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April 15, 2013

Via E-Mail to rule-comments@sec.gov

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

Re: File No. SR-FINRA-2013-018; Release No. 34-69178
SIFMA comment on FINRA proposed rule change re:
FINRA Rule 8313 (the "Proposal")

Dear Ms. Murphy:

The Securities Industry and Financial Markets Association ("SIFMA")[1] appreciates the opportunity to comment on the Proposal. The Proposal seeks to amend FINRA Rule 8313, which governs the release of disciplinary and other information by FINRA to the public. SIFMA's comment is limited to disclosures about Expedited Proceeding and specifically, cases where a respondent successfully raises an "inability to pay" defense under FINRA Rule 9554 (failure to comply with an arbitration award).

Background of the "Inability to Pay" Defense under Rule 9554

When a customer obtains an arbitration award against a financial advisor (FA) or broker-dealer firm (Firm), and the FA or Firm fails to pay the award, the customer may bring an expedited proceeding under FINRA Rule 9554 to suspend the FA or the Firm. Historically, there have been five defenses available to the respondent.[2] With respect to the "inability to pay" defense, the respondent must demonstrate a financial inability to pay the award.[3]

[1] SIFMA brings together the shared interests of hundreds of securities firms, banks and asset managers. SIFMA's mission is to support a strong financial industry, investor opportunity, capital formation, job creation and economic growth, while building trust and confidence in the financial markets. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association. For more information, visit www.sifma.org.

[2] *See* 75 Fed. Reg. 32,525-01 (June 8, 2010). The five defenses are: (i) inability to pay; (ii) the member or person paid the award in full or fully complied with the settlement agreement; (iii) the claimant has agreed to installment payments or has settled the matter; (iv) the member or person has filed a timely motion to vacate or modify the arbitration award; and (v) the member or person has filed a petition in bankruptcy and the bankruptcy proceeding is pending or the award payment has been discharged by the bankruptcy court.

[3] *Id.*

Prior to July 2010, the inability to pay defense could be raised by respondents in expedited proceedings involving both customer and industry claimants. On March 31, 2010, FINRA filed a proposed amendment to Rule 9554 to preclude a respondent from raising the inability to pay defense against a *customer* claimant.[4] On June 2, 2010, the SEC approved the amended rule.[5] As amended, Rule 9554 precludes a respondent from raising the inability to pay defense against a *customer* claimant, but *not* against an *industry* claimant.

Reasons for Eliminating the Inability to Pay Defense against Customer Claimants

One justification for eliminating the defense against customer claimants is that the defense limits FINRA's leverage to suspend the FA or Firm, and thereby induce payment of the arbitration award. According to the SEC, not only would eliminating the inability to pay defense "promote a fair and efficient process for taking action" against such violations, it would also "encourage members and associated persons to pay arbitration awards to customers."[6]

Another justification is that the defense provides FAs and Firms with a ready means to circumvent an arbitration award. When FAs and Firms use the defense to purposefully avoid paying an arbitration award, they violate FINRA Rule 2010 (just and equitable principles).[7]

Yet, even if the FA or Firm has a bona fide inability to pay, it would hardly be equitable or just to allow such person – who has a demonstrated issue with managing his or her own financial affairs – to avoid suspension and continue to advise retail customers. As the SEC has stated, "allowing members or their associated persons that fail to pay arbitration awards to remain in the securities industry presents regulatory risks and is unfair to harmed customers."[8]

The Reasons for Eliminating the Inability to Pay Defense against Industry Claimants Are Identical

All of the above arguments raised in favor of eliminating the inability to pay defense against customer claimants apply equally to industry claimants. The identity of the claimant (whether it be customer or industry), however, should have no bearing on whether the respondent FA or Firm may raise the inability to pay defense.

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[4] *See* 75 Fed. Reg. 21,686 (Apr. 19, 2010). The amendment added only one sentence to the end of FINRA Rule 9554(a), as follows: "When a member or associated person fails to comply with an arbitration award or a settlement agreement related to an arbitration or mediation under Article VI, Section 3 of the FINRA By-Laws involving a customer, a claim of inability to pay is no defense."

