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

Re: File No. SR-FINRA-2014-005

Dear Ms. Murphy:

I have previously commented on this Rule proposal two times, once, on the first round, as SR-FINRA-2010-035 and again when the Rule change was re-proposed, as SR-FINRA-2014-005 – and, so, I will assume familiarity with my background. I am grateful for the opportunity to comment and appreciate the serious consideration that the Commission has extended to the proposal before it. I am against FINRA's proposal to have arbitrators interrupt arbitration proceedings for the purpose of making an disciplinary referral.

My primary objection, as an advocate of arbitration and as an arbitrator for several forums, rested upon FINRA's exalting of regulatory objectives over arbitration fairness, upon the conflict in roles that this proposal created for arbitrators, and of FINRA's attempt to "deputize" arbitrators as examiners tasked to evaluate and report rule violations, even at the expense of the parties arbitrators, as neutrals and contractually-appointed arbiters are sworn to serve.

These concerns may seem irrelevant to the issues and questions the Commissioners are focused upon. I see them as heavily intertwined with the Commission's concern for the investor in arbitration. By citing an example of the irreconcilable conflict in arbitral roles that could result from the approval of this proposal, I believe I can demonstrate some of the adverse consequences to the claimant in arbitration.

Consider this example: A Claimant alleges a massive fraud of which s/he is a victim. The arbitrators take an oath swearing to abide by the parties' Submission Agreement and to effectuate a just resolution of the case. During the hearing, Claimant proves his/her case to the point that an arbitrator, convinced of the ongoing and serious nature of the Respondent's offense, chooses to report it to the Authority. The consequence of that reporting, the arbitrator understands, is that the regulators may shut down the Respondent's operations, appoint a receiver, and deprive the Claimant of any possibility of a full recovery. Is that his concern?

Were that arbitrator a private citizen with no contractual obligations to the parties, that reporting might be a good deed. It would serve the "greater good," as FINRA blithely

posits. But, it is not the arbitrator's commission to serve any good other than the good that achieves a resolution of the dispute in a manner than serve the interests of the parties. In the example above, the arbitrator, by interrupting the proceedings to report to the Authority, directly and unconscionably disserves the parties he swore to help. His report results in the Claimant, who entrusted her case to the wisdom and integrity of the arbitrators, left with nothing but an empty bag.

The Commission's Order solicits comments on one broad concern and three specific ones. First, commenters are invited to express views "with respect to questions raised by commenters about the potentially adverse consequences of the proposal for retail investors whose cases may be delayed or disrupted by a midcase [sic] referral." I think the above example, to the extent the arbitrator is right and the regulators are primed to act, illustrates just how a retail investor bears the brunt of the righteous arbitrator's decision to act in the "greater good." This example also posits a case where it matters not whether the forum advises the parties of the referral or not. The referral itself sets into motion the adverse consequences for the arbitrating investor.

The Commission asks, whether the referral might be made without notifying the parties? I don't see how that would work, because it will soon become intensely evident to the Respondent who has been reported that a nexus exists between the arbitration proceeding in which it is hotly engaged and the sudden interest of regulators in the Claimant's allegations. Put that aside, though. There is the greater problem that the forum and, more particularly, the arbitrator would engage in conduct detrimental to the parties' arbitration interests, if not their financial and business interests, and not be compelled to reveal it. Is any conduct alright, if one can point to a rule that endorses it? I will hope the Commission will not condone non-disclosure as a way to somehow mitigate the consequences of candor. Isn't that how cover-ups are rationally presented – that everything will be fine if everyone just remains mute?

It seems to me that instructions to withhold notice from the parties of a referral are in themselves acknowledgement that fully informed parties will raise objections, seek remediation, and act to preserve their rights. The Commission asks, whether FINRA should amend the proposal to preclude the Director, or anyone else, from notifying the parties of a referral? Substitute "the arbitrators" for "anyone else" and one quickly sees how inappropriate the question is. Perhaps, the forum may do as it wishes. The arbitrators have no right to withhold that material information from the disputants.

The Commission asks whether FINRA might set a better standard than it has articulated to justify a mid-case referral. FINRA, I believe, has erected a standard that is designed to assure rare resort to this rule. That does not mean that arbitrators will not act precipitously and make a report when one is unnecessary or wrongly based. That each arbitrator can act on his/her own simply magnifies the potential for mishap. And, whenever an arbitrator makes a mid-case referral, a number of "adverse consequences" can be expected to occur. The Claimant will likely encounter a delay in proceedings, while recusal procedures unwind. If an arbitrator is removed, the Claimant will have to await a replacement and expend time and money doing due diligence on the candidates.

Assuming the Respondent is able to proceed and a receiver is not appointed, it can be counted upon to object that the proceedings are unfairly tainted by the referral. While the forum can shrug off these objections, an adverse Award will invite vacatur proceedings and *prima facie* grounds for challenge will prevent a speedy dismissal of those post-Award proceedings. These proceedings, as a result of recurring objections, arbitrator timidity to assuage Respondents, requests for additional discovery, motion practice, and dilatory tactics, are far more likely to become protracted and expensive.

The Commission appears to be looking for a way to salvage this proposal. I cannot see the way. FINRA has made a misguided proposal and the Commission should disapprove the proposal. Arbitrators have the power to make disciplinary referrals at the conclusion of the arbitration proceedings. That is soon enough.

Respectfully submitted,

Richard P. Ryder, Esq.