

Mailing Address:

P.O. Box 4037
Atlanta, GA 30302-4037

In Person:

140 Decatur Street, Suite 326
Atlanta, GA 30303

Phone 404-413-9270

Fax 404-413-9272

Web law.gsu.edu



March 11, 2014

VIA ELECTRONIC SUBMISSION

Ms. Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549

Re: SR-FINRA-2014-005
Comments on Proposed Changes to FINRA Rules 12104 and 13104

Dear Ms. Murphy:

Thank you for the opportunity to comment on SR-FINRA-2014-005. The Georgia State University College of Law Investor Advocacy Clinic represents investors who have suffered losses resulting from broker misconduct but cannot afford or find private legal representation due to the size of their claim. Our mission also involves educating small investors. Because the proposal could affect small investors in arbitration, we submit this comment in opposition to the rule as currently proposed.

The proposed changes to Rule 12104 of the Code of Arbitration Procedure for Customer Disputes and Rule 13104 to the Code of Arbitration Procedure for Industry Disputes would permit arbitrators to make mid-case referrals when they suspect or have reason to believe, based off of evidence heard, that a serious threat to investors is imminent or ongoing. The current rules only permit such referrals when a case concludes. By going forward with this rule change, FINRA hopes to provide a means for arbitrators to stop ongoing or imminent fraudulent activity so as to benefit the public.

While we support SR-FINRA-2014-005's goal of protecting the innocent investing public from preventable harm, we have reservations resulting from the proposal's potential impact on the investor in the midst of an arbitration proceeding. In particular, we are concerned that the individual investor's proceeding will be delayed or adversely impacted by the potential for recusal of the referring arbitrator.

It is difficult to imagine a scenario where the subject of the referral would not seek recusal of the referring arbitrator. After all, that party is likely to believe that the referring

arbitrator is now partial to the investor and his odds of success in the arbitration would likely be improved by seeking a replacement. At that point, there are potential costs and delays for the investor, including attorney's fees, travel costs, and other court fees. Though the proposal includes some cost-cutting measures,¹ those measures admittedly do not account for the time delays and costs, such as increased attorneys' fees, associated with the investor addressing the motion and its aftermath. Moreover, if a referring arbitrator refuses to recuse herself when a motion is filed, the investor risks an expensive and time consuming motion to vacate at the proceeding's conclusion. These concerns are exacerbated by the fact that multiple arbitrators can make referrals and thus costs and delays associated with multiple recusal requests could land on the investor.

While this rule change could increase the risk that referring arbitrators would be accused of evident partiality,² FINRA believes the fact that mid-case referrals must stem from the hearing itself weakens that risk because conclusions resulting from evidence has not been found to constitute evident partiality.³ Nevertheless, the proposal permits parties to request the referring arbitrator's recusal. Absent the removal of this provision and definitive guidance that recusal motions would never be permitted (let alone granted) after a mid-case referral, we do not believe the proposal is in the best interests of investors.

In keeping with our mission to protect investors, the Investor Advocacy Clinic believes that the proposal in its current form will harm investors. Thank you again for your consideration and we look forward to any further discussion.

Best regards,



Scott Evans
Student Intern



Benjamin Stubbs
Student Intern



Patricia Uceda
Student Intern



Nicole Iannarone
Assistant Clinical Professor
Georgia Bar No. 382510

¹ For example, the proposal would require that FINRA pay the costs associated with the replacement arbitrator educating him or herself about the matter and would permit the parties to stipulate to testimony already heard and/or to rehear only certain key witnesses if the parties so agree. SR-FINRA-2014-005, page 16.

² See 9 U.S.C. § 10(a)(2) (permitting a motion to vacate when an arbitrator exhibits evident partiality in a proceeding).

³ See SR-FINRA-2014-005, pages 11-12.