

## Representation of Parties in Arbitration and Mediation

### SEC Approves a Proposed Rule Change Relating to Representation of Parties in Arbitration and Mediation

Effective Date: December 24, 2007

#### Executive Summary

The SEC has approved amendments to Rule 12208 of the Code of Arbitration Procedure for Customer Disputes (Customer Code) and Rule 13208 of the Code of Arbitration Procedure for Industry Disputes (Industry Code), and has approved new Rule 14106 of the Code of Mediation Procedure to address representation of parties in arbitration and mediation cases.<sup>1</sup>

The amendments apply to any case in which parties provide FINRA with notice of representation on or after December 24, 2007. If an attorney or representative files a pleading, or otherwise acts on behalf of a party in a case in the FINRA dispute resolution forum, then FINRA will consider these actions as sufficient notice of representation. If parties have provided such notice of representation to FINRA prior to the effective date, then the new rules do not apply. If they have not given such notice prior to the effective date, then the new rules do apply. The text of the amendment is set forth in Attachment A.

Questions concerning this *Notice* should be directed to Mignon McLemore, Assistant Chief Counsel, FINRA Dispute Resolution, at (202) 728-8151 or [mignon.mclemore@finra.org](mailto:mignon.mclemore@finra.org).

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#### Notice Type

- Rule Amendment

#### Suggested Routing

- Compliance
- Legal

#### Key Topics

- Arbitration
- Code of Arbitration Procedure
- Code of Mediation Procedure
- Dispute Resolution
- Mediation

#### Referenced Rules & Notices

- Rule 12208 (Customer Code)
- Rule 13208 (Industry Code)
- Rule 14106 (Mediation Code)

## Background and Discussion

The rule changes clarify the issue of representation of parties in FINRA dispute resolution proceedings. The prior rules stated only that “all parties shall have the right to representation by counsel at any stage of the proceedings.” The rules did not provide any guidance on the kind of representatives who were permitted to practice in the dispute resolution forum; nor did they provide guidance on the qualifications those representatives must have to participate in the forum. Moreover, the prior rules did not address a growing trend in American jurisprudence: the multi-jurisdictional practice of law, which occurs when attorneys, licensed in one United States (U.S.) jurisdiction, practice law in a jurisdiction in which they are not licensed.

To address these issues, FINRA filed a proposal with the Securities and Exchange Commission (SEC) on September 14, 2006. Amendments 1 and 2 were filed on November 9, 2006 and February 23, 2007, respectively. The SEC published the proposal for comment in the *Federal Register* on April 13, 2007.<sup>2</sup> After FINRA submitted its response to comments, the SEC approved the proposal on September 26, 2007.<sup>3</sup>

FINRA has amended Rules 12208 and 13208 of the Customer and Industry Codes, respectively, and adopted Rule 14106 of the Mediation Code (referred to collectively as “the rules”) to address representation of parties in arbitration and mediation. The rules provide that:

- ▶ parties may represent themselves;
- ▶ parties may be represented by an attorney, provided certain criteria are met; or
- ▶ parties may be represented by a person who is not an attorney, unless state law prohibits such representation or the person is currently suspended or barred from the securities industry in any capacity, or is currently suspended from the practice of law or disbarred.

In addition, the rules provide that issues regarding qualifications of a representative are to be governed by applicable law.

Each provision of the changes to the rules is discussed below.

### Representation by a Party

The rules codify current practice by explicitly stating that parties may represent themselves in an arbitration or mediation proceeding. Likewise, the rules state that a member of a partnership may represent a partnership; and a *bona fide* officer of a corporation, trust or association may represent the corporation, trust or association in an arbitration or mediation proceeding.

## Representation by an Attorney

Parties may be represented in an arbitration or mediation by an attorney at law in good standing and admitted to practice in any jurisdiction in the U.S., including the District of Columbia, or any commonwealth, territory or possession of the U.S., unless state law prohibits such representation. Thus, under this provision, if a party chooses to be represented by an attorney, the attorney must be licensed to practice law in a U.S. jurisdiction, be in good standing and comply with the applicable laws of the U.S. jurisdiction in which the hearings are held.<sup>4</sup>

Under this provision, neither the staff nor the arbitration panel<sup>5</sup> is required to verify the attorney's compliance with state law. If state law prohibits such representation, the parties may raise the issue with the panel. Parties also may seek court or regulatory agency relief. In the absence of a court order, the arbitration proceeding shall not be stayed or otherwise delayed pending resolution of such issues.

