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U.S. Securities & Exchange Commission
Washington, D.C.

Re: Comments on SR-FINRA-2014-028, "Notice of Filing of a Proposed Rule Change Relating to Revisions to the Definitions of Non-Public Arbitrator and Public Arbitrator"

Dear Sirs:

Thank you for affording me the opportunity to comment on the new FINRA Proposed Rules. I have two areas of comment:

(1) To avoid public perception that the FINRA arbitration process is unfair, and to prevent a "step backward" in investor protection, the SEC and FINRA need to reverse the attempt by new Proposed Rules 12100(p)(3), (u)(3), and (u)(7), with no stated legitimate rationale, to transfer large numbers of *public non-industry* arbitrators into the "*Non-Public*" pool a/k/a the "Industry" arbitrator pool, to render them: (a) ineligible for Chairmanship for three-person panels, (b) ineligible as sole arbitrators in cases of smaller claims, (c) ineligible for an "All-Public" panel arbitration or as a replacement arbitrator, (d) effectively precluding them from ever serving again in any customer case; and (e) with a result that will cause undue confusion to the public and augment the perception that FINRA arbitration is an unfair forum under the control of the brokerage firms. This transgression can be solved simply by modifying Proposed Rules 12100(p)(3), (u)(3), and (u)(7) by adding the phrase "other than customers", as follows:

> **Proposed Rule 12100(p)(3), as should be modified**
> "(3) is an attorney, accountant, expert witness or other professional who has, within the past five years, devoted 20 percent or more of his or her professional time, in any single calendar year, to representing or providing services to parties in disputes**[other than customers]** concerning investment accounts or transactions, or employment relationships within the financial industry; or …."

Proposed Rule 12100(u)(3), as should be modified

"(3) A person shall not be designated as a public arbitrator, who was, for a total of 15 years or more, an attorney, accountant, expert witness or other professional who has devoted 20 percent or more of his or her professional time annually to representing or providing services to parties in disputes [**other than customers**] concerning investment accounts or transactions, or employment relationships within the financial industry."

Proposed Rule 12100 (u)(7), as should be modified

"(7) A person shall not be designated as a public arbitrator who is an attorney, accountant, expert witness or other professional who has devoted 20 percent or more of his or her professional time, in any single calendar year, to representing or providing services to parties [**other than customers**]in disputes concerning investment accounts or transactions, or employment relationships within the financial industry unless the calendar year ended more than five calendar years ago."

(2) The SEC and FINRA need to clarify that the new Proposed Rule for categorizing "Non-Public" arbitrators do *not* apply to *all* "workers in the securities business", since it must exclude "clerical and ministerial" workers, as the SEC and FINRA have done in the past, consistent with the definitions in the Securities Exchange Act of 1934, Section 3.[1] This problem can be solved by the Proposed Rules clarifying that:

> "Associated person" as used in the proposed rule would have the meaning provided in Section 3(a)(18) of the Act, which expressly excludes, for certain purposes, any persons associated with the member whose functions are solely clerical or ministerial (referred to as "clerical and ministerial associated persons").

My comments are based on an extensive experience and history with the federal securities laws, the securities industry, investor-victims, and the FINRA/NASD

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[1] See Securities Exchange Act, Section 3:
(18) The term ''person associated with a broker or dealer'' or ''associated person of a broker or dealer'' means any partner, officer, director, or branch manager of such broker or dealer (or any person occupying a similar status or performing similar functions), any person directly or indirectly controlling, controlled by, or under common control with such broker or dealer, or any employee of such broker or dealer, except that any person associated with a broker or dealer whose functions are solely clerical or ministerial shall not be included in the meaning of such term for purposes of section 15(b) of this title (other than paragraph (6) thereof).

