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NASAA

February 7, 2013

Elizabeth M. Murphy, Secretary
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549

Via e-mail to rule-comments@sec.gov

RE: Release No. 34-68632, File Number SR-FINRA-2013-003

Dear Ms. Murphy:

The North American Securities Administrators Association (NASAA) supports the Financial Industry Regulatory Authority's (FINRA) efforts to continuously clarify the classification of individuals eligible to participate as arbitrators in its Dispute Resolution program. NASAA endorses FINRA's recognition that maintaining an impartial pool of arbitrators is important, and contends that any potential for bias must be accurately and clearly disclosed to the parties. NASAA concurs with the intent of SR-FINRA-2013-003 toward achieving this end. Given that investors have no choice but to litigate their claims in FINRA's arbitration forum, claimants must have access to FINRA arbitrators that are impartial and unbiased. In addition, the arbitration process should be free of any appearance of unfairness. In order to remove any bias or perception of bias, FINRA's "public" arbitrator pool should exclude all individuals employed by the securities industry or who have had any affiliation with the industry, including mutual fund and hedge fund employees. Such industry-affiliated employees should remain "non-public" for the duration of their FINRA arbitrator service. It is only logical that arbitrators with significant experience and expertise within the securities industry be recognized as such.

The current FINRA rule proposal seeks to amend the Customer and Industry Codes of Arbitration Procedure ("Codes") definition of "public arbitrator" to exclude persons associated with a mutual fund or hedge fund from serving as public arbitrators, and would require individuals to wait for two years after ending certain affiliations before they may be permitted to serve as public arbitrators. NASAA agrees that persons associated with a mutual fund or hedge fund should be excluded from serving as public arbitrators because of their industry association. However, NASAA also believes that a two-year cooling off period, or even a longer period of time, is inadequate.[1] The fact remains that these individuals worked in the industry, were paid by

[1] NASAA understands that the current FINRA Rule 12100(p) provides a five-year cooling off period for those currently considered non-public arbitrators. However, NASAA believes that the inherent biases of industry association necessitate a permanent non-public classification.

industry, were trained from industry's perspective, and were on the opposite side of the customer complaints involving their firms or against their colleagues, as well as possibly similarly-situated employees in other firms. It is not unreasonable to assume that these individuals may bring pro-industry perspectives to arbitration, particularly if these arbitrators themselves dealt with the sale of products or services that are the subject of the pending arbitration. It is also reasonable to assume that former industry employees formed friendships and bonds with other members of the industry, including industry trade association members and the like. Such affiliations often continue when an employee leaves the firm past a two (or five) year period. It is NASAA's position that the only classification suitable for industry-affiliated arbitrators, even if they have been away from industry for several years, is "non-public."[2]

It is recognized in our judicial system that a person's occupation or work history may lead to bias; consequently, courts permit the striking of jurors for cause based upon occupations. One of the most common questions asked in jury selection is a prospective juror's occupation. Investors in arbitration do not have the benefit of a voir dire and unlimited strikes for cause, but they do have the option of selecting from "public" and "non-public" pools. If an investor wants an arbitrator who is a former hedge fund manager, former broker, former industry attorney or an industry-affiliated individual, the investor can choose a "majority public" arbitration panel and receive an industry arbitrator. Conversely, if the investor selects an all-public panel, the investor should be entitled to, as the name "public" suggests, arbitrators without *any* present or past industry affiliation, bias, or perceived bias.

NASAA is not opposed to hedge fund and mutual fund managers serving on FINRA arbitration panels. NASAA believes that such arbitrators, however, must be classified as "non-public" for the duration of their FINRA arbitrator service.

Thank you for the opportunity to comment on this proposal. NASAA commends FINRA for taking several steps over the years to improve the arbitration forum and process, and encourages FINRA to take further action to ensure that investors who are forced into arbitration receive the fairest forum possible.

Sincerely,

A. Heath Abshure
NASAA President
Arkansas Securities Commissioner

[2] The current definition of Non-Public arbitrator in the FINRA rules limits association with the securities industry to activities related to its member firms and commodities brokers. This definition must be broadened to include the entire securities industry in customer disputes. This is particularly true now that FINRA plans to open up its forum to non-members.