If a party chooses to be represented by an attorney, either the party or the attorney must notify FINRA in writing of the attorney's intent to appear, and provide the attorney's contact information.<sup>6</sup> The party or attorney may satisfy this requirement by providing this information in the initial pleadings<sup>7</sup> filed with the Director of Arbitration (Director) or by means of the online filing system ([www.finra.org/onlineclaimfiling](http://www.finra.org/onlineclaimfiling)).<sup>8</sup>

## Representation by Others

Parties may be represented in an arbitration or mediation by a person who is not an attorney, unless:

- state law prohibits such representation;
- the person is currently suspended or barred from the securities industry in any capacity; or
- the person is currently suspended from the practice of law or disbarred.

This provision allows a relative, friend or associate to represent or assist a person (*e.g.*, an elderly or disabled person) with his or her arbitration or mediation. Investors can also find affordable legal representation at law school securities arbitration clinics.<sup>9</sup>

Under this provision, neither the staff nor the arbitration panel is required to verify the non-attorney's compliance with state law. If state law prohibits such representation or if the non-attorney representative is currently (i) suspended or barred from the securities industry or (ii) suspended from the practice of law or disbarred, the parties may raise the issue with the panel. Parties also may seek court or regulatory agency relief. In the absence of a court order, the arbitration proceeding shall not be stayed or otherwise delayed pending resolution of such issues.

If a party chooses to be represented by a non-attorney representative, either the party or the representative must notify FINRA in writing and provide the representative's contact information. The party or representative may satisfy this requirement by providing this information in the initial pleadings filed with the Director or by means of the online filing system ([www.finra.org/onlineclaimfiling](http://www.finra.org/onlineclaimfiling)).<sup>10</sup>

### Effective Date Provisions

The amendments to Rules 12208 and 13208 of the Customer and Industry Codes, respectively, and new Rule 14106 of the Mediation Code will become effective on December 24, 2007, and will apply to any case in which parties provide FINRA with notice of representation on or after December 24, 2007. If an attorney or representative files a pleading, or otherwise acts on behalf of a party in a case in the FINRA dispute resolution forum, then FINRA will consider these actions as sufficient notice of representation. If parties have provided such notice of representation to FINRA prior to the effective date, then the new rules will not apply. If they have not given such notice prior to the effective date, then the new rules will apply.

## Endnotes

1. Exchange Act Release No. 56540 (Sept. 26, 2007), 72 Federal Register 56410 (Oct. 3, 2007) (File No. SR-NASD-2006-109).
2. Exchange Act Release No. 55604 (April 9, 2007), 72 Federal Register 18703 (April 13, 2007).
3. See note 1.
4. While the multi-jurisdictional practice of law may be permitted in many jurisdictions, it may constitute a violation of certain states' unauthorized practice of law provisions.
5. The term "panel" means the arbitration panel, whether it consists of one or more arbitrators. See Rule 12100(q) of the Customer Code and Rule 13100(q) of the Industry Code.
6. If parties file an arbitration claim in California, their attorneys must provide a notice of intent to appear in the initial pleading submitted to FINRA Dispute Resolution. The notice in California arbitrations includes information similar to what is requested here. See FINRA's Notice to Attorneys and Parties Represented by Out-of-State Attorneys at [www.finra.org/ArbitrationMediation/ResourcesforParties/NoticestoParties/index.htm](http://www.finra.org/ArbitrationMediation/ResourcesforParties/NoticestoParties/index.htm).
7. A pleading is a statement describing a party's causes of action or defenses. The following documents are considered pleadings: a statement of claim, an answer, a counterclaim, a cross claim, a third-party claim and any replies.
8. In this case, if a party chooses to be represented by an attorney and the attorney files a pleading or otherwise acts on behalf of a party in the FINRA dispute resolution forum, then FINRA will consider these actions as sufficient notice of representation.
9. A securities arbitration clinic can help an investor who has a smaller claim but is unable to hire an attorney, provided the investor qualifies for assistance. For more information on clinic locations and eligibility requirements, see "How to Find an Attorney" at [www.finra.org/ArbitrationMediation/StartanArbitrationorMediation/HowtoFindanAttorney/index.htm](http://www.finra.org/ArbitrationMediation/StartanArbitrationorMediation/HowtoFindanAttorney/index.htm)
10. In this case, if a party chooses to be represented by a person who is not an attorney and this representative files a pleading or otherwise acts on behalf of a party in the FINRA dispute resolution forum, then FINRA will consider these actions as sufficient notice of representation.

