

**FINANCIAL INDUSTRY REGULATORY AUTHORITY  
OFFICE OF HEARING OFFICERS**

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

RESPONDENT 1

and

RESPONDENT 2

Respondents.

Disciplinary Proceeding  
No. 2011025617702

Hearing Officer—MAD

**ORDER DENYING RESPONDENTS' MOTION TO PERMIT EXPERT TESTIMONY**

On July 28, 2014, Respondents filed a motion for leave to offer expert witness testimony. The Department of Enforcement filed its opposition on August 11, 2014. At the request of the Hearing Officer, Respondents filed a reply on August 22, 2014.

[Respondent 1] has been a FINRA member since 1992. [Respondent 1]'s parent company, a Mexican brokerage firm, owns 100% of [Respondent 1]. This case arises from allegations that Respondents violated NASD's (now FINRA's) registration requirements by allowing foreign persons to conduct a business in securities without either being (1) registered or (2) exempt from registration.

Respondents assert that the foreign persons described in the Complaint "are already registered under Mexican law to make recommendations and effect transactions in securities to Mexican citizens, whether those securities are listed on the Mexican Stock Exchange or a U.S. Exchange, and thus, they are subject to the rules and regulations that govern securities transactions in Mexico . . . ." They argue that conflicts will arise if they attempt to comply with

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FINRA rules and the Mexican rules, and as a result the Mexican regulatory authority may initiate enforcement actions against the foreign persons referenced in the Complaint, [Respondent 1]'s parent company in Mexico, and possibly [Respondent 1]. Therefore, Respondents assert that they cannot register the employees of its parent company with FINRA.<sup>1</sup> In support of their contention, Respondents seek leave to offer "expert testimony regarding how the Mexican regulations will affect the business operations of [Respondent 1]." Specifically, Respondents propose to call Bernardo Martinez-Negrete and Rose Romero as their experts. Respondents expect that their proposed expert testimony will demonstrate that "they cannot comply with the rules in one jurisdiction without violating the rules in the other jurisdiction."

In essence, Respondents' expert testimony is offered in support of their defense that, because of the potential conflict with Mexican law, NASD registration requirements are not applicable to them. However, the task for the Hearing Panel is to determine whether the evidence presented at the hearing constitutes violations as alleged in the Complaint. The Hearing Panel does not have authority to grant Respondents a waiver of the registration requirements or to declare under the circumstances of this case that the governing NASD registration rules are unenforceable.

Congress tasked the Securities and Exchange Commission with oversight of NASD as a national securities association registered under Section 15A(a) of the Securities Exchange Act of 1934.<sup>2</sup> The Exchange Act expressly requires that a self-regulatory organization file with the SEC any proposed rule change, and states that "[n]o proposed rule change shall take effect unless

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<sup>1</sup> Answer at 3.

<sup>2</sup> 15 U.S.C. § 78o-3(a).

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approved by the Commission....”<sup>3</sup> Here, the SEC approved NASD’s rule change relating to foreign finders and foreign associates on February 13, 1995.<sup>4</sup> As explicitly provided for by the statutory scheme enacted by Congress under the Exchange Act, if Respondents were aggrieved by NASD’s proposed rule change, they were required to present their claims to the SEC and the federal circuit courts of appeals, not to this Hearing Panel. Specifically, the Exchange Act states:

A person aggrieved by a final order of the Commission entered pursuant to this title ... may obtain review of the order in the United States Court of Appeals for the circuit in which he resides or has his principal place of business, or for the District of Columbia Circuit, by filing in such court, within sixty days after the entry of the order, a written petition requesting that the order be modified or set aside in whole or in part.<sup>5</sup>

The exercise of this right of review is predicated upon the aggrieved party’s first presenting its grievance to the SEC itself.<sup>6</sup>

Because this Hearing Panel is not authorized to grant the relief Respondents seek, Respondents’ proposed expert testimony is not relevant. Accordingly, Respondents’ motion for

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<sup>3</sup> See Exchange Act Section 19(b), 15 U.S.C. §78s(b); see also *DL Capital Group, LLC v. Nasdaq Stock Mkt., Inc.*, 409 F.3d 93, 95 n.1 (2d Cir. 2005) (“Pursuant to 15 U.S.C. § 78s(b), the SEC must approve all NASD rules, practices, policies and interpretations before they are implemented.”).

<sup>4</sup> Order Approving Proposed Rule Change Relating to Amendments to Parts VI and X of Schedule C of the NASD By-Laws Relating to Foreign Finders and Foreign Associates, Rel. No. 34-35361, 1995 SEC LEXIS 367 (Feb. 13, 1995). On September 27, 1994, the NASD filed with SEC a proposed rule change pursuant to Section 19(b)(1) of the Exchange Act and Rule 19b-4 thereunder. *Id.* at \*1.

<sup>5</sup> Section 25(a)(1), 15 U.S.C. § 78y(a)(1).

<sup>6</sup> See Exchange Act, Section 25(c)(1) (“No objection to an order or rule of the Commission, for which review is sought under this section, may be considered by the court unless it was urged before the Commission or there was reasonable ground for failure to do so.”), 15 U.S.C. § 78y(c)(1).

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leave to offer expert witness testimony is denied.

**SO ORDERED.**

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Maureen A. Delaney  
Hearing Officer

Dated: September 9, 2014