



November 6, 2014

Via Electronic Filing

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

Re: SR-FINRA-2014-028; Proposed Rule Change Relating to Revisions to the Definitions of Non-Public Arbitrator and Public Arbitrator, Specifically as it Applies to Professionals Serving Investors

Dear Ms. Murphy,

The University of Miami School of Law Investor Rights Clinic (“the IRC”)¹ greatly appreciates the opportunity to comment on the proposed rule changes amending provisions in the Financial Industry Regulatory Authority (“FINRA”) rulebook, regarding who may be classified as a “non-public arbitrator” and “public arbitrator” under the Code of Arbitration Procedure for Customer Disputes and the corresponding Code sections for Industry Disputes.

While the IRC supports much of the proposed rule changes, the IRC respectfully disagrees with the proposed changes to Rules 12100(p)(3), 12100(u)(3), (7) and new subsection (10), which will prevent attorneys and other professionals who represent and provide services to investors in securities disputes (“investor advocates”) from serving as “public arbitrators.” This proposed rule change is at odds with the central criterion that has always defined “non-public” and “public” arbitrators: the extent and nature of potential arbitrators’ ties to the financial industry. More importantly, the significant adverse consequences to customers in the FINRA arbitral forum will far outweigh the benefit the re-classification was designed to address: an unsubstantiated “bias” imputed on investor advocates by the securities industry. As further discussed below, these consequences counsel against approval of this proposed re-classification.

As an initial matter, the rationale for labeling industry advocates as “non-public” stems from the concern that they may be biased against the industry. However, the public/non-public designation was never meant to account for biases in favor of the investing public. The purpose has always been to eliminate arbitrators’ perceived and actual bias

¹ The IRC is a clinical program in which 2L and 3L law students provide representation to individuals of modest means who have suffered investment losses as a result of broker misconduct but, due to the size of their claim, cannot find legal representation. Under faculty supervision, law students provide legal assistance and advice to investors who have potential claims involving misrepresentation, unsuitability, unauthorized trading, excessive trading, and failure to supervise, among other claims. For more information, please see <http://investorrights.law.miami.edu>.

against customers who are essentially forced to participate in this forum by the industry. Pre-dispute arbitration agreements are ubiquitous and, as a result, all customers' disputes are subject to mandatory arbitration before FINRA, a forum that was created by the industry and is perceived by the public as "the industry's forum." Additionally, securities firms repeatedly appear in the FINRA arbitral forum in connection with both customer and member disputes. In contrast, for the vast majority of investors, arbitration will be a singular event. Therefore, to the extent there is a concern about "bias,"² it should be balanced in favor of investors.

Second, reclassifying investor advocates as "non-public" arbitrators, however, will have several significant, adverse consequences for customers who are required to arbitrate their disputes in this forum. First, the proposed reclassification would cause unnecessary confusion due to the widely held understanding of the role of investor advocates as representing the "public." Indeed, investor advocates have traditionally been known as the voice of the "public." It is natural to associate investor advocates with the "public" pool for the simple reason that investor advocates serve the investor "public." Reclassifying investor advocates from "public" to "non-public" will undoubtedly foster unnecessary confusion.

Third, re-classification would unnecessarily complicate the ability of customers to select "non-public" arbitrators for their industry expertise and experience by adding large numbers of arbitrators who do not have any industry training or work experience. Traditionally, the "non-public" pool of arbitrators has consisted of individuals with industry expertise and experience. If chosen, these non-public individuals are generally relied upon to provide their experience and expertise to the other members of the panel in order to help them understand certain issues, concepts, terms, investment strategies, etc. The ability to include a "non-public" industry expert in the panel is particularly important for customers with smaller claims or more limited resources, who cannot afford a testifying expert and, instead, select a majority public panel for such expertise. Unfortunately, the proposed re-classification will improperly inflate the non-public pool with many individuals that have little or no industry experience.

Fourth the proposed re-classification would dramatically reduce the number of public arbitrators available for public panels. This is especially problematic because a recent study indicated that 75 percent of customers are requesting "all public" panels.³ The reduced pool of public arbitrators will have a direct and immediate impact on the ability to obtain swift and efficient resolution of claims, particularly when certain industry events or conduct gives rise to a large number of filed claims. For example, in March 2014, FINRA implemented a

² Regardless of the merit of an investor advocacy bias against the industry, FINRA has yet to produce any evidence that such a bias in fact exists. Until FINRA conducts research and studies demonstrating that this bias actually exists and has any impact on the fairness of proceedings, the proposed designation of investor advocates as "non-public" unnecessarily and unfairly imputes a bias on certain professionals, including the attorneys that work for the IRC, against the securities industry.

³ See Proposed Rule Change Relating to Amendments to the Code of Arbitration Procedure for Customer Disputes Concerning Panel Composition, 78 Fed. Reg. 37267, 37268 (June 20, 2013).

temporary stay of arbitration cases filed in Puerto Rico in order to recruit arbitrators from other jurisdictions to deal with an influx of claims relating to Puerto Rican closed-end bond funds.⁴ With so many claimants requesting public arbitrators, there was simply no way of meeting the number of claims because of the lack of arbitrators in the public pool.

Finally, while we urge the Commission to reject this proposed re-classification altogether, should it consider the re-classification, we recommend that the threshold for re-classification be based upon a percentage of revenues, not a percentage of time. The proposed rules would designate as “nonpublic, attorneys, accountants, and other professionals who devoted 20 percent or more of their professional time, within the past five years, to serving parties in investment or financial industry employment duties.” Such a definition could unintentionally render law professors and supervisors that work in investor advocacy clinics associated with law schools, such as the IRC, as “non-public.” Many of the professors associated with these clinics have become FINRA arbitrators and are currently designated as “public” arbitrators. While these clinics provide critical services to a largely underrepresented sector of the public – investors with claims too small to obtain legal representation – the primary function of these clinics is to teach second and third year law students practical lawyering skills. The proposed re-classification would render such professionals “non-public” even though the clinics earn no revenues and their primary function is educational.

The IRC understands FINRA’s concerns regarding perceived and actual bias as it relates to industry-tied arbitrators. Investor confidence in the neutrality and fairness of the arbitration process is of the utmost importance and provides the key rationale for separating arbitrators into the “public” and “non-public” categories. However, the IRC submits that any bias, actual or perceived, originates from the fact that FINRA and its predecessor organizations have always had close affiliations with the securities industry. The non-public/public designation should only be maintained to combat this bias, and to the extent that it prevents professionals from serving the investor public as public arbitrators, the proposed designation should be rejected.

The IRC would like to again thank the Commission for the opportunity and privilege to comment on SR-FINRA-2014-028.

Respectfully submitted,



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⁴ See FINRA Guidance Involving Puerto Rico Bond Funds
[<http://www.finra.org/arbitrationandmediation/arbitration/specialprocedures/p485122>].