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BY EMAIL (rule-comments@sec.gov)

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

Re: File No. SR-FINRA-2007-021
Proposal amending Rules 12206 and 12504 of the Customer Code and Rules 13206 and 13504 of the Industry Code to address motions to dismiss

Dear Ms. Morris:

Fidelity Investments[1] ("Fidelity") appreciates the opportunity to comment on the proposed amendments to the Financial Industry Regulatory Authority ("FINRA") rules governing motions to dismiss. Fidelity recognizes the value and importance of preventing bad-faith and dilatory motions to dismiss and supports FINRA's efforts to eliminate those motions from the arbitration process. However, the proposed rules extend beyond discouraging bad-faith motions. The proposed rules unfairly discourage all motions to dismiss – even those proper under FINRA rules and established law – and unduly narrow the scope of permissible motions to dismiss to prohibit motions even in cases where the law clearly supports them. Fidelity's comments are intended to address the limited scope of permissible motions to dismiss and procedural concerns surrounding the proposed rules.[2]

1. <u>Claims against clearing firms</u>

Clearing firms often are named as respondents in customer disputes arising out of the alleged conduct of the introducing firm or its brokers and not the clearing firm itself. Under the current rule, dismissal of these claims is permissible and routinely granted where the clearing firm did not owe and did not breach a legal duty owed to the claimant.

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[1] Fidelity Investments is comprised of a group of financial services companies, including National Financial Services LLC, a provider of clearing services.

[2] In addition to these comments, Fidelity supports the comment letter and proposed amendments submitted by the Securities Industry and Financial Markets Association ("SIFMA").

The proposed rules unfairly prohibit dismissal of these claims even though they are not legally viable.

The limited duties of clearing firms are well established by rule and by law. NYSE Rule 382 permits the allocation of responsibility between the introducing and clearing firms through written clearing agreements. The typical clearing agreement limits the duties of the clearing firm and specifically allocates duties relating to suitability and supervision (among other things) to the introducing firm. Customers are advised in writing of this allocation of responsibility at the inception of their account.

The well-established case law supports that clearing firms cannot be held liable for breach of duties that have been allocated to the introducing firm.[3] Indeed, FINRA arbitration panels routinely follow this compelling legal authority and dismiss clearing firms where there are no allegations of direct misconduct.[4] Claimants also voluntarily dismiss clearing firms when presented with the clearing agreement and the established body of law.[5]

Prohibiting dismissal of clearing firms prior to the close of the claimant's case prevents a fair and prompt adjudication of a dispositive legal issue. A full hearing on the merits will not change the fact that the claimant failed to state a legally viable claim against the clearing firm. Thus, prohibiting dismissal of these claims places an unfair and undue burden on clearing firms by forcing them to defend claims through discovery and

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[3] *See, e.g.*, *Carlson v. Bear Stearns & Co.*, 906 F.2d 315 (7th Cir. 1990); *Mars v. Wedbush Morgan Secs., Inc.*, 231 Cal. App. 3d 1608, 1614 (Cal. Ct. App. 1991); *Denson v. Bear Stearns Secs. Corp.*, 682 So. 2d 69, 71 (Ala. 1996).

[4] *See, e.g.*, *Lawrence and Patricia Taylor v. Pershing LLC*, NASD #06-00914 (Mar. 2007) (pre-hearing dismissal granted); *Inversiones Interven, Ltd. v. National Financial Services*, LLC, NASD #05-06544 (Jul. 2006) (same); *Ray v. SunTrust Securities, Inc.*, NASD #03-07628 (Jun. 2004) (same); *Miller v. National Financial*, NASD #96-00706 (confirmed by Superior Court of California, San Francisco, Jul. 29, 1999). *See also*, *Hoffman v. Fereydouni*, NASD #04-04302 (Oct. 2005) (pre-hearing dismissal); *Ray v. SunTrust Securities, Inc.*, NASD #03-07628 (Jun. 2004) (pre-hearing dismissal); *Voigtlander v. Wilson*, NASD # 03-5994 (Jun. 2004) (pre-hearing dismissal); *Shandy v. Cambridge Way*, NASD #02-02280 (Jan. 2003) (pre-hearing dismissal); *Lupo v. Schroder & Co.*, NASD #99-01364 (Jul. 2001) (pre-hearing dismissal); *Chafin v. Securities America Securities Corp.*, NASD #99 04423 (Aug. 2000); *Razouvaev v. Schroder, Wertheim & Co., Inc.*, NASD #9604398 (Dec. 1997); *Robinson v. Rauscher Pierce Refsnes, Inc.*, NASD #92 00528 (Sep. 1993); and *Beitner v. Herzog, Heine, Geduld, Inc.*, NASD #96 04576 (Feb. 1998 Order; Award Jul. 1998).

