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March 11, 2014

VIA ELECTRONIC SUBMISSION – RULE-COMMENTS@SEC.GOV
VIA PAPER SUBMISSION – FEDERAL EXPRESS

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

Re: File Number SR-FINRA-2014-005 (Mid-Case Referral)

Dear Ms. Murphy:

Thank you for the opportunity to comment on SR-FINRA-2014-005. For the reasons set forth below, I oppose this proposed rule. It is ill-advised, misguided and compromises FINRA Dispute Resolution's role as the primary provider of a securities arbitration forum.

Let me offer some brief personal background. I have been involved in the securities arbitration process since 1985 and in that 29 year period have had extensive experience with NASD/FINRA arbitration in various roles. For six years, I was in-house counsel for a New York Stock Exchange member firm and handled most of its arbitration defense work. Upon returning to private practice, I have represented broker-dealers and individual representatives in arbitration proceedings and from time to time have undertaken a claimant's case. In addition to representing clients in arbitration, I have served many times as an arbitrator for NASD, FINRA and other forum providers and trained arbitrators on behalf of NASD. I have been involved in at least 300 securities arbitrations throughout my career.

The existing Rule 12104 (and its Industry Code counterpart 13104) provides for a referral only at the conclusion of the arbitration. In my personal experience, disciplinary referrals occurred in only a small handful of cases, certainly no more than 6. I hardly think my experience is unusual and I think that disciplinary referrals are, and always have been, rare. I attribute this to the fact that, by the time a dispute actually gets to the arbitration hearing, the regulatory wheels have long been in motion. When an arbitration is filed, it is disclosed in the CRD System and FINRA has processes and procedures in place to conduct an inquiry. Furthermore, it is the practice of FINRA Dispute Resolution to provide copies of arbitration pleadings to the Office of Fraud Detection and Market Intelligence which in turn may conduct an inquiry or turn the matter over to Enforcement. When the arbitration hearing takes place, perhaps 10 to 13 months after the case is originally filed, considerable regulatory scrutiny has already occurred and I think arbitrators are sophisticated enough to understand this. They also understand their role in the arbitration process and strive to hear and consider all of the evidence before reaching a result.

The mid-case referral proposal is troublesome for a number of reasons. First, it compromises an arbitrator's neutrality. The proposed rule implicitly requires the arbitrator to hear at least some evidence before making a determination to refer. In effect, this is a decision on the merits without all of the evidence being presented and without the parties being provided an equal opportunity to be heard. This is a violation of due process.

Second, the reasonable belief standard in the proposed rule makes little sense and is unworkable. In a way, the standard is self-fulfilling. If an arbitrator concludes that a mid-case referral is warranted, of course his or her conclusion was reasonable. With FINRA moving to public panels in its arbitrations, individuals with industry experience and skills and arguably the ability to properly identify situations in which referrals are warranted will no longer be on panels. This raises a qualitative concern about referrals. While the proposed rule requires the approval of the President of Dispute Resolution or the Director of Arbitration (which are now the same person), this safeguard comes into play only after the damage is done. If the Director finds that a referral is improper, the bell cannot be un-rung. The process has been tainted.

Third, the proposed rule opens the door to more post-award challenges for bias. FINRA apparently does not believe this to be the case but I respectfully disagree. The issue is simply that an arbitrator formed an opinion or belief before all of the evidence has been received and before the parties have had an equal opportunity to be heard. That flies in the face of fundamental fairness and due process and is not likely something that would sit well with a reviewing court.

Fourth, the proposed rule is disruptive and costly. One of the primary "selling" points for securities arbitration over the years has been its expedited and cost-effective nature when compared to bringing the same claims in a civil court. While the time period from filing the statement of claim to hearing has increased as has the length of the typical hearing, the process is still faster and less costly than civil litigation. The proposed rule requires notice to all parties that an arbitrator has made a referral and gives the parties the opportunity to request that the referring arbitrator(s) recuse themselves. In my opinion, an arbitrator referral taints the entire panel. The entire panel must be removed and a new panel appointed. It goes without saying that this involves substantial delay and cost to the detriment of all parties to the arbitration.

Finally, from a purely practical perspective, I have racked my brain to try to come up with some fact pattern where a mid-case referral makes sense. I am unable to do so. In a hypothetical 5-day arbitration case, what exactly is gained by making a referral on Tuesday instead of at the conclusion on Friday? Does FINRA really believe that the respondent registered representative is going to participate in the hearing from 9 to 5 each day and then in the evening go home or back to his office to plunder and pillage the unsuspecting investing public? And what exactly is FINRA supposed to do with this referral? Assemble some SWAT team to swoop in and stop the threatened conduct? Seriously?

For all of these reasons, the proposed rule should be rejected and the existing Rule 12104 (and its counterpart 13104) be left alone.

Thank you for your consideration.

Very truly yours,

William D. Nelson
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WDN/mc