(hereinafter "FINRA") securities arbitration system throughout the entire evolution of the arbitrator ranking system. My first experience with the securities industry was my first job in 1967, while still in high school, as a securities clerk on Wall Street with Lazard Frerés & Co. earning an above-minimum-wage of $2.00 per hour. After law school at Cornell (with securities regulation training by Professor David Ratner), and practicing business litigation in New York City, I accepted an appointment as Attorney-Fellow at the Center for Study of Financial Institutions under Director Robert H. Mundheim, earning a Master of Laws in securities regulation from the University of Pennsylvania Law School, and publishing legal articles on the Securities Act of 1933 and Securities Exchange Act of 1934. During the second half of the 1970's, I served as Attorney-Adviser with the U.S. Securities & Exchange Commission in both the Division of Enforcement and the Division of Investment Management, at headquarters in Washington, D.C. For most of the past two decades, I have served as a FINRA Arbitrator (currently still on the Chairman roster), and also limited my practice of law to representing claimants in FINRA arbitrations. I have extensively experienced the FINRA arbitrator selection system many dozens of times, from its inception through all of its myriad modifications over the years, and done more than my share of "ranking" arbitrators. I have interviewed hundreds of investors seeking a consultation for my services, and understand their perceptions of the FINRA arbitration process as well as which types of cases have sufficient merit to be filed. As a FINRA Public Arbitrator, most cases to which I have been assigned were settled by the parties before final hearing; but of the published customer-case Awards in which I was a signatory, that actually ended up with a hearing, the customer received money in 33% of the cases.

The SEC and FINRA Should Reverse the Attempt By the Proposed Rules 12100(p)(3), (u)(3), and (u)(7), Without Any Legitimate Stated Rationale, to Seismically Shift Large Numbers of *Public Non-Industry* Arbitrators Into the "*Non-Public*" Pool a/k/a the "Industry" Pool To Render Them Effectively Useless

The Proposed Rules, in many respects, takes strides in investor protection by expanding the sphere of "Non-Public" arbitrator classifications *for persons from the brokerage firm industry* who really deserve to be grouped together with their fellow "Industry" arbitrators. Such realignment comports with the public's perception that "Non-Public" arbitrators are persons from the brokerage industry, so that an "All-Public" panels would not include an "Industry" arbitrator. For customer claimants who want "All-Public" panels, this type of alignment gives the investing public greater confidence that they are getting a "fairer shake" in the FINRA arbitration process that is otherwise perceived generally by the American public as "of the industry, by the industry and for the industry", especially with everyone in America wanting a securities account forced to sign a non-negotiable contract of adhesion, directing them solely to FINRA arbitration, not public courts with a jury of their peers, to resolve any disputes.

This more inclusive grouping of all brokerage firm industry associates together under the "Non-Public" umbrella has, according to the SEC website, been applauded by

comments from former PIABA Presidents, with such remarks as: "[It] would significantly address longstanding constituent perceptions about the fairness and neutrality of the public arbitrator roster and would enhance the interests of public investors"; " [T]he proposed rule and bright line test eliminates loopholes through which professionals in the securities industry or those that worked on behalf of the industry are classified as public arbitrators", and "[T]he notion that an arbitrator who could have spent nineteen and a half years employed in the securities industry can somehow become a 'public' arbitrator after a relatively brief cooling off period is contrary to common sense and provides a serious optics problem for arbitrator selection."

However, in their exuberance at the new 'common sense" of grouping more industry-associated arbitrators together under the "Non-Public" umbrella, such commenters have overlooked that the Proposed Rules also will incongruously create an **illogical seismic- shift of a large number of** *currently "Public", albeit* **"*Non*-Industry" FINRA arbitrators into the "*Non*-Public" pool of "Industry" arbitrators, which shift will *inhibit*, rather than promote, investor protection guaranteed by the Securities Exchange Act of 1934.**

One logical "common sense" step forward in the enhancement of public perception of FINRA arbitration fairness does *not* warrant one illogical step backward in return.

