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POSTED ONLINE

Nancy M. Morris
Secretary Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549–1090
rule-comments@SEC.gov

Re: Comment: File No. SR-NASD-2006-088 Amendments to FINRA Arbitration Code Rules 12206 and 12504 of the Customer Code to address motions to dismiss and to amend the provision of the eligibility rule related to dismissals.

Dear Ms. Morris:

I am writing to comment on SR-NASD-2006-088, a revision to FINRA Arbitration Code Rules 12206 and 12504 of the Customer Code to address motions to dismiss and to amend the provision of the eligibility rule related to dismissals.

I am a former Assistant Commissioner of the Securities Division of the state of Oregon (now known as the Department of Finance and Corporate Securities "DFCS"), and routinely advocate for investors in FINRA securities arbitrations.

I commend FINRA for taking steps to curb the wide spread abuse of motions to dismiss and for amending the eligibility rule related to dismissals. I do have a few comments that generally fall into two categories: (1) comments relating to improving the wording of the proposed rule and the explanations to achieve the result desired by implementing the rule, (2) comments to change the proposed rule to improve the likelihood that FINRA's goals in promulgating this rule will be achieved.

In virtually every selling away case, "We weren't involved" is a standard defense. Whether or not the Broker Dealer was, or should have been, involved is highly fact-dependent and often needs substantial discovery. I would expect motions to dismiss to continue to be filed in selling away claims and whenever the Broker Dealer wants to distance itself from its Registered Representative because of the "Factual Impossibility" loophole.

The rule also leaves the door open for motions to dismiss when successor liability is disputed. That too is inappropriate, since successor liability is also highly fact-dependent and often needs substantial discovery.

I would expect dispositive motions to continue in these cases because, while the rule doesn't use those words, the FINRA explanation does: "When a respondent files a motion to dismiss prior to the conclusion of a party's case in chief, the proposed rule change will: (1) permit two grounds only on which a panel may grant a motion to dismiss: signed settlement and/or written release ***and factual impossibility;...***"

The rule should state: "If the Registered Representative whose conduct is in question was licensed with the Broker Dealer at the time, for the purposes of this rule the Broker Dealer is "associated" with the conduct at issue."

The rule should also state: "If the Broker Dealer alleged to be a successor in interest to another Broker Dealer has acquired assets of, ownership interest in, or hired personnel formerly associated with another Broker Dealer, then, for the purposes of this rule the Broker Dealer is precluded from bringing a dispositive motion before the close of the claimant's case."

These changes would close the door on abusive use of motions to dismiss being used to cut off discovery and increase the costs of trying these cases.

FINRA says it believes that limiting the second ground to circumstances when "the party was not associated with the account(s), security(ies), or conduct at issue" "minimizes confusion concerning when the rule will apply." Since a claim of "factual impossibility" is the very essence of the standard broker defense to a selling away claim ("We weren't involved"), the FINRA explanation invites motions to dismiss in every such case as well as in every successor liability case. The proposed rule could be improved to promote its intended result by making it clear that motions to dismiss are not appropriate in selling away and successor liability cases. The explanation should affirmatively state that the concept of factual impossibility does not apply to claims for successor liability or in cases where the Registered Representative whose conduct is in question was licensed with the Broker Dealer at the time.

Thank you for your consideration of my comments. Please feel free to call if you have any questions or would like to discuss my comments further.

Very truly yours,

RICHARD M. LAYNE, PC

Richard M. Layne

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