**ATTACHMENT A**

New language is underlined, deletions are in brackets.

**Code of Arbitration Procedure for Customer Disputes,  
Code of Arbitration Procedure for Industry Disputes,  
and  
Code of Mediation Procedure**

\* \* \*

**Customer Code****12208. Representation of Parties****(a) Representation by a Party**

Parties may represent themselves in an arbitration held in a United States hearing location. A member of a partnership may represent the partnership; and a bona fide officer of a corporation, trust, or association may represent the corporation, trust, or association.

**(b) Representation by an Attorney**

At any stage of an arbitration proceeding held in a United States hearing location, all parties shall have the right to be represented by [counsel during any stage of an arbitration] an attorney at law in good standing and admitted to practice before the Supreme Court of the United States or the highest court of any state of the United States, the District of Columbia, or any commonwealth, territory, or possession of the United States, unless state law prohibits such representation.

**(c) Representation by Others**

Parties may be represented in an arbitration by a person who is not an attorney, unless:

- state law prohibits such representation, or
- the person is currently suspended or barred from the securities industry in any capacity, or
- the person is currently suspended from the practice of law or disbarred.

**(d) Qualifications of Representative**

Issues regarding the qualifications of a person to represent a party in arbitration are governed by applicable law and may be determined by an appropriate court or other regulatory agency. In the absence of a court order, the arbitration proceeding shall not be stayed or otherwise delayed pending resolution of such issues.

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## Industry Code

### 13208. Representation of Parties

**(a) Representation by a Party**

Parties may represent themselves in an arbitration held in a United States hearing location. A member of a partnership may represent the partnership; and a bona fide officer of a corporation, trust, or association may represent the corporation, trust, or association.

**(b) Representation by an Attorney**

At any stage of an arbitration proceeding held in a United States hearing location, all parties shall have the right to be represented by [counsel during any stage of an arbitration] an attorney at law in good standing and admitted to practice before the Supreme Court of the United States or the highest court of any state of the United States, the District of Columbia, or any commonwealth, territory, or possession of the United States, unless state law prohibits such representation.

**(c) Representation by Others**

Parties may be represented in an arbitration by a person who is not an attorney, unless:

- state law prohibits such representation, or
- the person is currently suspended or barred from the securities industry in any capacity, or
- the person is currently suspended from the practice of law or disbarred.

**(d) Qualifications of Representative**

Issues regarding the qualifications of a person to represent a party in arbitration are governed by applicable law and may be determined by an appropriate court or other regulatory agency. In the absence of a court order, the arbitration proceeding shall not be stayed or otherwise delayed pending resolution of such issues.

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**Code of Mediation Procedure**

**14100 – 14105.** No change.

**14106. Representation of Parties****(a) Representation by a Party**

Parties may represent themselves in mediation held in a United States hearing location. A member of a partnership may represent the partnership; and a bona fide officer of a corporation, trust, or association may represent the corporation, trust, or association.

**(b) Representation by an Attorney**

At any stage of a mediation proceeding held in a United States hearing location, all parties shall have the right to be represented by an attorney at law in good standing and admitted to practice before the Supreme Court of the United States or the highest court of any state of the United States, the District of Columbia, or any commonwealth, territory, or possession of the United States, unless state law prohibits such representation.

**(c) Representation by Others**

Parties may be represented in mediation by a person who is not an attorney, unless:

- state law prohibits such representation, or
- the person is currently suspended or barred from the securities industry in any capacity, or
- the person is currently suspended from the practice of law or disbarred.



**(d) Qualifications of Representative**

Issues regarding the qualifications of a person to represent a party in mediation are governed by applicable law and may be determined by an appropriate court or other regulatory agency. In the absence of a court order, the mediation proceeding shall not be stayed or otherwise delayed pending resolution of such issues.

**[14106] 14107. Mediator Selection**

(a) – (d) No change.

**[14107] 14108. Limitation on Liability**

No change.

**[14108] 14109. Mediation Ground Rules**

(a) – (g) No change.

**[14109] 14110. Mediation Fees**

(a) – (c) No change.

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