Throughout the industry, and among the general public, that phrase "*Non-Public*" is *synonymous with an arbitrator who is from the brokerage firms*, employed by the same industry as the respondents that claimants must sue to seek justice. The existence of the FINRA ranking system, from its roots, has always been to create a "bright-line" demarcation between arbitrators employed by the securities industry, on the one hand, and every other arbitrator, on the other hand. From the inception of the ranking system, "*Public*" arbitrators" naturally included lawyers, support staff, accountants, and experts who provided services to ensure that claimants received a fair hearing, although obviously not participating on any cases where conflicts exist. Now, turning the world on its head, and without any evidentiary support for a compelling need, the Proposed Rules seek to force a "round peg into a square hole" by terming "*Non-Public*" these large numbers (perhaps hundreds) of FINRA arbitrators who are attorneys and other professionals who have provided services to claimant-customers as part of their occupations, lumping them together in the same gene-pool as industry-brokers viewed by investor-claimants as on the proverbial "other side of the fence". **This seismic shift will "boot out" these current "Public" arbitrators into a "Non-Public" classification, to be grouped instead with the "Industry" arbitrators where they will practically never get appointed to customer cases ever again.**

It is indisputable that the American lexicon equates "Industry" arbitrator and "Non-Public" arbitrator as synonymous. This synonymous terminology, in the American investor perception, has been officially reinforced by the SEC and FINRA. See, e.g., SEC Release No. 34-69297, 2013 SEC LEXIS 1027 (April 4, 2013) (emph. add.):

> As stated in the Notice, **FINRA classifies arbitrators under the Codes as either "non-public" (otherwise known as "industry" arbitrators) or "public."** Arbitrators are generally considered **non-public if they are affiliated with the securities industry either because they (1) are currently or were formerly employed in a securities business; or (2) provide professional services to securities businesses**.

Indeed, as a matter of law and judicial definitions , the "Industry" arbitrator is synonymous with "Non-Public" arbitrator", throughout the United States. *See, e.g., Citigroup Global Mkts., Inc. v. Berghorst*, 2012 U.S. Dist. LEXIS 76459 (S.D. Fla. 2012) (emph. add.):

> In March 2009, FINRA appointed two public arbitrators, Guy Stewart, Jr. ("Stewart"), the Chairman of the arbitration panel, and Richard Epstein, Esq. ("Epstein"), and **one non-public or industry arbitrator**, Mark Sidell ("Sidell"). At the time, Sidell was registered as a General Securities Representative with Wells Fargo, which, like Citigroup, is a registered broker-dealer and member of FINRA.

Accord, ***STMicroelectronics, N.V. v. Credit Suisse Secs.*** 2010 U.S. Dist. LEXIS 144048 (S.D.N.Y. 2010) (emph. add.):

> Based on the Parties' rankings of the candidates, FINRA constituted the panel with John J. Duval, Sr. ("Duval") as the **non-public, knowledgeable industry arbitrator**, and two public arbitrators.

Accord, Adams v. Sec. Am., Inc., 2006 U.S. Dist. LEXIS 68190 (E.D. La. 2006) ("Moreover, as **the non-public or industry arbitrator**, Brown was required to have worked in the industry and have knowledge about the brokerage business.") (emph. add.); *accord, Grosso v. Salomon Smith Barney, Inc.*, 2003 U.S. Dist. LEXIS 20208 (E.D.Pa. 2003)("Petitioners cite NASD Code of Arbitration Procedure Section 10308 and assert that the arbitration panel was improperly constituted inasmuch as the panel chairperson was **the non-public or industry arbitrator**.") (emph. add.)

With this overwhelming evidence that the American people, and the U.S. Government, and the U.S. courts, **all** view "Industry" arbitrator and "Non-Public" as being synonymous, **why is FINRA incongruously proposing new Rules 12100(p)(3), (u)(3), and (u)(7), to place perhaps hundreds of experienced "Public", and clearly "*Non*-Industry", arbitrators into the "Industry" (Non-Public") roster?**

As William Shakespeare aptly put it, "Something is rotten in the state of Denmark." **The Proposed Rules 12100(p)(3), (u)(3), and (u)(7) appear to be a "power play" from the brokerage industry to cause more customer claimants to lose their cases in FINRA arbitration. Rather than FINRA demonstrating to the investing**

public that its forum can be trusted not to be dominated by the industry, the appearance is that FINRA is allowing itself to be a tool of the industry in making this proposal to undermine investor-claimants.

