



Financial Industry Regulatory Authority

April 30, 2012

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

**Re: File No. SR-FINRA-2012-011 – Proposed Rule Change Relating to  
Mediator Selection**

Dear Ms. Murphy:

The Financial Industry Regulatory Authority, Inc. ("FINRA") hereby responds to the comment letters received by the Securities and Exchange Commission ("SEC") with respect to the above rule filing. In this rule filing, FINRA is proposing to amend FINRA Rule 14107 of the Code of Mediation Procedure ("Mediation Code") to provide the Director of Mediation ("Mediation Director") with discretion to determine whether parties to a FINRA mediation may select a mediator who is not on FINRA's mediator roster.<sup>1</sup>

The SEC received five comment letters on the proposed rule change,<sup>2</sup> two in support of the proposal,<sup>3</sup> one which supports the proposal with a suggested modification,<sup>4</sup> and two of which oppose the proposal.<sup>5</sup> The PIABA letter states that the proposal "is a benefit in assisting forum participants in working towards a

<sup>1</sup> See Securities Exchange Act Rel. No. 66441 (February 22, 2012), 77 FR 12098 (February 28, 2012) (File No. SR-FINRA-2012-011).

<sup>2</sup> Comment letters were submitted by Ryan K. Bakhtiari, President, Public Investors Arbitration Bar Association, dated February 28, 2012 ("PIABA letter"); William A. Jacobson, Associate Clinical Professor of Law, Cornell Law School, and Director, Cornell Securities Law Clinic, and Patricia Peralta, Cornell Law School '13, dated March 15, 2012 ("Cornell letter"); Lisa A. Catalano, Director; Christine Lazaro, Supervising Attorney, Ben Kralstein, Andrew Mundo, and Daniel Porco, Legal Interns; St. John's School of Law Securities Arbitration Clinic, dated March 20, 2012 ("St. John's letter"); Jill I. Gross, Director; Edward Pekarek, Assistant Director; and Genavieve Shingle, Student Intern; Investor Rights Clinic, Pace Law School, dated March 20, 2012 ("PIRC letter"); and Thomas K. Potter, III, Burr Forman, LLP, dated March 23, 2012 ("Potter letter").

<sup>3</sup> See PIABA and St. John's letters.

<sup>4</sup> See Cornell letter.

<sup>5</sup> See PIRC and Potter letters.

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resolution of their disputes." The St. John's letter states, among other matters, that "to ensure quality and efficiency in mediation, it is best for the Director of Mediation to have discretion in approving a non-FINRA mediator."

The Cornell letter states that the Clinic "supports the Rule Proposal because FINRA should have the ability to control the quality of its mediation program." In the purpose section of the proposed rule change, FINRA stated that if the Mediation Director rejected the mediator selected, the parties would still be able to select a FINRA approved mediator, or a different non-FINRA mediator subject to the same conditions as the rejected mediator, or to mediate their dispute elsewhere. The commenter recommends that FINRA include this language in the proposed rule text or, in the alternative, that the SEC acknowledge the language in its order approving the proposed rule change. FINRA included the subject language in the purpose section of its proposal to ensure that reviewers of the proposed rule change were aware of the alternatives available to forum users if the Director rejects the parties' chosen mediator. FINRA does not believe it is necessary to include the suggested language in the rule text, and declines to amend the proposal. If the SEC approves the proposed rule change, FINRA will include the suggested language in its Regulatory Notice announcing approval of the proposed rule change to ensure that parties are cognizant of their options under FINRA's program. In addition, if the Director rejects the parties' chosen mediator, FINRA will notify the parties of the alternatives available to them.

In the PIRC letter, the commenters oppose the proposed rule change on the basis that it "may inhibit investor choice and force investors to incur further costs by hiring only mediators approved by the Director." The letter states that under the current rule, investors may engage a non-FINRA pro bono mediator, or a mediator who is willing to accept a reduced fee, and that the proposed rule change "would revive concerns of investors of modest means that they could not afford mediation in the FINRA forum." FINRA believes that its mediation program is cost effective for investors of all means, and that in addition to controlling user costs, FINRA has a duty to ensure the quality of its program. FINRA believes that maintaining control of its mediator roster is a necessary component of quality assurance.

FINRA's filing fees are modest and the Director has the discretion to waive them. The claimant's filing fees range from zero to \$300 depending on the size and type of case. FINRA also keeps its fees to mediators low in an effort to attract the best mediators and to discourage them from passing costs on to the parties. Mediators on the FINRA roster pay \$200 annually and FINRA only deducts \$150 per mediation from a mediator's compensation.

FINRA offers many opportunities for the parties to reduce the cost of mediation using its vetted, seasoned mediators. FINRA has over 250 qualified mediators on its roster who have strong credentials and relevant mediation experience. Upon acceptance to the roster, FINRA asks mediators to consider

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reducing their rates for smaller claims. Many have agreed to conduct mediations for \$50 per hour in appropriate cases. FINRA's Mediation Administrators can provide parties with a list from this group of mediators when requested. In addition, some FINRA mediators agree to conduct mediations on a pro bono basis for parties of limited means. Finally, every October, FINRA offers significant discounts during Mediation Settlement Month. During this annual event, mediators reduce their rates to encourage parties to mediate at FINRA. For a claim up to \$25,000, mediators agree to accept \$200 for a four hour mediation session. For a claim up to \$100,000, mediators agree to accept \$400. During this event, FINRA lowers its fees by 50 percent to encourage participation. Typically, a mediator charges between \$250 and \$500 per hour for services rendered, so parties who take advantage of this program enjoy significant savings.

As noted above, if the Mediation Director rejects a mediator the parties select, the parties still have options for mediating their dispute. They would be able to select a mediator on FINRA's roster, or a different non-FINRA mediator subject to the same conditions as the rejected mediator. They could also choose to mediate their dispute at another forum.

The Potter letter states, among other things, that FINRA's proposed rule is unnecessary and unenforceable. It states further that the proposal will deny parties the right to choose the neutral of their choice and restricts the parties' freedom to contract. FINRA disagrees with the commenter's assertion that the rule change is unnecessary. As stated above, FINRA has a duty to ensure the quality of its program, and maintaining control of its mediator roster is a necessary component of quality assurance.

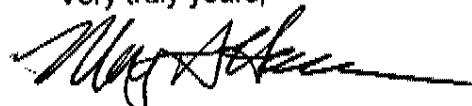
With respect to the other objections, the commenter misinterprets FINRA's proposal. As FINRA stated, if the Mediation Director rejects the mediator selected, the parties would still be able to mediate their dispute elsewhere. Mediation is completely voluntary and FINRA does not propose to prohibit parties from choosing their own mediators or forum for mediation. FINRA does not intend to police mediation between the parties that occurs outside of the FINRA forum. The aim of the proposed rule change is to ensure that FINRA provides quality and cost effective mediation services for parties using FINRA's forum.

FINRA believes that giving the Mediation Director discretion to determine whether parties may select a mediator who is not on FINRA's roster would protect the quality and integrity of the process for users of FINRA's mediation program. For the reasons stated above, FINRA declines to amend the proposed rule change as suggested by the commenters and requests that the SEC approve the proposed rule change as drafted.

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If you have any questions, please contact me by telephone at (212) 858-4481  
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Very truly yours,



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