December 3, 2010

BY EMAIL 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-2010-053**
Proposed amendments to the panel composition rule, and related rules, of the Code of Arbitration Procedure

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 amendments to the panel composition rule and related rules to provide customers with the option to choose an all public arbitration panel in all cases (the Proposal).[2] We understand that the Proposal is intended to enhance confidence and increase the perception of fairness in the FINRA arbitration process. We of course support measures designed to improve the securities arbitration process, and thereby enhance participants' confidence in the system generally. To that end, we offer the following comment on the Proposal:[3]

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[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 Relating to Amendments to the Panel Composition Rule, and Related Rules, of the Code of Arbitration Procedures for Customer Disputes (Nov. 5, 2010), Release No. 34-63250; File No. SR-FINRA-2010-053, available at http://www.sec.gov/rules/sro/finra/2010/34-63250.pdf.

[3] On November 22, 2010, the Securities Industry Conference on Arbitration (SICA), whose members at the time included SIFMA, FINRA, NASAA, and several claimants' lawyers, among others, filed a comment letter on the Proposal, available at http://sec.gov/comments/sr-finra-2010-053/finra2010053-16.pdf. As noted in footnote 2 of the SICA letter, SIFMA did not approve of its filing or content. Accordingly, this letter constitutes SIFMA's sole and exclusive comment on the Proposal.

1. Expanding the Public Arbitrator Pilot Program. FINRA's rule proposal essentially expands, and makes available to all investors, the FINRA pilot program that gave investors filing arbitration claims against certain firms the option of choosing an all-public panel (the Pilot). The Pilot was made possible by the voluntary agreement of SIFMA member firms to participate in it, beginning with 11 firms in 2008, and expanding to 14 firms in 2009. SIFMA cooperatively partnered with FINRA every step along the way to facilitate the development, expansion, and ultimate success of the Pilot. In this same spirit, SIFMA supports FINRA's proposed expansion of the Pilot to apply to all brokerage firms.[4] We particularly support the provision of the Proposal that preserves for customers who select the "Optional All Public Panel" the flexibility to strike all, some, or none of the arbitrators on the non-public arbitrator list.

2. Increasing the Perception of Fairness. FINRA's stated reason for launching the Pilot was to address customer advocates' concern that mandatory inclusion of a non-public arbitrator raised a perception that securities arbitration was unfair to customers.[5] The Pilot has now entered into its third year of operation. Encouragingly – but not surprisingly, the Pilot has not revealed any evidence or indication that the alleged *perception* has any basis in objective reality.

Unlike the alleged perception, the objective reality paints a much more confidence-inspiring mosaic: Empirical evidence has proven that investors' claims are more likely to be heard on the merits, more quickly and with less cost, in securities arbitration than they are in federal or state court. Our securities arbitration system permits investors with claims too small to litigate a cost-effective opportunity to be heard, and provides those with larger claims a forum with the appropriate experience and knowledge to resolve their disputes. Moreover, securities arbitration is unique among arbitration regimes in that it is closely supervised and regulated by independent regulators including the SEC.[6] FINRA recently echoed these same points in a strong defense of the fairness and efficiency of securities arbitration, bolstered by the most current data.[7] Thus, to the extent there may be a "perception of fairness" concern, it does not appear to derive from or bear any relation to objective reality or credible evidence, all of which

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[4] SIFMA does *not*, however, support FINRA's proposed expansion of the Pilot to customer disputes that name *individual* brokers as respondents. See discussion *infra*.

[5] Proposal at 4.

[6] SIFMA White Paper on Arbitration in the Securities Industry (Oct. 2007), available at http://sifma.org/issues/item.aspx?id=21334.

[7] FINRA Statement on Key Issues filed with the SEC Investor Advisory Committee Panel on Securities Arbitration (May 17, 2010), available at http://www.sec.gov/spotlight/invadvcomm/iacmeeting051710-finra.pdf.

suggest that securities arbitration is both procedurally and substantively fair, and fully protects investors' interests.

It is unclear – and FINRA's Proposal does not address – whether the Pilot cleared-up any misperceptions about the fairness of currently comprised three-arbitrator panels. It is therefore equally unclear whether the Proposal will, as FINRA believes, *increase* the perception of fairness.[8] Regardless, as discussed above, we are less concerned with perceptions given our overall high confidence in the current state of securities arbitration, which continues to provide ever-increasingly comprehensive protections and objective fairness for investors.

