



Kristine A. Vo  
Principal Counsel

April 22, 2019

Ms. Vanessa Countryman  
Acting Secretary  
U.S. Securities and Exchange Commission  
100 F Street, N.E.  
Washington, D.C. 20549-1090

RE: Proposed Rule Filing to Expand Time for Non-Parties to Respond to Arbitration Subpoenas and Orders of Appearance of Witnesses or Production of Documents (File No. SR-FINRA-2019-004); Response to Comments

Dear Ms. Countryman:

This letter responds to comments submitted to the U.S. Securities and Exchange Commission (“SEC” or “Commission”) regarding the above-referenced filing. In this filing, the Financial Industry Regulatory Authority, Inc. (“FINRA”) is proposing to amend FINRA Rule 12512(d) through (e) and FINRA Rule 12513(d) through (e) of the Code of Arbitration Procedure for Customer Disputes (“Customer Code”) and FINRA Rule 13512(d) through (e) and FINRA Rule 13513(d) through (e) of the Code of Arbitration Procedure for Industry Disputes (“Industry Code”) and together, “Codes”), to expand time for non-parties to respond to arbitration subpoenas and orders of appearance of witnesses or production of documents, and to make related changes to enhance the discovery process for forum users.<sup>1</sup>

The Commission received four comment letters in response to the proposed rule change.<sup>2</sup> All commenters supported the proposed rule change, stating, among other things, that it would: (1)

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<sup>1</sup> See Securities Exchange Act Rel. No. 85063 (February 6, 2019), 84 FR 3518 (February 12, 2019) (File No. SR-FINRA-2019-004).

<sup>2</sup> See Letter from Steven B. Caruso, Maddox Hargett & Caruso, P.C., dated February 11, 2019 (“Caruso”); Letter from Christine Lazaro, President, Public Investors Arbitration Bar Association, dated February 22, 2019 (“PIABA”); Letter from William A. Jacobson, Clinical Professor of Law and Director, Cornell Securities Law Clinic, and Saqeef Ahmad, Cornell University Law School, dated March 1, 2019 (“Cornell”); and Letter from Esmat Hanano, Caitlin Scofield, Caleb Swiney, Kevin Mathis, and Brook Ptacek, Student Interns, and Nicole G. Iannarone, Assistant Clinical Professor, Investor Advocacy Clinic, Georgia State University College of Law, dated March 5, 2019 (“GSU”).

facilitate fairness in the arbitration forum;<sup>3</sup> (2) promote efficiency and timeliness in discovery;<sup>4</sup> and (3) lower the costs in arbitration.<sup>5</sup> Although they supported the proposed rule change, GSU and Cornell also suggested some modifications, as discussed below.

### **Suggested Modifications to the Proposed Rule Change**

FINRA is proposing to amend the Codes to extend the response time for non-parties to object to an order or subpoena from 10 calendar days of service to 15 calendar days of receipt of the order or subpoena. GSU asserts that the proposal's use of "receipt" instead of "service" as the trigger for responses introduces uncertainty into the process because the serving party may not be aware of when the non-party receives the request. In the rule filing, FINRA stated that receipt of overnight mail service, overnight delivery service, hand delivery, email or facsimile is accomplished on the date of delivery. With each of these methods of service, FINRA believes parties will be able to determine the date of delivery because, other than for overnight mail service and overnight delivery service, typically delivery will be the same date as service. FINRA notes that the proposed rule change would exclude first class mail as an option to serve documents on a non-party, in part because it may be difficult to determine the date of delivery and, thereby, receipt. In addition, the proposed rule change would create consistency in FINRA's rules regarding the trigger for response deadlines relating to orders and subpoenas to non-parties—currently, the Codes provide "receipt" of the non-party's objection as the trigger for the party that requested the order or subpoena to respond to the objection.<sup>6</sup>

In addition, Cornell states that FINRA should require a certified mail option to verify when the non-party receives the subpoena or order. FINRA does not believe that a certified mail option is necessary as service by overnight mail, overnight delivery, hand delivery, email or facsimile allow the parties to verify the date of delivery and, thereby receipt, and provide for faster methods of delivery.

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<sup>3</sup> See Caruso, stating that "these proposed changes would be a fair, equitable and reasonable approach that would expedite and facilitate the efficiency of the arbitrator process . . . ."

<sup>4</sup> See PIABA, stating that "the proposed rule changes . . . strike a good balance between promoting fast and efficient discovery and . . . ensuring that third-parties, who are likely unaware of the arbitration, receive the subpoena or order in a fashion that is more likely to put those third-parties on notice of their obligations to produce documents or witnesses within a specified time period." PIABA noted that it would not support a longer timeframe than the timeframe being proposed, as lengthier response times could delay the arbitration process.

<sup>5</sup> See GSU, stating that "FINRA's efforts to enhance the speed of and lower costs in arbitration by amending the methods of service. . . . assists our Clinic's continuing efforts to provide no-cost advocacy to retail investors who cannot obtain legal representation . . . ."

<sup>6</sup> FINRA Rules 12512(e), 12513(e), 13512(e), and 13513(e) provide, in part, that: "The party that requested the order [or subpoena] may respond to the objections within 10 calendar days of receipt of the objections."

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FINRA believes that the foregoing responds to the issues raised by the commenters to the rule filing and that the proposed rule change should be approved as filed. If you have any questions, please contact me at [REDACTED]; email: [REDACTED].

Sincerely,

/s/ Kristine A. Vo

Kristine A. Vo  
Principal Counsel