



October 29, 2008

Ms. Florence Harmon  
Acting Secretary  
U. S. Securities and Exchange Commission  
100 F Street, N.E.  
Washington, D.C. 20549

**Re: File No. SR-FINRA-2008-031 – Proposed Rule Change to Amend the Uniform Submission Agreement; Response to Comments**

Dear Ms. Harmon:

The Financial Industry Regulatory Authority, Inc. (FINRA) (formerly known as the National Association of Securities Dealers, Inc. (NASD)) 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 the Uniform Submission Agreement (USA), which parties must sign prior to entering into arbitration, and related rules of the Code of Arbitration Procedure for Customer Disputes (Customer Code) and the Code of Arbitration Procedure for Industry Disputes (Industry Code) (collectively, the Codes).<sup>1</sup> The proposed revisions to the USA will: (1) clarify what the parties are attesting to when they execute the USA; (2) require parties to indicate in what capacity they are signing the agreement; (3) convert the USA to a FINRA-specific agreement; and (4) use plain English to make the agreement easier to read.

The SEC received five letters.<sup>2</sup> Two commenters support the proposed rule change;<sup>3</sup> three oppose it.<sup>4</sup> Two commenters who oppose the proposed rule change, however, raise concerns that are outside the scope of the proposal.

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<sup>1</sup> See Securities Exchange Act Rel. No. 58124 (July 9, 2008), 73 FR 40890 (July 16, 2008) (File No. SR-NASD-2008-031, Notice of Filing of Proposed Rule Change to Amend the Arbitration Uniform Submission Agreement and Related Rules).

<sup>2</sup> Comment letters were submitted by Seth E. Lipner, Professor of Law, Baruch College, August 6, 2008 (“Lipner Letter”); Lawrence S. Schultz, President, Public Investors Arbitration Bar Association, August 6, 2008 (“PIABA Letter”); Daniel S. Wilkerson, July 30, 2008 (“Wilkerson Letter”); Philip M. Aidikoff, Attorney, July 23, 2008 (“Aidikoff Letter”); and Steven B. Caruso, Esq., Maddox Hargett Caruso, P.C., July 16, 2008 (“Caruso Letter”).

<sup>3</sup> Aidikoff and Caruso Letters.

<sup>4</sup> PIABA, Lipner, and Wilkerson Letters.

### Certifying that Party's Representative Read the Rules

Under the proposed rule change, parties would be permitted to rely on their representatives to be familiar with the rules and procedures of the forum. A commenter who supports the proposal believes that this proposed change would eliminate the potential for misrepresentation by parties who have not read the rules and procedures relating to arbitration, but are required to so attest by executing the USA.<sup>5</sup> A commenter who opposes the proposed rule change for other reasons nevertheless states that this specific change is positive.<sup>6</sup>

### Removing References to Certain Rules and Corporate Documents

FINRA proposes to make the USA specific to FINRA and to remove language that is overly broad or that is generic to encompass the rules of the various self-regulatory organizations. A commenter who opposes the proposed rule change argues that amending paragraph three of the USA to remove the requirement that the arbitration be conducted pursuant to the Constitution, By-Laws, Rules and Regulations of the sponsoring organization may eliminate FINRA's authority under its Conduct Rules to enforce or collect on an arbitration settlement or award.<sup>7</sup>

FINRA disagrees with the commenter's argument for several reasons. Firms and associated persons are subject to FINRA's jurisdiction under FINRA By-Laws, whether or not they sign a USA.<sup>8</sup> In addition, firms and associated persons agree again to be bound by the By-Laws in paragraph one of the USA. Therefore, FINRA believes that similar references in paragraph three of the USA are redundant, and that their removal will make the document easier to read and understand for users of its dispute resolution forum. Moreover, the focus in paragraph three is on the procedures under which the arbitration will be conducted, and the proper reference in this context is the FINRA Code of Arbitration Procedure. For these reasons, FINRA declines to amend paragraph three.

One commenter contends that the proposed amendments to the USA do not define explicitly the rules and procedures to which the document refers, thereby, making

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<sup>5</sup> Aidikoff Letter.

<sup>6</sup> PIABA Letter.

<sup>7</sup> See note 6.

<sup>8</sup> See By-Laws of the Corporation, Article IV, Membership, and Article V, Registered Representatives and Associated Persons. For a firm to become a member of FINRA, it must agree to comply with the FINRA By-Laws, the Rules of the Corporation, and all rulings, orders, directions, and decisions issued and sanctions imposed under the Rules of the Corporation. Article IV, Sec. 1(a)(1) of By-Laws. Article V, Sec. 2(a)(1) of the By-Laws contains a similar requirement for registered representatives and associated persons. The Code of Arbitration Procedure is included in the Rules of the Corporation. Article I, Sec. (w) of the By-Laws states, "Rules of the Corporation' or 'Rules' means the numbered rules set forth in the manual of the Corporation beginning with the Rule 0100 Series, as adopted by the Board pursuant to these By-Laws, as hereafter amended or supplemented."

it difficult for parties to review them and agree to be bound by them.<sup>9</sup> In particular, the commenter seeks “specific document names, section names, page numbers, [and] web URLs ... where these rules can be found.”

