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March 8, 2018

***Via email to rule-comments@sec.gov***

Eduardo A. Aleman
Assistant Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: SEC Release No. 34-82693; File No. SR-FINRA-2018-003
FINRA Proposed Rule Change re: Simplified Arbitration

Dear Mr. Aleman:

The Securities Industry and Financial Markets Association ("SIFMA")[1] appreciates the opportunity to comment on FINRA's proposed rule change relating to Simplified Arbitration (the "Proposal").[2] We offer the following observations and recommendations:

**Fundamental fairness and due process require the right to cross-examination.**

The Proposal would add a new "Special Proceeding" consisting of a limited telephonic hearing. One of the primary limitations of the telephonic hearing would be that members and associated persons could not cross-examine a customer claimant or his or her witnesses. We object to the absence of an opportunity to cross-examine.

[1] SIFMA is the voice of the U.S. securities industry. We represent the broker-dealers, banks and asset managers whose nearly 1 million employees provide access to the capital markets, raising over $2.5 trillion for businesses and municipalities in the U.S., serving clients with over $18.5 trillion in assets and managing more than $67 trillion in assets for individual and institutional clients including mutual funds and retirement plans. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit http://www.sifma.org.

[2] SEC Release No. 34-82693; File No. SR-FINRA-2018-003 (February 12, 2018), available at http://www.finra.org/sites/default/files/rule_filing_file/SR-FINRA-2018-003-federal-register-notice.pdf.

Fundamental fairness and due process require that members and associated persons should have the right to explore, identify, examine, and highlight errors, omissions, and misstatements that bear upon the credibility, accuracy and completeness of a claimant's or witness's testimony. While, as the Proposal correctly points out, claimants may seek to avoid direct confrontation with their opponents, cross examination is a necessary element of an adversary proceeding – initiated by the claimant – which seeks in most instances to recover monetary damages from the respondent.

Cross-examination is likewise necessary to satisfy the due process rights of the firm and/or its associated persons, whose professional reputations, CRD records, and pecuniary interests are all at stake. Finally, arbitrators also benefit from cross-examination, which allows them to better assess the credibility, accuracy and completeness of testimony and thereafter assign it appropriate weight. Ultimately, this process allows the arbitrator to make better judgments about whether the respondent is liable and if so, the appropriate measure of damages. And when that happens, the quality and integrity of FINRA's arbitration forum benefits as well.

*Recommendation: For all the foregoing reasons, we recommend that the right to cross-examination be included in the Special Proceeding.*

Notably, the current default option for Simplified Arbitration under FINRA Rules 12800 and 13800 does not involve a hearing and allows the arbitrator to render an award based on the pleadings and other materials submitted by the parties. Obviously, this "papers only" default not only denies firms and associated persons the right to cross examination, but also to have their day in court and to speak to the arbitrator directly to rebut the allegations. With the advent of the Special Proceeding, we believe it represents an opportunity to provide firms and their associated persons with an alternative to the "papers only" default that provides a modicum of due process in an efficient format.

*Recommendation: Firms and associated persons should have the same ability as claimants to elect the Special Proceeding over the "papers only" default.*

**Poorly pled Statements of Claim that fail to plead with particularity and/or fail to state a claim impose significant due process risks on respondents in a Special Proceeding.**

When a claimant elects the "papers only" default, the claimant's Statement of Claim ("SOC") either pleads facts with particularity and/or sufficiently states a claim upon which relief may be granted, or it does not. If it does, then the respondent can intelligently address the allegations and claims in the Answer, and the arbitrator can intelligently decide the case based on those papers. If it does not, then the respondent is generally at a loss for how to respond, but then again so is the arbitrator, and the respondent typically prevails in such cases.

A claimant with a poorly pled SOC who elects the Special Proceeding, however, imposes unnecessary and unacceptable due process risks on respondents. Our members report that nowadays it is common to see one-page pleadings, particularly from pro se parties. A pro se claimant, for example, could submit a SOC that simply states, "The firm treated me poorly and I lost $49K." without any explanation or evidence as to how or why.

Since FINRA Rules do not allow the respondent to file a motion to dismiss for failure to state a claim, when the respondent dials-in to the Special Proceeding telephonic mini-hearing, the respondent would be completely exposed, with absolutely no idea what facts, allegations, evidence or claims may be raised by the claimant, or how to defend against them. The claimant would remain free to raise any issue or introduce any document under the sun for the very first time, leaving the respondents with no time or opportunity to prepare a response, cross-examine, or otherwise fairly defend themselves. This cannot be what was intended, and should not be allowed, in Special Proceedings.

*Recommendation: If the claimant elects the Special Proceeding, then firms and associated persons should be allowed to file a motion to dismiss for failure to state a claim, and if granted, then the case should be decided based on the "papers only" default procedure. In addition, if the claimant elects the Special Proceeding, then the claimant should be precluded from raising new issues, claims or evidence not previously raised or referenced in the SOC.*

**The time allotment for the Special Proceeding may require adjustment.**

The Proposal states that the arbitrator has the right to cede his or her allotted time to the parties. The Proposal allots 2.5 hours each to the claimant and the respondent, leaving 3 hours to the arbitrator in a notional 8-hour day. We observe that in practice many hearing days run from 10am to 4pm with an hour allocated for lunch in between. Under that circumstance, given the Proposal's current time allocation, the arbitrator would have no time to cede.

*Recommendation: The time allotment for Special Proceedings should be made on a percentage, or some other, basis in contemplation that the length of hearing days may differ in various circumstances.*

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If you have any questions or would like to further discuss these issues, please contact the undersigned.

Sincerely,

Kevin M. Carroll
Managing Director and
Associate General Counsel

cc: Richard W. Berry, Executive Vice President and Director FINRA-DR