MALECKI LAW

11 Broadway, Suite 715
New York, New York 10004
(212) 943-1233 telephone
(212) 943-1238 facsimile
www.AboutSecuritiesLaw.com

Jenice L. Malecki

Associates
Adam M. Nicolazzo
Robert Van De Veire

Of Counsel
Jalila A. Bell

February 7, 2013

Via SEC Website and First Class Mail

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

Re: Comment on File No. SR-FINRA-2013-003

Dear Ms. Murphy:

I write to provide a written comment regarding File No. SR-FINRA-2013-003, which proposes to bar persons associated with a mutual fund or a hedge fund from serving as a "public" arbitrator for a period of at least two years (the "cooling period"). For the below reasons, I support the amendment, but believe the cooling period should be extended to at least five years, i.e. the same period of time persons associated with brokers and dealers are subject to (although I would argue that all such persons should be subject to a cooling off period of ten years).[1]

Amendment of FINRA Rules 12100(u) and 13100(u)

I support FINRA's efforts to amend FINRA Rules 12100(u) and 13100(u) to bar persons associated with mutual funds and hedge funds from serving as public arbitrators. In each arbitration, the claimant and each respondent is given an opportunity to rank (select) six of ten chairpersons, six of ten public arbitrators, and six of ten non-public arbitrators, thereby striking the remaining four arbitrators on each list. If the claimant must name two respondents in the arbitration (say, a brokerage firm and the registered representative), the claimant can be sure that a maximum of eight chairpersons will be stricken of each list of ten (public chair, public arbitrator and industry arbitrator). It happens often that the claimant will be assigned a panel

[1] In the past 20 years, I have served on the Board of Directors of the Public Investors Arbitration Bar Association (PIABA), and have been a member of the Securities Industry Association (now SIFMA), New York County Lawyers Association (NYCLA), Securities and Exchanges Committee, and the New York State Bar Association. I have taught classes at New York Law School and Brooklyn Law School, and have served as an NASD and NYSE (both now FINRA) arbitrator and chairperson. I have also spoken on several panels at and written articles for Practicing Law Institute, NYCLA and PIABA. Through my career, I have represented both public customers and registered persons and firms in the securities industry.

entirely comprised of arbitrators that were not previously disclosed by FINRA, and that the claimant has had no say in selecting and no opportunity to research such arbitrators.

With the application of "all-public panels," which, according to FINRA do result in more awards to public investor-claimants after hearing, the claimant has the option of striking all industry arbitrators, making it even more important that the lists for public chairpersons and public arbitrators be comprised of individuals without significant ties to the securities industry.

1. Persons Associated with Mutual Funds or Hedge Funds Should Be Temporarily Barred from Serving as "Public" Arbitrators, But Should Also be Classified as "Non-Public" Arbitrators

FINRA's move to temporarily bar individuals associated with mutual funds and hedge funds from serving as public arbitrators is a step in the right direction. Mutual funds and hedge funds may be registered with the Commission, FINRA or other exchanges, and therefore may become subject to arbitrations brought by customers, and as a result, could hold biases against public investor-claimants in FINRA arbitrations.

However, FINRA should have sought to include this amendment in FINRA Rules 12100(p) and 13100(p), the sections that relate to definitions of "non-public" arbitrators, to positively qualify individuals who have been associated with mutual funds and hedge funds like those associated with brokers and dealers.

In NASD Notice to Members 06-64, the NASD made clear that the purpose for delineating between public and non-public arbitrators was to "ensure that individuals with significant ties to the securities industry may not serve as public arbitrators in NASD arbitrations." NASD Notice to Members 06-64, pg. 2 (emphasis added). Mutual funds and hedge funds do have significant ties to the securities industry, in that they maintain relationships with public customers, they earn percentages of profits by investing money, and they charge public customers management fees, like brokers and dealers. Public customers still need to apply for an account with a mutual fund or hedge fund, just like they need to do with a broker or dealer.

By not categorizing persons associated with mutual funds and hedge funds like persons associated with brokers and dealers, claimants lose the other protections afforded by FINRA Rules 12100 and 13100. For instance, Rule 12100(p)(2) provides that individuals who are "retired from, or spent a substantial part of a career engaging in, any of the business activities listed in paragraph (p)(1) [including association with a broker or dealer]" shall be deemed a non-public arbitrator. By mentioning individuals associated with mutual funds and hedge funds only in section 12100(u), there would be no permanent classification of people associated with mutual funds and hedge funds to retirement or after spending a substantial portion of their career there as being non-public arbitrators.

FINRA's delineation between brokers and dealers on one hand and mutual funds and hedge funds on the other simply ignores market realities and serves only to cause potential hardships to public investors when they are required to arbitrate their disputes in FINRA (which is almost always by obligatory pre-dispute agreement).

2. The Cooling Off Period Should be a Minimum of Five Years

FINRA's proposal that individuals associated with mutual funds or hedge funds only be subject to a two year cooling off period essentially fast-tracks those individuals to inclusion into public arbitrator and chairperson lists.

Other similar groups of individuals are barred from designation as "public" arbitrators for longer periods of time. For instance, individuals associated with a broker or a dealer are deemed "non-public" arbitrators and cannot be considered a public arbitrator for a minimum of 5 years. *See* 12100(u)(2); 13100(u)(2). Individuals associated with mutual funds and hedge funds, each similarly situated to brokers and/or dealers in that they maintain substantial ties to the securities industry and work for entities that act as market participants, should similarly be subject to a five year bar to designation as a public arbitrator.

FINRA's Form 19b-4 filing is deficient, in that its "Self-Regulatory Organization's Statement of Purpose of, and Statutory Basis for, the Proposed Rule Change" does not address this obvious inequity in applicable cooling off periods located within the same rule subsection. No basis is provided by FINRA for treating individuals associated with mutual funds and hedge funds differently than those associated with brokers or dealers.

Moreover, FINRA's sole basis for the rule amendment, investor confidence in the neutrality of FINRA's public arbitrator roster, would not be served by advancing certain industry employees to the public arbitrator lists while other similarly situated industry employees who work for brokers or dealers must wait a substantially longer time for the same treatment.

Increasing the cooling off period to five years will better ensure that arbitrators deemed "public" are less likely to hold biases on behalf of industry participants, and is more likely to satisfy FINRA's stated policy of investor confidence in the neutrality of FINRA's public arbitrator roster.

Your time and attention to this matter is greatly appreciated.

Very truly yours,

Jenice L. Malecki