One of the goals of the proposal is to streamline the USA by using plain English to make the document easier to read. In keeping with this goal, FINRA has eliminated redundant and generic references to corporate documents as described above. FINRA believes that inserting a detailed list of all rules and procedures that might possibly apply to any arbitration proceeding would make the USA unduly lengthy and complex for the average user of the dispute resolution forum. More importantly, the nature of a particular claim determines which rules and procedures would apply in the forum. A listing of all rules and procedures available in the forum may be confusing to investors when only some of the rules and procedures may apply to a particular claim. Thus, the proposed changes to the USA incorporate by reference the relevant rules and procedures of the forum, which are readily accessible on our Web site at [www.finra.org](http://www.finra.org) or in hard copy upon request. Most investors will find that the Code of Arbitration Procedure and the packet of materials provided for claimants will provide them with all the necessary rules and procedures applicable to their arbitration proceedings. For these reasons, FINRA declines to amend the proposal to address this issue at this time.

#### Comments Outside the Scope of Proposed Rule Change

Two commenters who oppose the proposal argue that the changes to the USA should not be approved because FINRA’s rules do not prohibit respondents from appearing in the forum if they have not executed a USA, and therefore, do not impose similar compliance requirements on respondents and claimants.<sup>10</sup> Two commenters who support the proposal express similar concerns over the alleged disparate treatment of claimants and respondents with regard to executing a USA.<sup>11</sup>

FINRA is not proposing at this time to amend the provisions of the Codes that address the execution requirements concerning the USA;<sup>12</sup> therefore, these comments are outside the scope of the rule filing. FINRA does believe it is important, however, to correct misconceptions expressed by the commenters concerning the accountability of respondents when they do not execute a USA. First, as noted previously, firms and associated persons or registered representatives are subject to FINRA’s jurisdiction under FINRA By-Laws,<sup>13</sup> which means that they are bound to arbitrate in the forum and are subject to the rules and procedures thereof. Second, Rules 12303(a) and 13303(a) of the Customer and Industry Codes, respectively, require respondents to serve each other party with a signed and dated USA. In addition, Rules 12307(c) and 13307(c)

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<sup>9</sup> Wilkerson Letter.

<sup>10</sup> PIABA and Lipner Letters.

<sup>11</sup> Aidikoff and Caruso Letters.

<sup>12</sup> Rules 12302 and 12303 of the Customer Code and Rules 13302 and 13303 of the Industry Code.

<sup>13</sup> See note 8.

prohibit a panel from considering any counterclaim, cross claim or third party claim that is deficient, which includes a USA that is not properly signed and dated.<sup>14</sup> Third, if respondents fail to submit a signed USA or otherwise object to jurisdiction within 30 days, arbitrators are instructed in the initial pre-hearing conference script to impose sanctions as provided in the Codes.<sup>15</sup> Last, FINRA trains its arbitrators extensively on how its rules and procedures should be applied. With regard to respondents' failure to submit a USA, FINRA recently published an article in *The Neutral Corner* that addressed this issue and reminded arbitrators of their ability to issue sanctions for noncompliance.<sup>16</sup> Therefore, FINRA believes that its rules, procedures, and arbitrator training programs address effectively the instances in which respondents fail to submit a USA.

As noted, FINRA believes these comments are outside the scope of the instant proposal and as such, recommends that the SEC approve the proposal.

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If you have any questions, please contact me on (202) 728-8151 or at [mignon.mclmore@finra.org](mailto:mignon.mclmore@finra.org).

Very truly yours,

Mignon McLemore  
Assistant Chief Counsel  
FINRA Dispute Resolution

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<sup>14</sup> Also under Rules 12307(c) and 13307(c), FINRA notifies the party making the counterclaim, cross claim or third party claim of any deficiencies in writing and copies the panel.

<sup>15</sup> Rule 12212 of Customer Code and Rule 13212 of the Industry Code. Sanctions also can be imposed under the FINRA By-Laws if the matter is referred for regulatory action. See Article XIII, Powers of Board to Impose Sanctions.

<sup>16</sup> See *The Neutral Corner*, Volume 1 – 2008, available at <http://www.finra.org/ArbitrationMediation/Neutrals/Education/NeutralCorner/P037817> (last visited Oct. 17, 2008).