December 10, 2007

Ref. FINRA's proposed rule changes to NASD Rules 12206, 12504, 13206 and 13504 regarding limitations on Motions to Dismiss.

The SEC's Release on the proposed changes to rules regarding motions to dismiss and FINRA's news release thereon dated Sept. 26, 2007 state that the arbitration panel would be limited to three grounds on which to grant the motion: (1) the existing 6-year time limit to submit a claim has run, (2) if the parties settle the case, or (3) so-called "factual impossibility", more precisely, "the party was not associated with the account(s), security(ies), or the conduct at issue".

It would be helpful if the SEC can give more guidance to arbitrators to make clearer:

1) whether the "factual impossibility" test to be met means that the panel may not grant a prehearing motion to dismiss based on convincing legal arguments, and
2) whether the "factual impossibility" test can be met by interpretation of documents submitted with the motion to dismiss.

I raise these two points as Motions to Dismiss are often structured around legal arguments and case law, together with documentation issues. The proposed Rules' "factual impossibility" test that "the party was not associated with . . ." seems to eliminate any grounds for granting the motion on legal arguments, but clarification by the SEC would be appreciated. On that point, I note in the SEC's publication of the proposal states on page 11, "The proposal will permit member firms and associated persons to file a motion to dismiss at the conclusion of a party's case in chief, based on any theory of law."

Whether the interpretation of documents (as argued in a motion to dismiss) would fit the "factual impossibility" test is not as clear cut, it seems, as documents could show that "the party was not associated with the accounts, securities or conduct at issue. The SEC's comment on that would be appreciated.

Lastly, please consider that arbitrations before FINRA include many employee matters, as all registered persons have to bring all but discrimination cases to arbitration (rather than to court). Query whether these three tests (under the Industry section) fit employment claims as nicely as customer cases?