SYRACUSE UNIVERSITY

COLLEGE OF LAW
OFFICE OF CLINICAL LEGAL EDUCATION

Nancy M. Morris, Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090

April 10, 2008

Re: File Number SR-FINRA-2007-021 – Proposed Rule Change and Amendment No. 1 Relating to Amendments to the Code of Arbitration Procedure for Customer Disputes and the Code of Arbitration Procedure for Industry Disputes to Address Motions to Dismiss and to Amend the Eligibility Rule Related to Dismissals

Dear Ms. Morris:

The Securities Arbitration and Consumer Clinic (SACC), in conjunction with the Office of Clinical Legal Education, at Syracuse University College of Law is writing to express its approval of the proposed rule change to NASD Rule 12504 of the Code of Arbitration Procedure for Customer Disputes.

The undersigned faculty has represented brokerage firms for about twenty years, and investors for about four years. In addition, the undersigned has sat on numerous NASD arbitration panels. Thus, the SACC's comments herein also reflect conclusions based upon first-hand experience with a variety of issues, and from differing perspectives.

While the SACC favors a black letter rule opposing motions to dismiss (except where parties have already settled or litigated a matter), we view the current proposal as a practical compromise, one that in most situations will further investor protection and interest in a hearing on the merits. Generally, the idea of motion practice is incongruent with the purpose of arbitration: to simplify the dispute resolution process. Asking arbitrators, many of whom are not lawyers, to make rulings without the requisite knowledge and skill required for such decisions, undermines the arbitration process.

While most counsel for Respondents may not engage in the filing of frivolous or harassing Motions to Dismiss, some do. There is currently no meaningful guide for the arbitrators in such an instance. More often, though, Motions to Dismiss are made for the purpose of 'educating the Panel', to get an impermissible shot at an 'extra' opening argument. These are not legitimate reasons for the filing of such Motions. In Court, such unsavory methods can be dealt with by the Court and the parties. In arbitration under the current Rules, Claimants do not have similar safeguards. Furthermore, in Court many dispositive motions are entertained only after extensive discovery, including depositions. Arbitration simply does not permit the range of discovery tools available in Court, rendering Motions to Dismiss particularly unsuited to the arbitral process.

That said, we appreciate FINRA's attempt to integrate the changes suggested in the various comment letters, including the SACC's observations, from 2006. Therefore, we urge the SEC to adopt the Proposed Rule 12504 for the reasons below, with the hope that it reflects a first of incremental improvements to be enforced in the realm of arbitration practice.

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At the outset, Rule 12504(a) (1) now unequivocally states that motions to dismiss "are discouraged in arbitration." This is an excellent starting point. The language will undoubtedly assist some arbitrators who might not otherwise appreciate the burdens on a party making a dismissal motion. Furthermore, Rule 12504(a) (2) – (3) now requires the respondent to answer the claim and provides for adequate notice. These provisions set the tone for the rest of the Rule and make clear that this process is not akin to litigation.

The Proposed Rule, under 12504(a) (4), compels the entire panel to hear the motion to dismiss and (a) (5) guarantees a prehearing conference via phone or in-person. A decision granting, but notably not denying, a motion to dismiss must be unanimous and accompanied by a written explanation under Rule 12504(a)(7). These provisions further arbitration's near guarantee that each claim will have a hearing on the merits by an arbitration panel. Requiring reasons for granting a motion to dismiss will assist courts and the regulatory bodies to better monitor the fairness of the process.

Additionally, multiple filings of the same motion to dismiss are expressly prohibited absent a panel order to the contrary under Rule 12504(a) (8). This provision helps alleviate the concern for respondent badgering by excessive and repetitive motion filing.

The Proposed Rule also provides a mechanism for assessing fees against the moving party if the panel denies the motion and for sanctions against parties who file "frivolous" motions. *See* Rule 12504 (a) (9) – (10). This proposed change thereby allows for possible punishment against parties for engaging in abusive practices under the Rule.

Providing well planned guidelines for motions to dismiss will increase investor confidence in the arbitration process. We note that Proposed Rule 12504(b), does not provide the guidance and does not 'discourage' such Motions as does the language in Proposed Rule 12504 (a). A similar approach within the two sections of the Proposed Rule would have been more appropriate. Notwithstanding that observation, Proposed Rule 12504 takes a big step towards serving the integrity of the arbitration process.

In summary, while we believe Motions to Dismiss have no place in the arbitration forum, other than as referenced above, we urge the SEC to accept this new rule. Please do not hesitate to contact us if you have questions regarding these comments.

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/s Emily S. Hatch
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