

April 1, 2010

Ms. Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090

Re: File No. SR-FINRA-2010-006 – Proposed Rule Change to Amend the Codes of Arbitration Procedure to Provide for Attorney Representation of Non-Party Witnesses in Arbitration; Response to Comment Letter

Dear Ms. Murphy:

The Financial Industry Regulatory Authority, Inc. (FINRA) hereby responds to the comment letter 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 12602 of the Code of Arbitration Procedure for Customer Disputes and Rule 13602 of the Code of Arbitration Procedure for Industry Disputes to provide for attorney representation of non-party witnesses.¹

Specifically, the proposed revisions to Rules 12602 and 13602 would provide that a non-party witness has the right to attorney representation at an arbitration proceeding held in a United States hearing location while the witness is testifying. The attorney would have to be in good standing and admitted to practice before the Supreme Court of the United States or the highest court of any state of the United States, the District of Columbia, or any commonwealth, territory, or possession of the United States, unless state law prohibits such representation. Under the proposed rule change, the panel would determine the extent to which the attorney could participate at the hearing.

The SEC received one letter on the rule proposal that supports the proposal subject to suggested modification.² The commenters support FINRA's efforts to consider due process protections for non-party witnesses. However, they raise concerns that the proposal may impede the arbitration process unless there are guidelines incorporated into the rule. They state that counsel for non-party witnesses may use scheduling conflicts to delay the arbitration process, and that they may

¹ See Securities Exchange Act Rel. No. 61517 (February 16, 2010), 75 FR 8169 (February 23, 2010) (File No. SR-FINRA-2010-006).

² A comment letter was submitted by William A. Jacobson, Esq. and Rubina Ali, March 16, 2010, Cornell University, Cornell Securities Law Clinic.

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overstep their role by making excessive or substantive objections. The commenters suggest that the proposed rule incorporate language to the effect that “Absent a finding of extraordinary circumstances, the role of the counsel for a non-party witness is limited to matters concerning privilege and conflicts arising under Fifth Amendment protections against self-incrimination.”

As stated in FINRA’s rule filing, arbitrators generally allow non-party witnesses to bring their attorneys with them when they testify. In these instances, FINRA has not observed the types of issues that the commenters raised. FINRA believes that the arbitrators should retain discretion relating to, among other matters, case scheduling and counsel participation at the hearing. If the SEC approves the rule proposal, FINRA will alert arbitrators to the commenters’ issues during arbitrator training.

For the reasons stated above, FINRA does not intend to amend the proposal as suggested by the commenters. FINRA believes the proposal supports due process at the forum and the SEC should approve the proposal as drafted.

If you have any questions, please contact me by telephone at (212) 858-4481 or email at margo.hassan@finra.org.

Very truly yours,

Margo A. Hassan
Counsel
FINRA Dispute Resolution