

OMB APPROVAL

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Page 1 of 6

SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549
Form 19b-4

File No. SR - 2010 - 006
Amendment No. 1

Proposed Rule Change by Financial Industry Regulatory Authority
Pursuant to Rule 19b-4 under the Securities Exchange Act of 1934

Initial ☐	Amendment ☒	Withdrawal ☐	Section 19(b)(2) ☒	Section 19(b)(3)(A) ☐	Section 19(b)(3)(B) ☐
			Rule		
Pilot ☐	Extension of Time Period for Commission Action ☐	Date Expires 	☐ 19b-4(f)(1) ☐ 19b-4(f)(2) ☐ 19b-4(f)(3)	☐ 19b-4(f)(4) ☐ 19b-4(f)(5) ☐ 19b-4(f)(6)	

Exhibit 2 Sent As Paper Document



Exhibit 3 Sent As Paper Document

**Description**

Provide a brief description of the proposed rule change (limit 250 characters).

Contact Information

Provide the name, telephone number and e-mail address of the person on the staff of the self-regulatory organization prepared to respond to questions and comments on the proposed rule change.

First Name Last Name
Title
E-mail
Telephone Fax

Signature

Pursuant to the requirements of the Securities Exchange Act of 1934,

has duly caused this filing to be signed on its behalf by the undersigned thereunto duly authorized officer.

Date By

(Name)

(Title)

NOTE: Clicking the button at right will digitally sign and lock
this form. A digital signature is as legally binding as a physical
signature, and once signed, this form cannot be changed.

SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

For complete Form 19b-4 instructions please refer to the EDFS website.

Form 19b-4 Information

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The self-regulatory organization must provide all required information, presented in a clear and comprehensible manner, to enable the public to provide meaningful comment on the proposal and for the Commission to determine whether the proposal is consistent with the Act and applicable rules and regulations under the Act.

Exhibit 1 - Notice of Proposed Rule Change

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The Notice section of this Form 19b-4 must comply with the guidelines for publication in the Federal Register as well as any requirements for electronic filing as published by the Commission (if applicable). The Office of the Federal Register (OFR) offers guidance on Federal Register publication requirements in the Federal Register Document Drafting Handbook, October 1998 Revision. For example, all references to the federal securities laws must include the corresponding cite to the United States Code in a footnote. All references to SEC rules must include the corresponding cite to the Code of Federal Regulations in a footnote. All references to Securities Exchange Act Releases must include the release number, release date, Federal Register cite, Federal Register date, and corresponding file number (e.g., SR-[SRO]-xx-xx). A material failure to comply with these guidelines will result in the proposed rule change being deemed not properly filed. See also Rule 0-3 under the Act (17 CFR 240.0-3)

Exhibit 2 - Notices, Written Comments, Transcripts, Other Communications

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Exhibit Sent As Paper Document

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Copies of notices, written comments, transcripts, other communications. If such documents cannot be filed electronically in accordance with Instruction F, they shall be filed in accordance with Instruction G.

Exhibit 3 - Form, Report, or Questionnaire

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Exhibit Sent As Paper Document

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Copies of any form, report, or questionnaire that the self-regulatory organization proposes to use to help implement or operate the proposed rule change, or that is referred to by the proposed rule change.

Exhibit 4 - Marked Copies

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The full text shall be marked, in any convenient manner, to indicate additions to and deletions from the immediately preceding filing. The purpose of Exhibit 4 is to permit the staff to identify immediately the changes made from the text of the rule with which it has been working.

Exhibit 5 - Proposed Rule Text

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The self-regulatory organization may choose to attach as Exhibit 5 proposed changes to rule text in place of providing it in Item I and which may otherwise be more easily readable if provided separately from Form 19b-4. Exhibit 5 shall be considered part of the proposed rule change.

Partial Amendment

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If the self-regulatory organization is amending only part of the text of a lengthy proposed rule change, it may, with the Commission's permission, file only those portions of the text of the proposed rule change in which changes are being made if the filing (i.e. partial amendment) is clearly understandable on its face. Such partial amendment shall be clearly identified and marked to show deletions and additions.

June 14, 2010

Ms. Elizabeth M. Murphy
Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090

Re: File No. SR-FINRA-2010-006 – Proposed Rule Change to Amend the Codes of Arbitration Procedure to Provide for Attorney Representation of Non-Party Witnesses in Arbitration; Response to Comments and Partial Amendment No. 1

Dear Ms. Murphy:

The Financial Industry Regulatory Authority, Inc. (“FINRA”) hereby submits its second response to 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 Rule 12602 of the Code of Arbitration Procedure for Customer Disputes and Rule 13602 of the Code of Arbitration Procedure for Industry Disputes (“Codes”) to provide for attorney representation of non-party witnesses.¹ Specifically, the proposal, as filed, would provide that a non-party witness has the right to attorney representation at an arbitration proceeding held in a United States hearing location while the witness is testifying. The panel would determine the extent to which the attorney could participate at the hearing.

