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By E-Mail To: rule-comments@sec.gov

Ms. Nancy Morris
Secretary
Securities and Exchange Commission
100 F. Street, N.E.
Washington, DC 20549

Re: File No. SR-FINRA-2007-021
Proposal amending Rule 12504 of the Customer Code and
Rule 13504 of the Industry Code

Dear Ms. Morris:

We appreciate the opportunity to comment on proposed NASD Rules 12504 and 13504. We generally agree with the comments in SIFMA's April 7, 2008 letter to you. Our comments here focus upon the key subsection of each rule - Subsection (a)(6).

As proposed, Subsection (a)(6) is a poor compromise that does not appropriately address the legitimate concerns of pre-hearing motions to dismiss. As set forth below, Subsection (a)(6) should be redrafted to properly address (1) a claimant's right to a hearing, and (2) the interests of efficiency and fairness in the arbitration process. While my practice in securities arbitration is substantially devoted to representing broker-dealers, I agree with many of the comments made by attorneys representing investors to prior versions of these rules. Pre-hearing motions to dismiss have been the subject of abusive practices by some respondents. Respondents have filed motions seeking dismissal due to the deficiency of the allegations of the statement of claim or on grounds that would require determination of crucial contested facts. Certainly, any proposed rule should deter such practices. However, Subsection (a)(6) goes too far in limiting the *grounds* for a motion to dismiss, but not far enough in providing *standards* to guide arbitrators in considering such motions.

The essential purpose of a hearing is twofold: (1) to present evidence (by taking the testimony of witnesses and submitting exhibits) so the arbitrators can determine the facts, and (2) to allow the parties to argue how the case should be determined. A rule that denies the parties these fundamental elements of a hearing would be unfair and inappropriate. Yet, the currently proposed rule permits such a result.

While Subsection (a)(6) limits the *grounds* for dispositive motions, it does not provide the arbitrators with adequate *standards* for determining when a pre-hearing motion to dismiss should be granted. Under the current version of the rule, a panel would be permitted to grant a motion to dismiss even though there are serious disputes concerning essential facts.

In order to provide the arbitrators with sufficient guidance, the rule needs to set forth standards for deciding a pre-hearing motion to dismiss. Indeed, a properly written rule that focuses upon standards need not overly restrict the grounds for such motions. Consider the following change to Subsection (a)(6):

> (6) The panel shall not consider, act upon, or grant a motion to dismiss a party or a claim under this rule:
>
> (A) if the motion seeks dismissal based upon insufficient or defective allegations set forth in the statement of claim;
>
> (B) if there exists a dispute concerning a fact that is necessary for the determination of the motion;
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> (C) if discovery has not been sufficiently completed by the parties; or
>
> (D) if the panel believes its decision-making process will be substantially enhanced by having a full hearing on the merits.

This change has two effects: First, it continues to bar traditional motions to dismiss based on the insufficiency of allegations set forth by a claimant. Such technicalities are overly harsh for unrepresented investors and are inappropriate in the FINRA arbitration forum.[1] Second, the change provides meaningful, flexible standards, to guide the arbitrators' decision-making process.

These proposed standards balance the need for a full hearing and the efficiencies that can be achieved in pre-hearing motion practice. As stated, the point of a hearing is to have testimony to determine the facts and to have argument on how the case should be decided. If there is no dispute about the essential facts, then all that is needed to decide the merits is a pre-hearing conference that provides the parties with the opportunity to present argument to the arbitrators (which is already prescribed by proposed Rules 12504 and 13504).

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[1] Statements of Claim that do not fairly apprise respondents of the claims should not be dismissed. Rather, any unfairness caused by the lack of information should be cured through information requests or requests for a more detailed statement of claim.

The language proposed in this letter also provides the arbitrators sufficient latitude to decide to have a full hearing in the interest of fairness. The arbitrators may decide to postpone their ruling until after a full hearing, even though there technically may not be a factual dispute. This aspect of the language proposed in this letter guards against unfairness caused by the vagaries of the pre-hearing presentation of facts. For example, a non-lawyer investor representing himself may present written materials that fail to set forth a controversy concerning the essential facts, even though such a controversy actually exists. Under the language proposed here, the arbitrators are free to make allowance for these and other situations where fairness requires a full hearing.

Further, equitable considerations in the process also will be enhanced if the meaning of certain terms used in the language proposed above is left to the case-by-case interpretation of the arbitrators. For example, the arbitrators should be left to decide the meaning of "necessary" facts in the above subsection (6)(B), "sufficiently completed" discovery in above subsection (6)(C), or the decision-making process "enhanced" in above subsection (6)(D). This will permit the parties to educate the arbitrators as to how to apply that language to their particular situation and allow the arbitrators to address the broad spectrum of issues that arise in FINRA arbitrations.

Based upon previous letters sent to the Commission to comment on these rules, we anticipate that certain claimants' counsel will object to a rule providing *standards* for determining motions, rather than *grounds*, because many arbitrators are not lawyers and are not trained in applying legal concepts. This is not a valid objection. If arbitrators are competent to determine the facts and apply the law after a full hearing on the merits, than they also are competent to determine (a) whether a factual dispute exists, and (b) if there is no factual dispute, the application of the law and their sense of fairness to those undisputed facts.

In short, Subsection (a)(6) of the proposed rule does not provide sufficient standards and unjustifiably gives priority to conducting a full hearing, no matter how unnecessary, over the traditional goals of arbitration: efficiency and fairness.

Thank you for your consideration.

Very truly yours,

HONIGMAN MILLER SCHWARTZ AND COHN LLP

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