

Mediator Selection

Amendments to Mediation Code to Provide the Mediation Director With Discretion to Determine Whether Parties to a FINRA Mediation May Select a Mediator Who Is Not on FINRA's Mediator Roster

Effective Date: August 6, 2012

Executive Summary

Under FINRA Rule 14107 (Mediator Selection) of the Code of Mediation Procedure (Mediation Code), parties to a mediation may select a mediator from FINRA's roster or from a source of their own choosing, including a mediator who is not on FINRA's mediator roster. In limited instances, the director of Mediation (Mediation director) may assign a mediator. The SEC approved amendments to the Mediation Code granting the Mediation director discretion to determine whether parties may select a mediator who is not on FINRA's mediator roster.¹

The amendments are effective on August 6, 2012, for all mediation cases filed on or after the effective date.

The text of the amendments is set forth in Attachment A.

Questions concerning this *Notice* should be directed to:

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Notice Type

- ▶ Rule Amendment

Suggested Routing

- ▶ Compliance
- ▶ Legal
- ▶ Registered Representatives

Key Topics

- ▶ Code of Mediation Procedure
- ▶ Mediation
- ▶ Mediator Selection

Referenced Rules & Notices

- ▶ FINRA Rule 14107

Background & Discussion

The Mediation Code permits parties to a mediation to select a mediator either from a list of FINRA mediators supplied by the Mediation director, or from a list or other source of their own choosing. In limited instances, the Mediation director assigns the mediator. Although parties usually select a FINRA mediator, under the current provision, parties may select a mediator who is *not* on FINRA's roster.

In 1995, when FINRA implemented its mediation program, FINRA permitted parties to select non-FINRA mediators to ensure that parties had access to a sufficient number of mediators. After more than 15 years of administering the mediation program, FINRA's mediator roster includes many seasoned securities mediators. FINRA staff carefully screens every mediator applicant, and the National Arbitration and Mediation Committee² (through its Mediation Subcommittee) reviews and approves each application before FINRA places an applicant on the roster. FINRA staff conducts a background check of approved applicants before placing them on the mediator roster. Staff elicits evaluations of its mediators from parties and counsel and conducts periodic quality control reviews of FINRA mediators. Non-FINRA mediators are not subject to FINRA's screening process, background check or periodic evaluation. Accordingly, the selection of a non-FINRA mediator raises concerns for the forum.

In response to these concerns, FINRA amended FINRA Rule 14107(a) to provide the Mediation director with discretion to determine whether parties to a FINRA mediation may select a mediator who is not on FINRA's mediator roster. Under the amended rule, if the parties select a non-FINRA mediator who is willing to apply to be a FINRA mediator, and the staff believes that the mediation program would benefit by adding the mediator to the roster, then the Mediation director may permit the mediator to serve on the case.³ FINRA believes that the amendments protect the quality and integrity of the process for users of its mediation forum.

If the Mediation director rejects a non-FINRA mediator the parties selected, the parties still have options for mediation. The parties may:

- ▶ select a FINRA-approved mediator;
- ▶ select a different non-FINRA mediator subject to the same conditions as the rejected mediator; or
- ▶ mediate their dispute elsewhere.

FINRA Rule 14107(c) provides that a mediator selected or assigned to mediate a matter must comply with FINRA rules relating to disclosures required of arbitrators unless, with respect to a mediator selected from a source other than a list provided by FINRA, the parties elect to waive such disclosure. FINRA amended the provision to state that it applies to a non-FINRA mediator who is approved to serve on a FINRA mediation.

The amendments are effective for all mediation cases filed on or after August 6, 2012.

Endnotes

1. See Securities Exchange Act Rel. No. 67040 (May 22, 2012), 77 FR 31677 (May 29, 2012) (File No. SR-FINRA-2012-011).
2. The National Arbitration and Mediation Committee (NAMC) makes recommendations to FINRA staff regarding recruitment, qualification, training and evaluation of arbitrators and mediators. The NAMC also makes recommendations on rules, regulations and procedures that govern the conduct of arbitration, mediation and other dispute resolution matters before FINRA.

The NAMC members include investor representatives, securities industry professionals and FINRA arbitrators and mediators. A majority of the NAMC members and its chair are public (non-industry) representatives. This diverse composition ensures a neutral approach in the administration of Dispute Resolution's forum, promoting fairness to all parties.

3. FINRA mediators pay an annual \$200 fee to remain active on the roster and a \$150 fee per case. FINRA will require non-FINRA mediators who serve on a case to complete the application process for inclusion on the roster and to pay the applicable fees.

ATTACHMENT A

New language is underlined; deletions are in brackets

14107. Mediator Selection

(a) A mediator may be selected:

[•] (1) By the parties from a list supplied by the Director;

[•] (2) With the Director's approval upon receipt of the parties' joint request, [By the parties] from a list or other source the parties choose [of their own choosing]; or

[•] (3) By the Director if the parties do not select a mediator after submitting a matter to mediation.

(b) For any mediator assigned or selected from a list provided by FINRA, the parties will be provided with information relating to the mediator's employment, education, and professional background, as well as information on the mediator's experience, training, and credentials as a mediator.

(c) Any mediator selected or assigned to mediate a matter shall comply with the provisions of Customer Code Rule 1240[8]5 or Industry Code Rule 13408, unless, with respect to a non-FINRA mediator approved by the Director, [mediator selected from a source other than a list provided by FINRA,] the parties elect to waive such disclosure.

(d) No mediator may serve as an arbitrator of any matter pending in FINRA arbitration in which he served as a mediator; nor may the mediator represent any party or participant to the mediation in any subsequent FINRA arbitration relating to the subject matter of the mediation.

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