Can this be true? Let us look at FINRA's own published "rationale" for the seismic shift. In its Notice accompanying the Proposed Rules, FINRA cites its reasons for the Proposed Rules as a whole, starting with reference to purported past public comments:

> The intent of the proposed rule change is to address the concerns about arbitrator neutrality that were raised by the commenters on the 2013 amendments.

From this "rationale", one would expect that there must have been a clamoring by dozens of commentators in 2013 to shift an entire class of "Public" arbitrators into the "Non-Public "category. However, see http://www.sec.gov/rules/sro/finra/2013/34-69297.pdf:

> SECURITIES AND EXCHANGE COMMISSION
> (Release No. 34-69297; File No. SR-FINRA-2013-003)
> April 4, 2013
> Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Order Approving Proposed Rule Change to Amend the Customer and Industry Codes of Arbitration Procedure to Revise the Public Arbitrator Definition....
>
> "The Commission received **45 comment letters on the proposed rule change"....**
>
> "**<u>One commenter</u>** suggested that the definition of "public arbitrator" should exclude any attorney whose firm has derived $50,000 or ten percent or more of its annual revenue in the prior two years from professional services rendered to claimants in customer disputes concerning an investment account or transaction".
> (emph. add.)

One commenter? Out of the 45 comment letters ? That is hardly a legitimate "rationale" for the new FINRA Proposed Rules 12100(p)(3), (u)(3), and (u)(7) banishing all such non-industry attorneys and other professionals from the "Public" arbitrator category into the "Industry"/"Non-Public" roster, never to be heard from again in any customer cases.

In its proposal at SEC Release No. 34-72491, FINRA gave one additional "rationale" for the seismic shift, this time specifically referring to the Proposed Rules 12100(p)(3), (u)(3), and (u)(7):

> "**Industry representatives** raised **concerns about the *neutrality*** of the **public arbitrator roster**, ***and*** **they do not believe that these professionals should serve as *public arbitrators*.**"
> (emph. add.)

Let us examine this FINRA explanation to see if it makes any sense. The first part of the "rationale" is that "Industry representatives raised concerns about the neutrality of the public arbitrator roster." What is the basis of these concerns about neutrality by an entire roster of perhaps hundreds of FINRA "Public" arbitrators whose mere appearance on that roster have been one of the few sources for customer claimants to feel like they can get a "fair shake" in FINRA arbitration? Where are statistical studies that hundreds of "Public" arbitrators have "neutrality" problems? The appearance is that FINRA has chosen to acquiescence in, or cower to, "industry representatives'" hearsay "concerns" pulled out of thin air, without evidentiary examination, which unsavory appearance will only undermine American investor confidence in the neutrality of the FINRA forum itself.

FINRA is opting for the wrong approach. If *any* arbitrator is not "neutral", he or she should be removed from a case, and if generally lacking neutrality, must be removed from all rosters, both Public and Non-Public. FINRA has a procedure for the parties to comment upon the arbitrators with an Arbitrator Evaluation Form so that FINRA can deal with, and weed out, any arbitrators evidencing bias. Moreover, FINRA Rules already has a system to remove biased arbitrators from a case, with an SEC-approved standard. See FINRA Code of Arbitration Procedure (Customer Cases) Rule 12407 "Removal of Arbitrator by Director" (emph. add.):

> **(a) Before First Hearing Session Begins**
> Before the first hearing session begins, the Director may remove an arbitrator for conflict of interest or bias, either upon request of a party or on the Director's own initiative.
> (1) The Director will grant a **party's request to remove an arbitrator if** it is reasonable to infer, based on information known at the time of the request, that **the arbitrator is biased, lacks impartiality**, or has a direct or indirect interest in the outcome of the arbitration. **The interest or bias must be definite and capable of reasonable demonstration, rather than remote or speculative. Close questions regarding challenges to an arbitrator by a customer under this rule will be resolved in favor of the customer**. [2]

[2] Similarly, protections exist at later stages as well. See Rule 12407(b):
(b) After First Hearing Session Begins
After the first hearing session begins, the Director may remove an arbitrator based only on information required to be disclosed under Rule 12405 that was not previously known by the parties.

