

## Mediator Classification

### SEC Approves Amendments to FINRA Dispute Resolution, Inc. By-Laws to Classify Mediators as Public Members if They Are Not Otherwise Disqualified From Being Classified as Public Members

Effective Date: January 22, 2013

#### Executive Summary

The SEC approved amendments to the FINRA Dispute Resolution, Inc. By-Laws to clarify that services provided by mediators, when acting in such capacity and not representing parties in mediation, should not cause the individuals to be classified as industry members under the By-Laws.<sup>1</sup>

The amendments are effective on January 22, 2013, and apply to nominations of mediators by the FINRA Dispute Resolution, Inc. Board for membership on the National Arbitration and Mediation Committee submitted on or after this date. The text of the amendments is set forth in Attachment A.

Questions concerning this *Notice* should be directed to:

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- ▶ Mignon McLemore, Assistant Chief Counsel, Dispute Resolution, at (202) 728-8151 or [mignon.mclemore@finra.org](mailto:mignon.mclemore@finra.org).

#### Background and Discussion

Mediators are neutrals who guide parties toward a joint solution to resolve their disputes. Mediators are retained only by agreement of all parties to a dispute rather than by any one party, and the parties compensate mediators jointly pursuant to that agreement. Further, mediators do not represent any party in the mediation and have no power to decide the outcome of the dispute. In light of the unique role mediators play in FINRA's forum, FINRA

December 2012

#### Notice Type

- ▶ Rule Amendment

#### Suggested Routing

- ▶ Compliance
- ▶ Legal
- ▶ Senior Management

#### Key Topics

- ▶ Mediators
- ▶ Mediations
- ▶ Industry Members
- ▶ Public Members

#### Referenced Rules & Notices

- ▶ Dispute Resolution By-Laws, Article I(s)
- ▶ Dispute Resolution By-Laws, Article I(x)

does not believe the services mediators provide should cause these individuals to be classified as industry members under the By-Laws, thus, making them ineligible to serve as a public member of the National Arbitration and Mediation Committee (NAMC).<sup>2</sup> FINRA has, therefore, amended the definitions of industry members<sup>3</sup> and public members<sup>4</sup> in the By-Laws so that services provided by mediators, while acting in such capacity and not representing parties in mediation, would not cause these individuals to be classified as industry members.

FINRA has amended two parts of the definition of industry member.<sup>5</sup> First, Article I(s) (4) of the By-Laws defines an industry member as a committee member who provides professional services to brokers or dealers, and such services constitute 20 percent or more of the professional revenues received by the member or 20 percent or more of the gross revenues received by the member's firm or partnership.<sup>6</sup> As amended, the definition exempts any services provided in the capacity as a mediator of disputes involving a broker or dealer and not representing any party in such mediations from being considered professional services provided to brokers or dealers.

Second, Article I(s)(5) of the By-Laws defines an industry member as a committee member who provides professional services to a director, officer or employee of a broker, dealer or corporation that owns 50 percent or more of the voting stock of a broker or dealer, and such services relate to the director's, officer's or employee's professional capacity and constitute 20 percent or more of the professional revenues received by the member or 20 percent or more of the gross revenues received by the member's firm or partnership.<sup>7</sup> Similar to the change in Article I(s)(4), FINRA has amended the definition to exempt any services provided in the capacity as a mediator of disputes involving a director, officer or employee as described in this definition and not representing any party in such mediations from being considered professional services provided to such individuals.

FINRA has also amended the definition of public member under the By-Laws. A public member is defined as a committee member who has no material business relationship with a broker or dealer or a self-regulatory organization registered under the Securities Exchange Act (other than serving as a public director or public member on a committee of such a self-regulatory organization). As amended, the definition clarifies that acting in the capacity as a mediator of disputes involving a broker or dealer and not representing any party in such mediations is not considered a material business relationship with a broker or dealer.

The amendments prevent mediation activity from automatically classifying the mediator as an industry member under the By-Laws. The amendments do not, however, shield a mediator from being classified as an industry member because of activities that would otherwise cause the mediator to be considered an industry member. For example, if a mediator was an employee of a broker or dealer within the prior year, FINRA would classify the mediator as an industry member under the By-Laws.

