Public Investors Arbitration Bar Association

March 18, 2008

Nancy M. Morris, Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-0609

Re: Proposed Revisions to Rules 12206 and 12504 of the NASD Code of Arbitration Procedure – Motions to Dismiss
SR-FINRA-2007-021

Dear Ms. Morris:

On behalf of the Public Investors Arbitration Bar Association (PIABA), I am pleased to comment on the above-referenced rule changes concerning motions to dismiss in FINRA arbitrations. PIABA strongly supports these rule changes, and requests that the Commission approve the proposed revisions on an accelerated basis.[1]

PIABA is a bar association comprised of attorneys who represent investors in securities arbitration. Since its formation in 1990, PIABA has promoted the interests of the public investor in all securities and commodities arbitration forums. Our members and their clients have a strong interest in the rules which govern the FINRA arbitration process.[2]

The Need for the Rule Change

Currently, FINRA's procedural rules do not provide for motions to dismiss in advance of the evidentiary hearing. However, as FINRA stated in this rule filing, this is not the first attempt to codify such a procedure. FINRA first attempted to delineate the grounds for pre-hearing dismissals and the procedure for such motions as part of its Code Rewrite originally filed with the Securities and Exchange Commission in October 2003. The provisions of the Code Rewrite relating to dispositive motions turned out to be quite controversial, and ultimately were withdrawn from the Code Rewrite. Subsequently, FINRA submitted the dispositive motion proposal in a separate filing, and this proposal was also withdrawn.

[1] As an organization which advocates for the public investor in securities arbitrations, our comment is directed primarily to the proposed revisions to the Customer Code, in Rules 12206 and 12504 of the NASD Code of Arbitration Procedure. We note, however, that FINRA has proposed identical rule changes for the Industry Code in Rules 13206 and 13504. We are generally supportive of these conforming revisions.

[2] Like FINRA's staff in its filing, we will use the term FINRA to refer both to the NASD and FINRA.

Since 2003, FINRA's stated position as reflected in these proposals has been that the parties had a right to a hearing in arbitration and that except for certain eligibility motions, dispositive motions are discouraged and should only be granted in extraordinary circumstances. The "extraordinary circumstances" standard is not part of the current proposal. See Securities Act Release No. 54360 (August 24, 2006), 71 FR 51879 (August 24, 2006) (File No. SR-NASD-2006-088).

Though rarely granted, in recent years dispositive motions have been routinely filed by the industry and pose a significant burden on the arbitration process. As PIABA pointed out in our comment to the August 26, 2006, FINRA dispositive motion rule proposal,[3] lawyers who represent the industry in customer arbitrations were told at seminars that motions to dismiss should be routinely raised in every answer to every statement of claim.

On many occasions, industry respondents filed more than one motion in a single case, or made motions for reconsideration of the panel's denial of a motion to dismiss. While, as noted, very few of these motions were successful, our members and their clients were still required to expend time and money to respond to the motions, thereby increasing the expense of a procedure which was intended to be more informal, expeditious and cost-effective than litigation. Furthermore, even where investors prevailed in these motions, arbitration panels commonly assessed half of the forum fees incurred on the motion to the public investor.

To demonstrate the industry's abuse of the dispositive motion practice, PIABA has provided more than 150 examples of dispositive motions to FINRA.

Dispositive motions are clearly being abused by industry respondents to burden the arbitration process and prejudice investor claimants. We are gratified that FINRA has acknowledged the problem and is taking decisive action to restore the investor's right to present evidence at a hearing in support of his or her claim.

Motions to Dismiss Are Inappropriate in FINRA Arbitration

The rule revisions which are the subject of this filing recognize that the vast majority of customer claims involve factual disputes between a public investor and his or her broker, which can only be resolved by the panel after

[3] See letter to Nancy M. Morris from Robert S. Banks, Jr., PIABA President 2005-2006, regarding SR-NASD-2006-088, dated September 21, 2006.

an evidentiary hearing. FINRA's effort to reconcile these competing interests represents a workable compromise.

It is universally accepted that arbitrations should be less formal, less time-consuming, and less expensive than litigation. To this end, discovery in arbitration is very limited, essentially consisting of document production and a limited number of requests for information. Court-style depositions are strongly discouraged, and court-style interrogatories to address factual questions are typically not permitted. Parties must rely on the arbitration hearing itself to provide the essential factual support for their claims.

In truth, nearly all of the motions to dismiss filed by respondents in FINRA arbitrations are more akin to court-style motions for summary judgment, the essence of which is that after full discovery, including depositions, interrogatories, and requests for admissions, no material question of fact remains, and one party is entitled to judgment as a matter of law. Such a proceeding, styled as a motion to dismiss in arbitration, simply has no place in a process which restricts discovery and relies on a hearing to resolve factual disputes.

Equally significant is that in court proceedings, if summary judgment is granted, the losing party has an automatic right to appeal where an appellate court in a *de novo* judicial review takes a fresh look at the lower court decision to assure the losing party has not been a victim of an erroneous legal or factual determination. In contrast, in arbitration there is no appeal from the grant of a motion to dismiss, so that not only are losing claimants denied a hearing to address factual issues, they are precluded from a judicial review of potential error in the dismissal of their claims. This result is particularly troubling in view of the fact that the deciding arbitrators typically not only have no judicial experience, they may not even be lawyers. Thus, the motion to dismiss procedure is fundamentally unfair to claimants and has no place in arbitration.