Both FINRA and the SEC have approved this method of addressing problems of arbitrator violation of "neutrality" by bias or lacking impartiality" by the ***required standard*** **of "definite and capable of reasonable demonstration, rather than remote or speculative**", with any close questions required to be "**resolved in favor of the customer**". **Where is the evidence by these unidentified "industry representatives'" of bias against perhaps hundreds of "Public" arbitrators that is "definite and capable of reasonable demonstration, rather than remote or speculative", with any close calls to be determined against the industry?** The brokerage firms that are respondents in customer arbitrations are *already* afforded protections from lack of "neutrality" by an arbitrator, with no evidence put forward that these existing protections are inadequate. [3]

The second part of FINRA "rationale" from these unnamed and unidentified "industry representatives", is that "they [the industry representatives] do not believe that these professionals should serve as *public arbitrators*." Thus, FINRA is asking the SEC to approve a seismic shift of perhaps hundreds of "Public" arbitrators (obviously desired by investor-customers to remain "Public" arbitrators) into a roster of "Industry" arbitrators (*i.e.,* Non-Public"), and to cause utter confusion contrary to the American lexicon equating "Industry and "Non-Public", merely on the hearsay "*belief*" of some unidentified "industry representatives"? Moreover, to the extent that the "neutrality" concern has any relation to the "belief" that perhaps hundreds of "Public" arbitrators should be thrown into the "Industry" arbitrator pool, such a seismic shift of classification would have absolutely no effect upon correcting any inherent "neutrality" problems of any arbitrator, who should not be an arbitrator in any category if they are not truly

[3] As additional current protections for respondents who have any "neutrality" concerns, all "Public" arbitrators are required to disclose in their Arbitrator Disclosure Reports any employment on behalf of customer-claimants, and disclose every conflict with brokerage firms that have been the subject of an arbitration. If a brokerage firm prefers another candidate, it has four "strikes", to wit, peremptory challenges, and must rank the remaining six candidates, for both the Chairperson and the other "Public" arbitrator, thus allowing a total of eight "strikes" against any "public" arbitrators in 3-member panels. If a "Public" arbitrator, such as myself, receives an appointment as a replacement arbitrator, it will either occur because the brokerage firm ranked the arbitrator or, if all ranked candidates are not available, then from a computer random selection, and can be asked for recusal or challenged for "cause" if the background disclosures could reasonably be perceived as creating a bias. Indeed, recently, I voluntarily (pursuant to Rule 12406) stepped down as a replacement Chairman, upon challenge, with the respondent expressing concern (which I considered not unreasonable) about a potential appearance of bias since I was actively pursuing a customer case against that firm's predecessor during the same time frame as the facts in the matter at hand. If I chose not to step down, then the Director of Arbitration has the authority to implement a removal under Rule 12407. In other words, a tried-and-true system already exists for respondent firms to ensure that attorneys (and other professionals) who are employed to assist claimants in other cases are not appointed where they can show a potential bias.

"neutral". FINRA thus lacks any coherent explanation for proposing Rules 12100(p)(3), (u)(3), and (u)(7). Once again, "Something is rotten in the state of Denmark."

One can only surmise that the "industry representatives" have a "hidden agenda", to wit, to have customers *lose* more cases against the brokerage firms. This conclusion can be inferred from the latest FINRA statistics evidencing that the "All-Public" panels, which includes the hundreds of fine experienced arbitrators that the "industry representatives" want kicked-out of such "All-Public" panels, are working to the advantage of customers in the "win-loss column". The following Chart of results is from the latest FINRA "Dispute Resolution Statistics" (https://www.finra.org/ArbitrationAndMediation/FINRADisputeResolution/AdditionalResources/Statistics/):

Comparison of Results of All-Public Panels and Majority Public Panels in Customer Claimant Cases

Year Decided[1]	Cases Decided by All-Public Panels[2]	Percentage (and Number) of Cases Decided by 3 Public Arbitrators Where Customer Awarded Damages	Cases Decided by Majority-Public Panels[3]	Percentage (and Number) of Cases Decided by 2 Public Arbitrators and 1 Non-Public Arbitrator Where Customer Awarded Damages
2011	13	54% (7 cases)	17	18% (3 cases)
2012	99	49% (49 cases)	111	33% (37 cases)
2013	128	43% (55 cases)	107	44% (47 cases)
2014	45	51% (23 cases)	45	42% (19 cases)

1 An all-public option for arbitration panels was implemented on Feb 1, 2011. Statistics reflect cases heard with awards from that point forward.
2 Three public arbitrators.
3 Two public arbitrators and one non-public arbitrator.