[5] *See, e.g.*, *Richard L. Lackey and Diane Lackey,et al. v. National Financial Services, LLC, Casimir Capital, L.P. and James Ahern*, FINRA #05-02643 (Dec. 2007); *Donald M. Ball, et al. v. National Securities Corporation, National Financial Services, LLC, Kevin Guzman, Francisco Javier Tineo*, FINRA #07-00468 (Oct. 2007); *Lois A. Koons, et. al. v. Neel R. Dekle, Dekle Financial Group, Park Avenue Securities LLC, National Financial Services LLC, The Guardian Life Insurance Companies of America*, NASD #04-03141(Feb. 2007); *Darnell N. McWillie, et al. v. Keith Cox et al.*, NASD #03-08900 (Jun. 2005); *Michael N. King & Associates Profit Sharing Plan et al. v. Katrina Bowers, Invest Financial Corporation and National Financial Services Corporation*, NASD #03-01623 (Nov. 2004); *Mark C. and Pattie L. Heitzman v. 1st Global Capital Corporation, Stephen P. Regouby d/b/a Union Financial Advisors, Inc. and National Financial Services Corporation*, FINRA #03-00076 (Oct. 2004); *The Argo Corporation et al. v. First Institutional Securities, L.L.C et al.*, NASD #03-01250 (April 2004).

hearing, incurring substantial and unnecessary attorneys' fees and costs, when the allegations clearly are subject to dismissal. In this context, the proposed rules serve only to delay the fair adjudication of these issues and increase costs unnecessarily for both sides, which is contrary to the fundamental objective of the arbitration process.

The rule proposal should recognize this established principle and permit dismissal of clearing firms where the claim lacks any factual allegation of direct misconduct by the clearing firm.

2. <u>Other appropriate grounds for dismissal</u>

a. <u>Time-barred claims</u>

The proposed rules should be amended to permit dismissal of time-barred claims. While the proposed rules permit dismissal of claims filed beyond the six-year eligibility period established by FINRA, the proposed rules do not provide for dismissal of claims filed beyond applicable statutes of limitations. Statutes of limitations were established to ensure a timely and fair resolution of claims while the evidence, both physical and mental, is available. The proposed rules should permit dismissal of claims barred by the eligibility rule <u>and</u> the applicable statutes of limitations.

b. <u>Individuals improperly named</u>

The proposed rules should be amended to permit dismissal of claims brought against individuals, including executives, who are without direct involvement, direct supervisory responsibility, or personal knowledge of the alleged conduct. Courts and arbitrators agree such claims are appropriate for dismissal. While the proposed rules provide for dismissal when "[t]he moving party was not associated with the account(s), security(ies), or conduct at issue," this should be expanded to include dismissal of individuals, including executives, without direct involvement, direct supervisory responsibility, or personal knowledge of the alleged conduct.

3. <u>Cost-shifting for motions brought in good faith</u>

The proposed requirement that a panel assess forum fees against an unsuccessful moving party is unfair and unnecessary. A panel should be able to exercise discretion to allocate forum fees where appropriate. Fidelity has no objection to FINRA encouraging the assessment of fees against a party who brought a motion in bad faith or without a reasonable foundation. Such motion practice benefits no one and should be strongly discouraged. However, a panel should not be <u>mandated</u> to assess fees against a party whose good-faith motion was denied. The assessment of fees can be left in the panel's sound discretion with appropriate FINRA guidance.

Thank you for giving Fidelity the opportunity to comment on the proposed rules governing dispositive motions. If you have any questions regarding this comment letter, please contact me at (617) 563-8740.

Sincerely,

Jody Forchheimer