## Effective Date Provisions

The amendments are effective on January 22, 2013, and apply to nominations of mediators by the FINRA DR Board for membership on the National Arbitration and Mediation Committee submitted on or after this date.

## Endnotes

1. See Securities Exchange Act Rel. No. 68142 (Nov. 2, 2012), 77 FR 67038 (Nov. 8, 2012) (Order Approving Proposed Rule Change to Amend the By-Laws of FINRA Dispute Resolution, Inc. to Clarify That Services Provided by Mediators Should Not Cause Them to Be Classified as Industry Members Under the By-Laws) (File No. SR-FINRA-2012-040).
2. The NAMC is a committee appointed by the Board of Directors of FINRA Dispute Resolution, Inc. (FINRA DR). It is comprised of a majority of public members and advises the FINRA DR Board on the development and maintenance of FINRA's Dispute Resolution forum. See Plan of Allocation and Delegation of Functions by FINRA to Subsidiaries – NASD Dispute Resolution, §III(C)(1)(b). See also Rules 12102(a) and 12102(a)(1) of the Code of Arbitration Procedure for Customer Disputes and Rules 13102(a) and 13102(a)(1) of the Code of Arbitration Procedure for Industry Disputes.
3. See Dispute Resolution By-Laws, Article I(s) (Definitions – Industry Member).
4. See Dispute Resolution By-Laws, Article I(x) (Definitions – Public Member).
5. The By-Laws define an industry member using six criteria. The proposal would amend two of them, subsections (4) and (5). See note 3, *supra*.
6. The amendments in this definition would also apply to classifications for directors, defined as members of the Board, under the By-Laws. See Dispute Resolution By-Laws, Article I(j) (Definitions – Director).
7. *Id.*

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## ATTACHMENT A

New language is underlined; deleted language is in brackets.

### By-Laws of FINRA Dispute Resolution, Inc.

#### ARTICLE I DEFINITIONS

When used in these By-Laws, unless the context otherwise requires, the term:

(a) – (r) No change;

(s) “Industry Member” means a committee member who (1) is or has served in the prior year as an officer, director, employee or controlling person of a broker or dealer, excluding an independent director, an outside director, or a director not engaged in the day-to-day management of a broker or dealer; (2) is an officer, director (excluding an outside director), or employee of an entity that owns more than ten percent of the equity of a broker or dealer, and the broker or dealer accounts for more than five percent of the gross revenues received by the consolidated entity; (3) owns more than five percent of the equity securities of any broker or dealer, whose investments in brokers or dealers exceed ten percent of his or her net worth, or whose ownership interest otherwise permits him or her to be engaged in the day-to-day management of a broker or dealer; (4) provides professional services to brokers or dealers, and such services constitute 20 percent or more of the professional revenues received by the Director or member or 20 percent or more of the gross revenues received by the Director’s or member’s firm or partnership (except that any services provided in the capacity as a mediator of disputes involving a broker or dealer and not representing any party in such mediations shall not be considered professional services provided to brokers or dealers); (5) provides professional services to a director, officer, or employee of a broker, dealer, or corporation that owns 50 percent or more of the voting stock of a broker or dealer, and such services relate to the director’s, officer’s, or employee’s professional capacity and constitute 20 percent or more of the professional revenues received by the Director or member or 20 percent or more of the gross revenues received by the Director’s or member’s firm or partnership (except that any services provided in the capacity as a mediator of disputes involving a director, officer, or employee as described in this subsection (5) and not representing any party in such mediations shall not be considered professional services provided to such individuals); or (6) has a consulting or employment relationship with or provides professional services to a self regulatory organization registered under the Act, or has had any such relationship or provided any such services at any time within the prior year;

(t) – (w) No change;

(x) “Public Member” means a committee member who has no material business relationship with a broker or dealer or a self regulatory organization registered under the Act (other than serving as a public director or public member on a committee of such a self regulatory organization or acting in the capacity as a mediator of disputes involving a broker or dealer and not representing any party in such mediations);

(y) No change.