictory language could be interpreted as an involuntary waiver of the rights provided to employees under Rule 13312. Therefore, a member firm's use of such language could restrict the rights of employees to have their disputes heard in FINRA's arbitration forum, which would violate IM-13000,[21] and could also violate FINRA Rule 2010.[22]

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[18] See supra note 9.

[19] See FINRA Rule 2010 (Standards of Commercial Honor and Principles of Trade) (stating that A member, in the conduct of its business, shall observe high standards of commercial honor and just and equitable principles of trade).

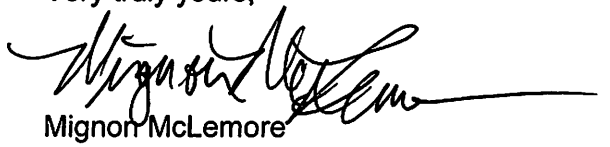
[20] See FINRA Rule 13312(a).

[21] See supra note 16.

[22] See supra note 19.

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

Very truly yours,



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cc:

Mr. David Blass, Chief Counsel, Division of Trading and Markets, U. S. Securities and Exchange Commission

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Mr. Daniel Fisher, Branch Chief, Division of Trading and Markets, U. S. Securities and Exchange Commission