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**VIA EMAIL:** [rule-comments@sec.gov](mailto:rule-comments@sec.gov)

Elizabeth M. Murphy  
Secretary  
Securities and Exchange Commission  
100 F. Street, NE  
Washington, DC 20549-1090

RE: Comment in Opposition to Proposed Amendment  
to FINRA Rule 14107 of the Mediation Code,  
SR-FINRA-2012-011

Dear Ms. Murphey:

I write to oppose FINRA proposed amendment to Mediation Code Rule 14107, which would prohibit parties and their counsel involved in FINRA arbitrations from selecting non-FINRA-list private mediators without prior approval from FINRA's Director of Arbitration. My views are mine alone: From the perspective of a 26-year practitioner in the securities-litigation/arbitration field, member of the bars of several states and securities-regulation or compliance professional organizations, and a chair-qualified FINRA arbitrator. I do not purport to represent the views of my law firm or any given client.

The proposed amendment would upend the long-standing and well-accepted practice throughout the United States of allowing (indeed encouraging) private parties involved in disputes (and their counsel) to find ways to resolve those disputes among themselves by the means of their choice.

The Commission should refuse the proposed amendment on at least five grounds:

1. **Unnecessary.** FINRA has not established the need for the proposed rule change. To the contrary, FINRA's proposal admits that most "parties usually select a FINRA mediator, [although] under the current provision, parties may select a mediator who is *not* on FINRA's roster." Proposal, §II(A)(1) at 2.

manipulative acts, promote just and equitable principles of trade and generally protect investors. While FINRA's Rule proposal asserts its *ipse dixit* conclusion on these points, it does not demonstrate that private mediators not subject to FINRA's screening, evaluation or administrative processes are unqualified, unscrupulous, or any less able to serve the parties', or the public's, interests. Indeed, many mediators not on FINRA's list, nevertheless are qualified practitioners subject to other, similar requirements, e.g. Tennessee Supreme Court Rule 31 ( <http://www.tncourts.gov/rules/supreme-court/31> ). Moreover mediation is a voluntary, consensual process -- as is the arbitration agreement giving FINRA jurisdiction over a dispute in the first instance -- in which **any party** may decline to proceed **at any point** upon its/their **unilateral** decision that they do not trust, like or respect any given mediator (or for no reason at all, for that matter).

3. **Enforcement problems.** The proposed amended Rule presents enforcement difficulties, because there simply is no way for FINRA to know, monitor, or enforce a prohibition against private parties using private mediators (or other neutrals) to help them resolve their arbitration dispute without involving FINRA staff.

4. **Back-door Fee Enhancement.** The result of the proposed amendment will require parties -- even those unhappy with FINRA mediation -- to forego the mediator of their choice, alternatively force their chosen private mediator to assume payment of FINRA's recurring annual "membership" fee, in addition to the per-mediation case fee. *See* Proposal at 3 & n. 5. Indeed, the Proposal itself lists a "mediator has no interest in applying for FINRA's roster," *id.*, as a basis for denying approval.

5. **More FINRA Administrative Hegemony over a Voluntary Process.** The Rule proposal usurps the rights of the parties and their counsel to freedom of contract with the neutral(s) of their choice, in the midst of a voluntary, contractually-based arbitral forum, and thus unnecessarily displaces fundamental legal precepts and practices without demonstrating a compelling need to do so. FINRA did not solicit comments on the proposed Rule change.

The Commission should decline to approve the proposed amendment to FINRA Rule 14107 and should reject SR-FINRA-2012-11.

With kind regards, I remain,

Very truly yours,



Thomas K. Potter, III