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Florence Harmon, Deputy Secretary  
Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549-1090

**RE: Comment on File No. SR-FINRA-2010-06**

Dear Ms. Harmon:

Thank you for the opportunity to comment on proposed rule changes. It is a valuable privilege and one hopes that commentary informs the Commission's deliberations. I comment primarily as one who has served in the role of arbitrator for FINRA and other forums. I have also, in the past, served as a mediator, an arbitration attorney, a testifying expert, and am a proponent of the process. For the past twenty years, I have written a newsletter on securities arbitration.

If this rule is adopted, the world will not change and, of course, it is possible that some good may come of it. I do not believe so, however, and would urge the Commission to encourage FINRA's withdrawal of the proposal. The proposal is unnecessary – it is a solution looking for a problem. The proposed change – mandating counsel for third-party witnesses -- has a strong capacity for mischief and confusion. Finally, the reasons for adoption have not been adequately explained.

**Proposal is Unnecessary**

In FINRA's recent response to another commenter, it wrote: "...*arbitrators generally allow non-party witnesses to bring their attorneys with them when they testify.*" The proposed change, creating a right to counsel for third-party witnesses in FINRA arbitrations, substitutes direction in place of creative judgment. FINRA concedes that its arbitrators have not been denying such requests for representation; it just wants to address the situation before it becomes a problem.

Unless the Commission believes, as FINRA apparently does, that there should be no instance where an eligible attorney who accompanies a witness may be denied, or even have conditions placed upon his/her, entry to the hearing room, the Commission should rely upon the good judgment of the arbitrators to govern that issue. Take away the arbitrators' prerogative to place restraints upon an attorney's appearance (in the case

of a non-party) and you remove much of the arbitrator's ability to control that attorney once s/he gains entry.

FINRA's response to that possibility is simply that the staff has not observed problems with counsel. My response is that it has perceived no problems with arbitrator's conduct in connection with the subject of this rulemaking, yet FINRA has felt obliged to intervene and set in place a strict and unconditional rule. Prerogatives should be valued and deference be given to arbitrators' judgment, at least until FINRA has observed abuses of that prerogative.

### **Potential Mischief and Confusion**

FINRA makes the surprising allusion to its obligation as a forum to assure "due process" in its proceedings. An allusion to fairness would have sufficed, but playing a "constitutional" card to justify its proposal's rightness is overkill. Witnesses in the courts do not have an express due process right to representation. FINRA, as a SRO and a private arbitration forum, has not been required by the courts or Congress to provide due process, even in its disciplinary proceedings. The courts have repeatedly held that FINRA is not a "state actor" subject to constitutional imperatives.

One worries that FINRA's raising the bar with such language will impel it to offer other changes to restrict arbitrator actions in the name of "due process." Arbitrators are not judicial officers and arbitration proceedings are not designed to be as structured as judicial proceedings. In FINRA's comment letter of April 1, it again uses the phrase, "due process," to describe the aim of this proposal. This intent to inject further legalism into the arbitration process is troubling and marks a trend inimical to arbitration's effectiveness. Certainly, such change should not be abided without justification for the imposition of rigidity.

The goal of fundamental fairness for arbitration is praiseworthy. Making arbitration look more like the courtroom – a process practiced by FINRA repeatedly in the name of fairness and now "due process" – has a debilitating impact in the longer term on arbitration's ability to remain speedy and informal. It is worth noting in this regard that the National Futures Association's arbitration forum, whose proceedings are subject to far fewer procedural restraints and complexities than FINRA's, boasts an average turnaround time of about 6 months for cases that proceed through hearing. FINRA's comparative statistic has run between 13 and 16 months since 2000.

Now, we can add time for developing the requesting attorney's bar qualifications. Must the out-of-state attorney follow the same state procedures for admission to the hearing room in Florida, Illinois, California, and Massachusetts as out-of-state attorneys for the parties need to? May the arbitrators reject an attorney's request on such niceties – or postpone the hearing and the witnesses' testimony until such prerequisites to hearing room entry are satisfied? The lessons of tying the arbitrators' hands with rigid rule requirements is that they reduce control, add confusion, and protract the process.

What happens once the attorney is admitted entry. FINRA provides that the arbitrators will control the process, as they deem appropriate, but what happens if the lawyer proves disruptive or unruly? Having been directed to allow the lawyer to be present during the witness' testimony, may the arbitrators eject the lawyer? May they realistically even threaten him with ejection? If they release the witness, due to counsel's behavior, they may lose valuable evidence and insights to the truth.

The arbitrators will not retain control when they are constrained by a rule imperative. Lawyers will dare conduct in arbitration that they would not attempt in court, particularly lawyers with clients who are non-parties. Arbitrators and arbitration will be better served if arbitrators retain the prerogative to decide if the witness' request for counsel's presence should be granted, since that grant can then be conditioned upon counsel's playing a constructive role.

### **Inadequate Explanation**

In order to exercise control over the proceedings and to assure an expedited, yet fair, conclusion to the proceedings, the arbitrators have to know that they have the authority to act. Telling arbitrators what to do – instead of instructing them on their options -- is a bad habit of this forum and this proposal reflexively reacts in that same direction, even, apparently, without any visible stimulation.

FINRA makes the cryptic allusion to non-party broker testimony, but does not explain why that particular example bears weight. It simply submits: *“in many instances when a non-party is testifying at a FINRA arbitration hearing, the non-party witness is an associated person who handled the customer claimant's account, but was not named as a respondent in the case. Under the current Codes, the arbitrators determine whether an associated person can bring an attorney to a hearing.”*

Could it be that this rule change is being driven by a concern on FINRA's regulatory side that using a broker's testimony against him/her would be advanced if the broker were represented? Perhaps, FINRA's concern is more paternal and it worries about the broker unwittingly admitting a crime or inviting civil liability. Whatever the reasons, FINRA should be candid about its reasons. Do they justify supplanting reliance upon its arbitrators' discretion and good judgment? FINRA has not adequately explained to what concern this proposed solution is directed. It has saluted “due process” and bowed to a concern for non-party witnesses, and testifying brokers, in particular, but the underpinnings for this action have not been truly addressed.

### **Conclusion**

The objectionable proclivity of FINRA to propose rules that tell arbitrators what to do, instead of encouraging and training them on the exercise of good judgment, appears once again with this proposal. The Commission should prize the informality and consequent speediness of the arbitration process and not permit its sacrifice to formalistic procedures. In this case, there has been no real justification offered for a rule change that will add confusion to the process and reduce arbitrator control of the proceedings. FINRA does not “believe that arbitrators have been denying requests by non-party

witnesses to be represented by counsel while testifying,” yet it believes “due process” demands a remedy in the form of an unbending statement of witness rights. The Commission should demand more justification before abusing arbitrators’ judgment and prerogatives in the name of a hollow call for constitutional fairness.

Sincerely,

Richard P. Ryder