



February 1, 2012

Via E-Mail to rule-comments@sec.gov

U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549
Attn: Elizabeth M. Murphy, Secretary

**Re: File No. SR-FINRA-2011-075
Proposed Rule Change To Preclude Collective Action
Claims From Being Arbitrated**

Dear Secretary Murphy:

The Securities Industry and Financial Markets Association (SIFMA),¹ through its Arbitration Committee, appreciates the opportunity to comment on FINRA's proposed rule change to preclude collective action claims from being arbitrated (the "Proposal").² To the extent the Proposal is designed and intended to merely codify FINRA's 1999 interpretive letter opining that collective actions are ineligible for arbitration in FINRA's arbitration forum, SIFMA does not object to the proposed change. We do, however, have some concerns with certain language in the Proposal. Accordingly, we recommend the following revisions to address these concerns and otherwise clarify the scope and applicability of the proposed rule change:

1. Limit scope to collective actions. The Proposal states that the rule would apply to any claim "that involves plaintiffs who are similarly-situated against the same defendants as in a court-certified collective action." This language could be misconstrued to include, among other things, multi-party litigation outside of the collection action context. We understand, however, that FINRA's purpose and intent is to limit the application of the proposed rule to collective actions. Thus, we recommend language changes to section (b)(2) of the proposed rule to

¹ SIFMA brings together the shared interests of hundreds of securities firms, banks and asset managers. SIFMA's mission is to support a strong financial industry, investor opportunity, capital formation, job creation and economic growth, while building trust and confidence in the financial markets. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association. For more information, visit www.sifma.org.

² Notice of Filing of Proposed Rule Change To Amend the Code of Arbitration Procedure for Industry Disputes To Preclude Collective Action Claims From Being Arbitrated (Jan. 5, 2012), Release No. 34-66109; File No. SR-FINRA-2011-075, available at <http://www.finra.org/web/groups/industry/@ip/@reg/@rulfil/documents/rulefilings/p125382.pdf>.

improve its clarity and precision, and to make it parallel and consistent with the language used by FINRA in section (b)(4) of the proposed rule. See COMMENT 1 *infra*.

2. Limit scope to FINRA arbitration. The Proposal’s commentary states that “the existence of a certified or putative collective action nullifies any pre-dispute arbitration agreements.” This language is incorrect insofar as firms can and do agree to arbitrate collective actions in arbitration fora other than FINRA, and can and do agree to arbitrate claims solely on an individual basis in arbitration fora other than FINRA, and such agreements remain valid and enforceable. Thus, we recommend language changes to sections (b)(3) and (b)(4) of the proposed rule to clarify this point. See COMMENT 2 *infra*.

Following is a mark-up of the proposed rule that reflects the two comments above:

“(b) Collective Actions

(1) Collective action claims under the Fair Labor Standards Act, the Age Discrimination in Employment Act, or the Equal Pay Act of 1963 may not be arbitrated under the Code.

(2) Any claim that **[COMMENT 1]**~~involves plaintiffs who are similarly situated against the same defendants as in a court-certified collective action or a~~ **is the subject of a certified or** putative collective action, or that is ordered by a court for collective action at a forum not sponsored by a self-regulatory organization, shall not be arbitrated under the Code, if the party bringing the claim has opted-in to the collective action.

(3) The Director will refer to a panel any dispute as to whether a claim is part of a collective action, unless a party asks the court **[COMMENT 2]** **or other forum** hearing the collective action to resolve the dispute within 10 days of receiving notice that the Director has decided to refer the dispute to a panel.

(4) A member or associated person may not enforce **[COMMENT 2]**~~any arbitration~~ **to arbitrate in this Forum** against a member of a certified or putative collective action with respect to any claim that is the subject of the certified or putative collective action until the collective action certification is denied or the collective action is decertified.

These subparagraphs do not otherwise affect the enforceability of any rights under the Code or any other agreement.”

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Thank you for giving SIFMA the opportunity to comment on the Proposal. If you have any questions regarding this comment or any related issues, please contact the undersigned SIFMA staff advisor to the Arbitration Committee, Kevin Carroll, at 202.962.7382 or kcarroll@sifma.org.

Sincerely,



Kevin M. Carroll
Managing Director and
Associate General Counsel

cc: Linda D. Fienberg, President, FINRA Dispute Resolution
George H. Friedman, Executive Vice President, FINRA Dispute Resolution
Robert W. Cook, Director, Division of Trading and Markets, SEC