<u>The Proposed Rule Revisions Strike a Fair Balance Between Competing Interests</u>

The FINRA proposed rule changes permit pre-hearing dismissals in three narrow circumstances: (1) where the claim is ineligible for arbitration under the six-year eligibility rule; (2) where there is a settlement agreement or release signed by the claimant which previously released the claim; or (3) where the named respondent was not associated with the account(s), security(ies), or conduct at issue.

As might be expected with any compromise, there are parts of this rule which PIABA finds unpalatable. PIABA believes that pre-hearing motions to dismiss should not be permitted in any circumstance. Even these three narrow grounds for motions to dismiss will typically require fact-oriented motion practice. There may be tolling provisions applicable to motions made under the eligibility rule; these issues require an evidentiary hearing. Similarly, it seems apparent that the last prong will encourage branch office managers and control persons, who may be liable under federal and state securities statutes, to improperly seek dismissal on the ground that they were not directly involved with the account which is the subject of the claim, even though such involvement may not be necessary to establish liability. These motions will require the claimant to spend significant time to marshal and present evidence to establish to the panel's satisfaction the need for an evidentiary hearing. None of this is consistent with the stated objectives of arbitration, to streamline procedures and provide a cost-effective dispute resolution mechanism. PIABA believes these matters, while not specifically addressed in the rules, should be the subject of FINRA rule comment, making it clear that the pre-hearing dismissal rules are to be strictly interpreted and that they are not intended to allow dismissal of claims of secondary liability, including those based on causes of action establishing liability for persons not directly associated with the accounts, securities, or conduct at issue.

Despite our concerns, PIABA is supportive of this rule. The clear delineation of the grounds for a motion to dismiss should preclude a majority of the motions to which our members and their clients have been subjected. FINRA also has built into the rule several provisions designed to discourage all but meritorious motions. These provisions give comfort that the proposed rule will indeed have the intended effect of making the filing of motions, and certainly the granting of such motions, a rarity. These provisions include the following:

- The rule states, clearly and succinctly, that pre-hearing motions to dismiss are discouraged. Rule 12504(a)(1).

- Motions to dismiss can no longer be filed with the answer to the statement of claim. Rule 12504(a)(2). This practice was abused by respondents. It resulted in procedural inconsistencies and required the preparation of briefs and forced unnecessary and unproductive hearings at the earliest stages of the proceedings. Moreover, some respondents filed motions to dismiss without even filing an answer; the new rule would prohibit that practice.

- The new rule guarantees sufficient notice and an opportunity to respond, including an opportunity to be heard orally, in person or by telephone. Rule 12504(a)(3) and (5). These provisions simply preserve minimal due-process protections.

- The oral hearing must be recorded. Rule 12504(a)(5). This would provide a record in the event a vacatur action were filed.

- Motions to dismiss must be heard by the entire panel. Rule 12504(a)(4). A decision granting (but not denying) a motion to dismiss must be unanimous, and the reasons would have to be provided in the written award. Rule 12504(a)(7).

- Multiple filings of the same motion to dismiss are prohibited, absent an order from the panel to the contrary. Rule 12504(a)(8). This would put a stop to one of the abusive tactics our members have observed.

- The panel is prohibited from considering or acting upon a motion to dismiss not brought under one of the three grounds. By proscribing even consideration of such motions, the rule makes clear a motion to dismiss on other than the specified grounds would exceed the panel's jurisdiction.

- The rule *mandates* that forum fees be assessed against the party who unsuccessfully makes a motion to dismiss. Moreover, the panel is authorized to assess attorney fees or any other appropriate sanctions against a respondent who files a frivolous motion to dismiss. These provisions should discourage the filing of weak and frivolous motions, which we routinely see under the current system.

PIABA also supports that portion of the eligibility rule which requires that a panel specifically state its grounds for granting a motion to dismiss on eligibility grounds, and refrain from deciding on any other ground. Rule 12206(b)(7). Under current practice, panels sometimes fail to specify the grounds for their decision to grant the motion. This is a problem because a claimant whose case is dismissed on eligibility grounds still has the right to go to court with the claim. Rule 12206(b). When panels fail to set forth the reason for their decision, the parties are unable to determine whether the dismissed case could be re-filed in court. The revision to Rule 12206(b)(7) resolves this issue.

To summarize, PIABA believes that the revisions to the rules will materially reduce the number of motions to dismiss in arbitration and strongly supports the changes. The rule changes should substantially improve a situation which has unjustly caused delays, driven up the cost of arbitrations to claimants, and resulted in unfair dismissal of claims for investors who simply want their "day in court." We urge the approval of the rule revisions.

Accelerated Approval

Finally, we request the Commission consider approval of this filing on an accelerated basis. Clearly, the approval of this amendment by a unanimous National Arbitration and Mediation Committee (NAMC), including both public and industry representatives, is an indication that the rule is deserving of expedited approval. We also understand that the FINRA Board unanimously approved these changes.

We must also emphasize that, despite FINRA's efforts to discourage the filing of motions to dismiss, and the filing of this proposed rule change, respondents continue filing fact-based dispositive motions in large numbers. The only way this will end is for the Commission to promptly approve this rule proposal.

Conclusion

We request the Commission approve these rules on an accelerated basis. Thank you for your consideration of this important matter.

Respectfully,

PUBLIC INVESTORS ARBITRATION
BAR ASSOCIATION
Laurence S. Schultz
President, 2007-2008

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