Since the option of "All-Public Panels" began, there have been 285 cases decided by "All-Public" panels, with 134 awards of at least some compensation to claimants, for a **47% rate** of some success. In stark contrast, and statistically significant, there were 280 cases that included a "Non-Public" ("Industry") arbitrator with only 106 cases where a claimant received some positive award, for a **38% rate**. As these statistics, and the benefits of an "All-Public" panel" become more commonly known, virtually every claimant is naturally going to start opting for an "All-Public "panel, rendering choosing a "Non-Public" arbitrator relatively obsolete. **This expectation of claimants choosing an "All-Public" panel" going forward, combined with the disqualification of a "Non-**

Public" arbitrator becoming a Chairman,[4] or even being appointed a sole arbitrator for small dollar cases,[5] will relegate the current "Public" arbitrators being seismically shifted into the "Non-Public" pool from ever getting appointed to customer dispute cases ever again on an "All-Public" panel, or from ever becoming an arbitrator ever again on a customer case because the respondent has unlimited "strikes" on the "Non-Public" list. [6] It seems that "industry representatives" want to "muck-up" the categories, as a procedural ploy, to derive a better "win rate" for the broker respondents and to create utter confusion in the minds of claimants, especially those not represented by a lawyer or else represented by an attorney with little experience with the various lists. Proposed Rules 12100(p)(3), (u)(3), and (u)(7), would effectively ban from any future customer cases perhaps hundreds of "Public" arbitrators that the "industry representatives" want, without any legitimate justification, seismically shifted into the 'Non-Public" roster with the "Industry" arbitrators.

In other words, it appears that "industry representatives" instead want to "neutralize" (i.e., to make ineffective, or put out of action)[7] perhaps hundreds of "Public" arbitrators desired by the investing public, and expected to appear in the "Public" roster. Thus, the appearance to the American public is that FINRA has been taken in, "lock, stock and barrel", by unidentified "industry representatives".

The SEC staff should be rolling their eyes and shaking their heads to witness this FINRA deference to "industry representatives" as a **100% reversal from FINRA's position taken just a few years ago,** when FINRA proudly touted that customers would

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[4] See FINRA Rules of Arbitration Procedure **Rule 12403 Cases With Three Arbitrators**
(e) Appointment of Arbitrators; Discretion to Appoint Arbitrators Not on the List
(1) The Director will appoint: …
(C) The highest-ranked available public arbitrator from the combined chairperson list, who will serve as chairperson of the panel.

[5] See FINRA Rules of Arbitration Procedure **Rule 12402. Cases with One Arbitrator**
(a) Composition of Panels
The arbitrator will be a public arbitrator selected from the public chairperson roster, unless the parties agree in writing otherwise

[6] See FINRA Rules of Arbitration Procedure **Rule 12403 Cases With Three Arbitrators**
(c)(1) Non-Public Arbitrator List
(A) Each separately represented party may strike any or all of the arbitrators from the non-public arbitrator list by crossing through the names of the arbitrators.

[7] See http://dictionary.reference.com/browse/neutralize, defining "neutralize" to include: "to make (something) ineffective" or "to put out of action or make incapable of action".

be able to have their arbitrations without any "Non-Public" industry arbitrators; and everyone understood that "Non-Public" meant "Industry" arbitrators:

> 11-05 Customer Option to Choose an All Public Arbitration Panel in All Cases; Effective Date: February 1, 2011....
>
> The second method, called the composition rules for **optional all public panel**, allows any party to select an all public arbitration panel. **FINRA believes that providing customers with the *right to exclude a non-public arbitrator from the panel deciding their case will enhance customers' perception of the fairness of FINRA's rules and the securities arbitration process.***
>
> ....
>
> The amendments apply *only* to customer disputes; they do not apply to disputes involving only industry parties. FINRA believes giving customers the option of an all public panel will enhance confidence in and increase the perception of fairness in the FINRA arbitration process. **Customers will have expanded power in choosing arbitration panels, and *all customers will have the ability to exclude non-public arbitrators* from their panels**.
>
> http://finra.complinet.com/en/display/display.html?rbid=2403&element_id=9973 (emph. add.)

