Financial Industry Regulatory Authority

March 5, 2012

Ms. Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090

Re: File No. SR-FINRA-2011-067 – Proposed Rule Change Relating to Whistleblower Claims in Arbitration

Dear Ms. Murphy:

The Financial Industry Regulatory Authority, Inc. ("FINRA") hereby responds to the January 3, 2012 comment letter received by the Securities and Exchange Commission ("SEC") from the Securities Industry and Financial Markets Association ("SIFMA"), with respect to the above rule filing. In this rule filing, FINRA is proposing to amend FINRA Rule 13201 of the Code of Arbitration Procedure for Industry Disputes ("Code") to align the rule with statutes that invalidate predispute arbitration agreements for whistleblower claims. FINRA is also proposing to make a conforming amendment to FINRA Rule 2263.[1] The proposed rule change would amend Rules 13201 and 2263 to provide that a dispute arising under a whistleblower statute that prohibits the use of predispute arbitration agreements is not required to be arbitrated under the Code. It also provides that such a dispute may be arbitrated only if the parties have agreed to arbitrate it after the dispute arose.

While SIFMA supports the proposed rule change to the extent that it aligns the Code with federal statutes that do not require parties to arbitrate whistleblower claims, it makes three recommendations for amending the proposal. First, SIFMA suggests that FINRA amend the proposal to replace the term "dispute" with the term "claim" throughout. SIFMA noted in its letter (at footnote 3), that the relevant provision in the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") uses the term "dispute," stating that "[n]o predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section." However, SIFMA does not believe "dispute" is the best term to use in the Code amendments.

[1] See Securities Exchange Act Rel. No. 65896 (December 6, 2011), 76 FR 77283 (December 12, 2011) (File No. SR-FINRA-2011-067).

One Liberty Plaza
165 Broadway
New York, NY
10006-1404

t 212 858 4000
www.finra.org

Dodd-Frank requires special treatment for certain whistleblower causes of action. Unlike the vast majority of disputes between and among member firms and associated persons, which must be arbitrated at FINRA, Dodd-Frank requires parties to *agree* to arbitrate whistleblower claims. Therefore, since the enactment of the statute, an associated person has the absolute right to bring a whistleblower claim in court. To arbitrate such causes of action at FINRA, all parties must agree after the dispute arises. If, for example, an associated person initiated an arbitration against a member firm at FINRA that included a claim for breach of contract and a claim under a whistleblower statute, FINRA would require the firm to arbitrate the breach of contract claim and would *ask* the firm if it agreed to arbitrate the whistleblower claim. If the firm did not agree to arbitrate the whistleblower claim, the associated person could bring the whistleblower claim in court. Similarly, if a member firm initiated an arbitration against an associated person, and the associated person's defense to the firm's claim was the assertion of a whistleblower claim, the associated person could bring the whistleblower claim in court. If the associated person seeks the court's order to consolidate the firm's arbitration claim and the associated person's whistleblower claim in the associated person's court case, FINRA of course would comply with the court's ruling.

FINRA intended to track the Dodd-Frank language in the proposed rule change to ensure that FINRA aligned the Code with Dodd-Frank. If the Commission approves the proposed rule change, FINRA would administer the rule in a manner that is consistent with the practice described in the examples above. Therefore, FINRA declines to amend the proposal as suggested.

Second, SIFMA recommends that FINRA narrow the proposed rule change by inserting the word "federal" before "whistleblower" statute. FINRA does not believe that it would be appropriate to compel a registered person to arbitrate a whistleblower claim, pursuant to a U-4 agreement, when there is a statute precluding enforcement of a predispute arbitration agreement, regardless of whether the statute is promulgated under federal or state law. If the SEC approved the proposal, FINRA would continue to accept a whistleblower claim under a state statute if the parties agreed to arbitrate the claim, or if a court ordered the claim to be arbitrated at the forum. Therefore, FINRA declines to make the recommended amendment to the proposed rule change.

Third, SIFMA recommends that FINRA amend the proposal to provide that it does not apply retroactively because, among other reasons, Dodd-Frank does not provide for retroactive application of this section. FINRA's view, however, is that the relevant Dodd-Frank provision (quoted above) invalidates all predispute arbitration agreements relating to whistleblower claims under the section. Therefore, since the effective date of Dodd-Frank, FINRA's practice has been to require parties to agree post dispute to arbitrate whistleblower claims under the relevant provision. The

proposed rule change is consistent with FINRA's practice. Therefore, FINRA declines to make the recommended amendment to the proposed rule change.

FINRA believes that the proposed rule change would align the Code with statutes that invalidate predispute arbitration agreements for whistleblower claims and requests that the SEC approve the proposed rule change as drafted.

If you have any questions, please contact me by telephone at (212) 858-4481 or email at margo.hassan@finra.org.

Very truly yours,

Margo A. Hassan
Assistant Chief Counsel
FINRA Dispute Resolution