Financial Industry Regulatory Authority

December 2, 2008

Florence Harmon
Acting Secretary
U. S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549

Re: File No. SR-FINRA-2008-047 – Proposed Rule Change to Amend Rule 12401 of the Code of Arbitration Procedure for Customer Disputes and Rule 13401 of the Code of Arbitration Procedure for Industry Disputes to Raise the Amount in Controversy Heard by a Single Chair-Qualified Arbitrator to $100,000; Response to Comments

Dear Ms. Harmon:

The Financial Industry Regulatory Authority, Inc. ("FINRA") hereby responds to the comment letters received by the Securities and Exchange Commission ("SEC") with respect to the above rule filing. In this rule filing, FINRA is proposing to amend Rule 12401 of the Code of Arbitration Procedure for Customer Disputes and Rule 13401 of the Code of Arbitration Procedure for Industry Disputes ("Codes") to raise the amount in controversy that will be heard by a single chair-qualified arbitrator to $100,000.[1]

Currently, FINRA appoints a single chair-qualified arbitrator to resolve claims of more than $25,000 but not more than $50,000. Any party may request a panel of three arbitrators to resolve these claims. For claims over $50,000, the panel consists of three arbitrators. Under the proposal, FINRA would appoint a single chair-qualified arbitrator to resolve claims of more than $25,000 but not more than $100,000. Parties would be permitted to request a panel of three arbitrators for these claims only if all parties agreed to the request.

[1] *See* Securities Exchange Act Rel. No. 58651 (September 25, 2008), 73 FR 57391 (October 2, 2008) (File No. SR-FINRA-2008-047, Notice of Filing of Proposed Rule Change to Raise the Amount in Controversy Heard by a Single Chair-Qualified Arbitrator to $100,000).

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The SEC received seven comment letters.[2] Five commenters support the proposal[3] and two oppose it.[4]

Six commenters support increasing the amount in controversy that would be heard by a single public arbitrator.[5] One commenter asked the SEC to consider raising the threshold to $250,000;[6] and one commenter encouraged FINRA to consider raising the threshold to $250,000 at the option of the investor.[7] One commenter urged FINRA to increase the threshold to $200,000 and to consider adopting a default rule providing for a single arbitrator in every case regardless of the amount of the controversy unless the parties agree otherwise.[8] One commenter opposes the proposal, stating that it would diminish the quality of the decision making process in FINRA arbitrations by eliminating the collaborative, deliberative process that occurs with three arbitrator panels.[9]

FINRA believes that the proposal, as filed, strikes the right balance between offering users an efficient and cost effective forum and providing three-arbitrator panels for disputes that involve greater amounts in controversy or that do not specify an amount in controversy. By raising the threshold as proposed, FINRA would be restoring the proportion of cases heard by a single arbitrator to what it was when the single arbitrator threshold was last increased in 1998 (about a third). If the proposal is approved, FINRA expects to double the percentage of single-arbitrator cases from approximately 17 percent to 34 percent. In addition, by eliminating the option for one party unilaterally to request three arbitrators in matters between $25,000 and $100,000, all parties will

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[2] Comment letters were submitted by Steven B. Caruso, Maddox Hargett Caruso, P.C., dated October 9, 2008 ("Caruso letter"); Laurence S. Schultz, President, Public Investors Arbitration Bar Association, dated October 20, 2008 ("PIABA letter"); Barry D. Estell, dated October 20, 2008 ("Estell letter"); Jill Gross, Director, and Stephanie Myers, Student Intern, Investor Rights Clinic, John Jay Legal Services, Inc., Pace University School of Law, dated October 23, 2008 ("Gross letter"); David P. Neuman, Stoltmann Law Offices, P.C., dated October 23, 2008 ("Neuman letter"); William A. Jacobson, Associate Clinical Professor, Cornell Law School and Director, Cornell Securities Law Clinic, and Seth M. Nadler, law student, dated October 23, 2008 ("Jacobson letter"); and Gregory M. Scanlon, Vice President & Associate General Counsel, Charles Schwab & Co., Inc., dated October 23, 2008 ("Scanlon letter").