Does it enhance "customers' perception of the fairness of FINRA's rules and the securities arbitration process" for the public to now see FINRA, three years later, trying to undermine the "Public" arbitrator pool by dumping into the "Industry" (a/k/a "Non-Public") roster (and effectively banning from any future customer cases) an entire roster of knowledgeable arbitrators who have extensive training in FINRA Rules and understand how to evaluate cases fairly? A resounding NO!

I believe, from my experience, that strong benefits exist to all parties, and especially for investor protection, for professionals such as myself to serve as FINRA arbitrators in customer cases. Attorneys such as myself has a unique experience of being contacted by potential claimants and evaluating cases based on the facts and law, by playing "devil's advocate" with potential clients, to "weed out" cases that should not be brought at all. In my situation, I have turned down well over 90% of potential clients, which client scrutiny and case evaluation is required for a contingency-fee-based service. This unique training and experience makes such lawyers and other professionals better arbitrators to ask the right questions, in other customer cases where they serve as "Public" arbitrators, to get to the pertinent material facts, and rule justly.

The Proposed Rules 12100(p)(3), (u)(3), and (u)(7) need to be fixed, can easily be remedied by simply adding the phrase "**other than customers**". Now that this proposal

has been exposed, it is incumbent upon the SEC to protect the public, and ensure the protections afforded investors in the Securities Exchange Act of 1934, especially Section 2 ("to impose requirements necessary to make such regulation and control reasonably complete and effective", and "to insure the maintenance of fair and honest markets in such transactions") by making these modifications.

2. Clarification Needed that "Associated Person" Does Not Include "Clerical or Ministerial Functions"

My second comment concerns the need to clarify the term "associated person" to make it consistent with other FINRA Rules and the Securities Exchange Act of 1934, to wit, clarifying that "associated person" does not include persons who performed "purely clerical or ministerial functions". The need for such clarification is heightened because of FINRA's overbroad, ambiguous, and erroneous verbiage accompanying "Test of Proposed Rule Change" in its Form 19b-4 filed with the SEC, and in the Federal Register with SEC Release No. 34–72495, stating:

> The amendments would, among other matters, provide that persons who **worked** in the financial industry **for any duration during their careers** would always be classified as nonpublic arbitrators.
>
> (emph. add.)

Obviously, **the test for a lifetime classification is *not* whether someone "*worked*" in the financial industry" as a summer "clerk" 45 years ago**, which would be an irrational interpretation of the FINRA Rules, and an unfair punishment of individual arbitrators. Claimants do not feel any prejudice from someone who merely had a clerical capacity with a broker-dealer, so a lifetime or other ban from "Public Arbitrator" status is nonsensical. It is unfortunate that FINRA has injected the term "worked" instead of the consistent verbiage of "associated person", thereby needlessly creating potential for litigation and unforeseen adverse consequences. FINRA and the SEC have acknowledged the need for clarification of "associated person" in other rulemaking, notably in File No. SR-FINRA-2013-035, SEC Release No. 34-70272, adopting FINRA Rule 4340:

> Proposed Supplementary Material .01 (**Definition of Associated Person; Clerical and Ministerial Functions**) would clarify that the term "associated person" as used in the proposed rule would have the meaning provided in Section 3(a)(18) of the Act, which expressly excludes, for certain purposes, any persons associated with the member whose functions are solely clerical or ministerial (referred to as "clerical and ministerial associated persons"). n7 [n7 15 U.S.C. 78c(a)(18)].