3. Preserving Safeguards for Individual Brokers. The current Pilot applies only to disputes between customer claimants and brokerage firms. The Pilot does *not* apply to disputes by customer claimants that name *individual* brokers as respondents. The Proposal, however, would extend to all disputes between customer claimants, on the one hand, and brokerage firms and/or individually named brokers, on the other. SIFMA opposes the Proposal with respect to cases involving individually named brokers.

First, the very concerns that underpin the Proposal – namely, fairness for, and the protection and rights of, *individuals* – seem to apply with equal force to individually named brokers, as to customer claimants.[9] Currently, FINRA oversees approximately 637,000 individual registered securities representatives.[10] These hundreds of thousands of individuals face potentially significant reputational and career damage, economic loss, and perhaps the loss of their very livelihood, in the aftermath of an arbitration proceeding. These individuals, thus, may often have as much, if not more, at stake as the claimant who brings the dispute.

Accordingly, when these individuals sign their brokerage license application,[11] which compels them to arbitrate any disputes with their customers under FINRA arbitration rules,[12] they reasonably expect that adequate procedural protections will be afforded to them under those

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[8] Proposal at 4.

[9] Federal law requires that FINRA rules appropriately balance the need to "protect investors" with the obligation to avoid "unfair discrimination between customers, issuers, brokers, or dealers." 15 U.S.C. § 78o-3(b)(6).

[10] *See About FINRA*, available at http://www.finra.org/AboutFINRA/index.htm.

[11] Form U4, Uniform Application for Securities Industry Registration, available at http://www.finra.org/web/groups/industry/@ip/@comp/@regis/documents/appsupportdocs/p015112.pdf.

[12] *Id.* at p. 15.

rules so that they may properly defend themselves. Such protections, we submit, should include the right to have a non-public arbitrator on their arbitration panel – an arbitrator who knows the customs and practices of the industry, and/or who has the relevant case-specific product/service expertise to help fairly and efficiently adjudicate the case.

Second, as noted, the Pilot did not include cases where an individual broker was named as a respondent. Thus, we don't have the benefit of two-plus years of Pilot data to inform us on how those cases fared, or whether they would be appropriate for inclusion in the Pilot – much less whether it is now appropriate to simply lump these cases into the Proposal without the benefit of any study, data, legal or policy analysis, or even discussion.

Finally, the case for allowing individually-named brokers to have a non-public arbitrator on their panel is even more compelling in cases where the individual broker is named alone, and is no longer associated with a brokerage firm. In such cases, the resources and records of the broker's prior firm may well be critical to mounting the individual broker's defense, but also may well be unavailable or far less available to the individual broker in preparing his or her case. Under these circumstances (among others), the inclusion of a non-public arbitrator would likely benefit both parties to the dispute as well as the public panelists, by appropriately educating them about the relevant financial products and services, industry customs and practices, and other legal industry-related issues. The non-public arbitrator may also reduce costs for both parties by obviating the need for the parties to call expert witnesses to educate the panel about certain products or industry practices.

But most important, based on their expertise and long-standing careers in the industry, non-public arbitrators are more likely to be offended by than protective of misbehavior by others in the industry. And thus, their primary concern in deciding cases is to ensure the facts are weighed fairly, the parties are treated fairly, and that justice is done, all of which helps protect the reputation of our industry and the integrity of our dispute resolution forum. For all the foregoing reasons, we submit that individual brokers should be entitled to the same protection – equal protection under FINRA rules – as customer claimants. Regardless, fundamental fairness requires that the panel selection process, at a minimum, ought to be bilateral, at least as between individual brokers and customer claimants.

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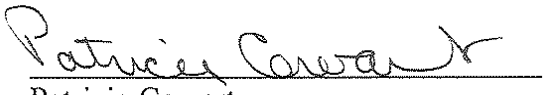
Thank you for giving SIFMA the opportunity to comment on the Proposal. If you have any questions regarding this comment or any related issues, please contact the SIFMA staff advisor to the Arbitration Committee, Kevin Carroll, at 202.962.7382 or kcarroll@sifma.org.

Sincerely,



Patricia Cowart
Chair, SIFMA Arbitration Committee

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