[5] 75 Fed. Reg. 32,525-01.

[6] *Id.* at 32,526.

[7] *See* FINRA Rules IM-12000 and IM-13000.

[8] 75 Fed. Reg. at 32,525.

While drawing distinctions between customers and firms may be appropriate in certain instances, a problem arises when the distinction puts one group at a disadvantage to the other. In passing the original amendment, neither FINRA nor the SEC explained why eliminating the defense should apply only to expedited proceedings involving customer claimants, but not industry claimants.

The Exchange Act states that FINRA rules must not be "designed to permit *unfair discrimination* between customers, issuers, brokers, or dealers."[9] In its current form, however, Rule 9554 discriminates against FAs and Firms by not affording them the same protections as customers who hold arbitration awards against respondent who raise the inability to pay defense. Rule 9554 in fact precludes FAs and Firms (and FINRA) from securing a suspension against a respondent, which they otherwise would have obtained if they were afforded the same protections as customers.

If a respondent avoids paying a valid award to an FA or Firm (often times a previous employer), that does not make their action any less reprehensible or more excusable than when they fail to pay a valid award to a customer. In fact, a respondent who does so and successfully raises the inability to pay defense to avoid suspension ultimately creates unnecessary regulatory, compliance, and investor protection risks that undermine, rather than promote, "just and equitable principles of trade" in the securities industry.

Moreover, FINRA expedited proceedings are not the appropriate forum for deciding the defense's applicability because FINRA lacks the tools and enforcement mechanisms to accurately confirm the assets of the FA or Firm asserting the defense.[10] Federal bankruptcy court, on the other hand, is the better forum for adjudicating a financial condition defense.[11] Unlike FINRA expedited proceedings, bankruptcy proceedings are more accurate, "are subject to federal perjury charges, and provide greater penalties for hiding assets."[12] If an FA or Firm filed for bankruptcy to avoid paying an arbitration award, that would be a reportable event. The investing public would at least have the opportunity to understand the circumstances surrounding the FA or Firm's financial condition and to consider that information in deciding whether or not to do business with the FA or Firm.

For all the foregoing reasons, we urge FINRA to amend Rule 9554 to preclude respondents from raising the inability-to-pay defense in intra-industry cases.

Proposed Disclosure re: Expedited Proceedings

The Proposal would consolidate the publication standards for expedited proceeding decisions in proposed Rule 8313(a)(3), and provide that FINRA shall release to the public information with respect to any suspension, cancellation, expulsion, or bar that constitutes final FINRA action.

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[9] 15 U.S.C.A. § 78o-3(6) (emphasis added).

[10] *See* 75 Fed. Reg. at 32,525.

[11] *Id.* At 32,526.

[12] *Id.*

Our concern is that many respondents that owe valid arbitration award, and that successfully raise the inability to pay defense, are able to *avoid* the suspension that would otherwise be imposed under Rule 9554, and thus, would also be able to *avoid* the reporting of such suspension under proposed Rule 8313(a)(3).

We think this situation represents a significant disclosure, transparency, and investor protection problem. The fact that the respondent 1) has an arbitration award that he has not paid, and 2) claims that he has an inability to pay that arbitration award in an expedited proceeding under Rule 9554, would certainly be highly relevant and beneficial information to: (i) a retail customer who contemplates doing business with such respondent, (ii) a member firm that may seek to hire such respondent, and (iii) a regulator who oversees such respondent, among others.

Thus, short of eliminating the inability to pay defense in intra-industry cases, we believe cases where a respondent successfully raises the defense should be publicly reported under proposed Rule 8313 – for the benefit and protection of retail customers, prospective employers, and regulators alike.

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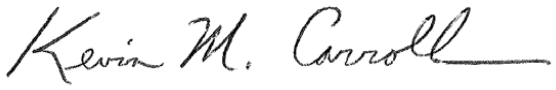
If you have any questions, or would like to further discuss this issue, please contact the undersigned at 202.962.7382 or kcarroll@sifma.org.

Sincerely,



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