

St. John's University School of Law  
Securities Arbitration Clinic  
8000 Utopia Parkway  
Belson Hall, 2nd Floor  
Queens, NY 11439  
Tel (718) 990-6930  
Fax (718) 990-6931  
[www.stjohns.edu/law/sac](http://www.stjohns.edu/law/sac)

March 15, 2011

**VIA ONLINE SUBMISSION**

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

**Re:** File No. SR-FINRA-2011-006 (Proposed Rule Change Relating to Amendments to the Code of Arbitration Procedure for Customer Disputes and Code of Arbitration Procedure for Industry Disputes)

Dear Ms. Murphy:

The Securities Arbitration Clinic at St. John's University School of Law is very pleased to accept this opportunity to comment on the proposed changes to the FINRA Rules related to motion practice. The Clinic supports the current rule proposal in its endeavor to provide moving parties with a time period for replying to responses in the arbitration process; however, we believe that there is room for improvement in the way the rule has been drafted.

The Clinic is a not-for-profit organization in which second and third year law students provide free legal representation under our supervision to public investors in their securities disputes who are otherwise unable to obtain legal representation. Our clients are generally of modest means, and if the Clinic did not represent them, they would likely be forced to proceed *pro se*. Accordingly, we are very sensitive to ensuring that the administration of the arbitration system is as simple and straightforward as possible.

Overall, we believe the proposed rule is a step in the right direction. Currently, both the Customer and Industry Code of Arbitration Procedure (collectively, "Codes") fail to explicitly permit or preclude the filing of replies. On June 21, 2010, FINRA revised its practice relating to motion replies and published a Notice to Parties on its website stating that moving parties have five calendar days from receipt of a response to its motion to submit a reply. In civil litigation,

moving parties file replies to responses pursuant to express rules. With the Codes silent on this matter, FINRA appears to have adopted civil customs without similar rules regulating the process. The Notice to Parties reflects FINRA's intent to revise its informal practice of accepting and forwarding motion replies to arbitrators, regardless of whether the motion and response have already been reviewed or even ruled on, and provides for a 5-day safety period within which replies may be filed before motion documents are sent to the arbitrators. A formal codification of FINRA's revised practice will promote further clarity and efficiency as it relates to the filing of motion replies.

Our first concern with the drafting of the proposed rule is that the 5-day reply period may not provide *pro se* claimants with adequate time to prepare their replies. The daunting task of preparing a legal document is enough to discourage a *pro se* claimant from exercising his or her right to reply. While a represented party has the advantage of an attorney, or even a team of attorneys, assigned to the task of drafting a reply, a *pro se* claimant is left to his or her own device. Further, the 5-day deadline does not consider the time it takes for a *pro se* claimant to read and understand the contents of a response, let alone the time required to draft a reply. To ensure that *pro se* claimants are not unfairly prejudiced, we believe that an extended reply period for such claimants should be provided. In the alternative, a general increase in the number of days to file a reply will achieve a similar result.

Our second concern is that a *pro se* claimant, unfamiliar with the rules of civil litigation and FINRA's informal practices, may assume that the absence of language setting a time to file a sur-reply implies that such a filing is impermissible. On the other hand, a represented party may benefit from knowing that a sur-reply, although not expressly permitted by the Codes, may be forwarded to and considered by an arbitrator. This result creates further disparity between *pro se* claimants and industry respondents, and is not in accord with the amendments' purpose of providing all parties with an opportunity to fully brief the disputed issues. We believe that it is important that all customers be given the opportunity to proceed through arbitration in a fair and neutral forum. Providing additional guidance to *pro se* claimants regarding their procedural rights, including those that may not be expressly codified in a rule, may help to ensure that all parties are arbitrating on equal grounds.

Last, we believe that, although a codification of the reply period may not encourage additional replies, it has the potential to foster abuse, especially by parties with greater resources. It gives them the opportunity to flood the arbitration process with improper replies that do not address the contents of the responses. We suggest that the amended rules include express language limiting the scope of motion replies to those issues and facts previously raised in the

motion and response. It will have the effect of discouraging costly motion practice and will further promote efficiency – an important purpose of the proposed amended rules.

We welcome any questions you may have regarding our position. Please do not hesitate to contact us should you have any questions or wish to discuss this matter.

Respectfully submitted,  
ST. JOHN'S UNIVERSITY SCHOOL OF LAW  
SECURITIES ARBITRATION CLINIC

/s/  
Lisa A. Catalano  
*Director, Associate Professor of Clinical Legal Education*

Christine Lazaro  
*Supervising Attorney*

Clair S. Seu  
*Student Intern*

Stephen Chou  
*Student Intern*