The SEC received three letters.² The Cornell letter generally supports the proposal but raises concerns that the proposal may impede the arbitration process unless there are guidelines incorporated into the rule. The Cornell letter states that counsel for non-party witnesses may use scheduling conflicts to delay the arbitration process and that counsel may overstep their role by making excessive or substantive objections. The Cornell commenters suggest modifying the proposal to limit the role of counsel for a non-party witness, absent a finding of extraordinary circumstances, to matters concerning privilege and conflicts arising under Fifth Amendment protections against self-incrimination. FINRA responded that Dispute Resolution has not observed the types of issues the Cornell letter raised and believes that arbitrators should retain discretion relating to, among other matters, counsel participation at a hearing. FINRA

¹ See Securities Exchange Act Rel. No. 61517 (February 16, 2010), 75 FR 8169 (February 23, 2010)(File No. SR-FINRA-2010-006).

² Comment letters were submitted by William A. Jacobson, Esq. and Rubina Ali, Cornell University, Cornell Securities Law Clinic, dated March 16, 2010 (“Cornell letter”); Richard Ryder, Esq. dated April 16, 2010 (Ryder letter), and Scott R. Shewan, President, Public Investors Arbitration Bar Association, dated April 28, 2010 (PIABA Letter).

stated that FINRA would alert arbitrators to the commenters' issues during arbitrator training.³

Ryder and PIABA submitted their letters after FINRA submitted its response to the Cornell letter. The Ryder letter states, among other matters, that the proposal is unnecessary and arbitrators should retain the discretion to decide whether a non-party witness' attorney may attend the hearing while the witness is testifying. The Ryder letter asserts that "FINRA concedes that its arbitrators have not been denying such requests for representation; it just wants to address the situation before it becomes a problem." FINRA continuously reviews its Codes to enhance its case administration processes and to ensure that its forum is fair to all participants. Indeed, FINRA strives to improve the Codes before problems arise. The proposed rule change would close a gap in the Codes relating to non-party witness representation. FINRA believes the proposal will enhance the fairness of FINRA arbitration for witnesses appearing at its forum.

The PIABA letter states that a non-party witness' attorney should only appear on behalf of the witness and suggests that the rules permit objections only on behalf of the witness. That letter further suggests that the rules permit only objections based on generally accepted privileges, such as, attorney-client privilege, work product doctrine, spousal privilege, clergy privilege, and the accountant-client privilege. The PIABA letter also states that FINRA should permit counsel to take steps to protect client interests, but that counsel should be careful not to advocate on behalf of any party to the case. PIABA suggests amending the proposal to state that "Participation of counsel for non-party witnesses will be limited to advocacy on behalf of his or her non-party client, and counsel should not be permitted to engage in argument, questioning, or advocacy on behalf of any party to the proceeding."

FINRA believes that each case presents unique facts and circumstances and the arbitrators are in the best position to determine the appropriate level of participation for an attorney representing a non-party witness. Experience at the forum indicates that when arbitrators have allowed a non-party witnesses' attorney to participate at a hearing, the participation usually involved objections based on generally accepted privileges as described in the PIABA letter. As such, FINRA is proposing to amend the proposal to state that, unless otherwise authorized by the panel, the attorney's role would be limited to the assertion of recognized privileges such as the attorney client and work product privileges, and the privilege against self-incrimination. FINRA believes the amendment would provide additional guidance to parties and arbitrators on the role of a non-party witnesses' attorney, while ensuring that arbitrators retain the authority and flexibility they need to determine the appropriate level of attorney representation at a hearing.

³

See letter from Margo A. Hassan, FINRA Dispute Resolution, dated April 1, 2010.

The proposed rule change is amended as follows. Proposed new language is underlined; proposed deletions are in brackets.

* * * * *

Customer Code

12602. Attendance at Hearings

- (a) The parties and their representatives are entitled to attend all hearings. Absent persuasive reasons to the contrary, expert witnesses should be permitted to attend all hearings.
- (b) An attorney for a non-party witness may attend a hearing while that non-party witness is testifying. [The panel will determine the extent to which the attorney may participate.] Unless otherwise authorized by the panel, the attorney's role is limited to the assertion of recognized privileges, such as the attorney client and work product privileges, and the privilege against self-incrimination. The attorney must be 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) The panel will decide who else may attend any or all of the hearings.

Industry Code

13602. Attendance at Hearings

- (a) The parties and their representatives are entitled to attend all hearings. Absent persuasive reasons to the contrary, expert witnesses should be permitted to attend all hearings.
- (b) An attorney for a non-party witness may attend a hearing while that non-party witness is testifying. [The panel will determine the extent to which the attorney may participate.] Unless otherwise authorized by the panel, the attorney's role is limited to the assertion of recognized privileges, such as the attorney client and work product privileges, and the privilege against self-incrimination. The attorney must be 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) The panel will decide who else may attend any or all of the hearings.

* * * * *

In conclusion, FINRA believes that the proposed rule change would enhance fairness in the arbitration process by ensuring that a non-party witness may be represented by counsel while testifying, and should be approved.

Thank you for the opportunity to respond to the comment letters. If you have any questions, please contact me by telephone at (212) 858-4481 or by email at margo.hassan@finra.org.

Very truly yours,

Margo A. Hassan
Assistant Chief Counsel