[3] *See* Caruso, PIABA, Gross, Neuman, and Jacobson letters.

[4] *See* Estell and Scanlon letters.

[5] *See* Caruso, PIABA, Estell, Gross, Neuman, and Jacobson letters. Although Estell supports raising the threshold for a single arbitrator, he opposes the proposed rule change because of its impact on non-chair qualified arbitrators.

[6] *See* Caruso letter.

[7] *See* PIABA letter.

[8] *See* Gross letter.

[9] *See* Scanlon letter.

benefit by the increased efficiencies and cost savings. For these reasons, FINRA declines to amend the single arbitrator threshold proposal.

Three commenters expressed concerns that increasing the amount in controversy that would be heard by a single arbitrator will result in fewer non-chair qualified arbitrators serving on cases.[10] While FINRA is not proposing to amend the rules relating to the chairperson rosters[11] or the composition of arbitration panels,[12] FINRA understands that raising the threshold for a single chair-qualified arbitrator will result in fewer arbitrators serving on certain cases. FINRA believes that appointing chair-qualified arbitrators to resolve claims up to $100,000 would ensure that parties have experienced arbitrators resolving their disputes. In addition to completing FINRA's chairperson training, chair-qualified arbitrators either (i) have a law degree and have served as an arbitrator through award on at least two cases, or (ii) have served as an arbitrator through award on at least three cases.

Two commenters requested that filing fees be reduced for cases heard by a single arbitrator.[13] FINRA considered the effect of the proposal on all fees imposed by the forum. The significant cost savings for hearing sessions with a single arbitrator represent the greatest impact of the proposal to users of the forum. For example, under the proposal the forum fees for a dispute involving $75,000 will decrease from $750 to $450 per four-hour hearing session. FINRA has not proposed to amend the initial filing fees, which are already based on the amount in dispute, and which may be reallocated by the panel at the end of the case. The Codes will continue to provide that the Director may defer payment of all or part of the filing fee if a claimant has demonstrated a financial hardship.[14] Additionally, parties will continue to be able to request that the panel consider assessing all or part of any filing fee on other parties in the case.[15] For these reasons, FINRA declines to revise the filing fees.

One commenter asked FINRA to clarify the rule proposal to make clear that the $100,000 limit applies to each party that asserts a claim as opposed to all parties in the aggregate.[16] The commenter is concerned that a party may try to aggregate the total claims asserted by all parties (e.g., claimants and respondents) in order to receive a

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[10] *See* PIABA, Estell, and Jacobson letters.

[11] *See* Rules 12400 and 13400 (Neutral list Selection System and Arbitrator Rosters).

[12] *See* Rules 12402 (Composition of Arbitration Panels) and 13402 (Composition of Arbitration Panels Not Involving a Statutory Discrimination Case). Rule 12402(a) provides that if the panel consists of one arbitrator, the arbitrator will be a public arbitrator selected from the public chairperson roster, unless the parties agree in writing otherwise. Rule 13402 is similarly worded.

[13] *See* Caruso and PIABA letters.

[14] *See* Rules 12900 and 13900 (Fees Due When a Claim is Filed).

[15] *Id.*

[16] *See* Jacobson letter.

three arbitrator panel.[17] FINRA does not intend to change its current practice. Currently, upon receipt of a statement of claim and an answer thereto, FINRA staff determines the total amount claimed by claimants, and the total amount claimed by respondents and appoints the number of arbitrators required by Rules 12401 and 13401. In doing so, FINRA only aggregates a claimant's claim with another claimant's claim, or a respondent's claim with another respondent's claim. FINRA does not aggregate all of the parties' claims (e.g., claimants' claims with respondents' claims). FINRA will explain in the Regulatory Notice announcing the rule change how the $100,000 threshold will be applied. Therefore, FINRA declines to revise the proposal as requested.

In conclusion, FINRA believes that the proposal will make arbitration more expeditious, efficient and cost effective, and should be approved. If you have any questions, please contact me by telephone at (212) 858-4481 or by email at margo.hassan@finra.org.

Very truly yours,

Margo A. Hassan
Counsel

[17] *Id*.