Accord, 1985 SEC No-Act. LEXIS 2730:

> As noted, Section 3(a)(4) defines a broker as "any person engaged in the business of **effecting transactions in securities** for the account of others . . ." (emphasis added). Neither the 1934 Act nor any rule thereunder defines the term, "effecting" transactions as used in the definition of a broker. However, the Senate Report on the 1934 Act states that "effecting transactions" refers to participation in a transaction whether as principal, agent, or both." Sen. Rep. 792, 73rd Cong., 2nd Sess., p. 17 (1934). The staff has long recognized that the definition of a "broker" does not extend to persons who perform "purely clerical or ministerial functions" with respect to securities transactions. . n8 [n8 A similar characterization of functions as "solely clerical or ministerial" is used in the **definition of "associated persons"** in Section 3(a)(18) of the Act. The House Report accompanying the enactment of this provision states that the term "ministerial" as used in Section 3(a)(18) refers to persons "acting in obedience to authority without the exercise of judgment."]

Accordingly, the SEC should require that, for purposes of the FINRA Proposed Rules, that: "associated person" as used in the proposed rule would have the meaning provided in Section 3(a)(18) of the Act, which expressly excludes, for certain purposes, any persons associated with the member whose functions are solely clerical or ministerial (referred to as "clerical and ministerial associated persons").

Conclusion

To avoid public perception that the FINRA arbitration process is unfair, and to prevent a "step backward" in investor protection, the SEC and FINRA need to reverse the attempt by new Proposed Rules 12100(p)(3), (u)(3), and (u)(7), with no stated legitimate rationale, to transfer large numbers of *public non-industry* arbitrators into the "*Non-Public*" pool a/k/a the "Industry" arbitrator pool, to render them: (a) ineligible for Chairmanship for three-person panels, (b) ineligible as sole arbitrators in cases of smaller claims, (c) ineligible for an "All-Public" panel arbitration or as a replacement arbitrator, (d) effectively precluding them from ever serving again in any customer case; and (e) with a result that will cause undue confusion to the public and augment the perception that FINRA arbitration is an unfair forum under the control of the brokerage firms. This transgression can be solved simply by modifying Proposed Rules 12100(p)(3), (u)(3), and (u)(7) by adding the phrase "other than customers", as follows:

> **Proposed Rule 12100(p)(3), as should be modified**
> "(3) is an attorney, accountant, expert witness or other professional who has, within the past five years, devoted 20 percent or more of his or her professional time, in any single calendar year, to representing or providing

services to parties in disputes**[other than customers]** concerning investment accounts or transactions, or employment relationships within the financial industry; or …."

Proposed Rule 12100(u)(3), as should be modified

"(3) A person shall not be designated as a public arbitrator, who was, for a total of 15 years or more, an attorney, accountant, expert witness or other professional who has devoted 20 percent or more of his or her professional time annually to representing or providing services to parties in disputes **[other than customers]** concerning investment accounts or transactions, or employment relationships within the financial industry."

Proposed Rule 12100 (u)(7), as should be modified

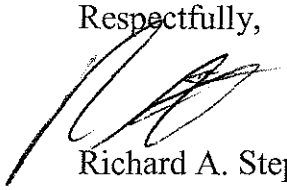
"(7) A person shall not be designated as a public arbitrator who is an attorney, accountant, expert witness or other professional who has devoted 20 percent or more of his or her professional time, in any single calendar year, to representing or providing services to parties **[other than customers]**in disputes concerning investment accounts or transactions, or employment relationships within the financial industry unless the calendar year ended more than five calendar years ago."

Moreover, the SEC and FINRA need to clarify that the new Proposed Rule for categorizing "Non-Public" arbitrators do *not* apply to *all* "workers in the securities business", since it must exclude "clerical and ministerial" workers, as the SEC and FINRA have done in the past, consistent with the definitions in the Securities Exchange Act of 1934, Section 3. This problem can be solved by the Proposed Rules clarifying that:

> "Associated person" as used in the proposed rule would have the meaning provided in Section 3(a)(18) of the Act, which expressly excludes, for certain purposes, any persons associated with the member whose functions are solely clerical or ministerial (referred to as "clerical and ministerial associated persons").

Thank you.

Respectfully,



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