This document is scheduled to be published in the
Federal Register on 06/20/2013 and available online at
http://federalregister.gov/a/2013-14683, and on **FDsys.gov**

8011-01p
SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-69761; File No. SR-FINRA-2013-024)

June 13, 2013

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of Proposed Rule Change Relating to Amendments to the Discovery Guide Used in Customer Arbitration Proceedings

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b-4 thereunder,[2] notice is hereby given that on June 3, 2013, Financial Industry Regulatory Authority, Inc. ("FINRA") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been substantially prepared by FINRA. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

FINRA is proposing to amend the Discovery Guide ("Guide") used in customer arbitration proceedings to provide general guidance on electronic discovery ("e-discovery") issues and product cases and to clarify the existing provision relating to affirmations made when a party does not produce documents specified in the Guide. The proposed rule change fulfills FINRA's commitment to review the topics of e-discovery and product cases with the Discovery Task Force ("Task Force") that FINRA established in 2011.[3] FINRA believes that the proposed

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1 15 U.S.C. 78s(b)(1).

2 17 CFR 240.19b-4.

3 In 2011, FINRA received SEC approval to update the Guide (See Securities Exchange Act Rel. No. 64166 (April 1, 2011), 76 Federal Register 19155 (April 6, 2011), File No. SR-FINRA-2010-035). As part of the rule making process, FINRA agreed to establish the Task Force under the auspices of the National Arbitration and Mediation Committee (NAMC). FINRA charged the Task Force with reviewing substantive issues relating to

revisions to the Guide will reduce the number and limit the scope of disputes involving document production in customer cases, thereby improving the arbitration process for the benefit of public investors, broker-dealer firms, and associated persons.

The text of the proposed rule change is available on FINRA's website at http://www.finra.org, at the principal office of FINRA and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, FINRA included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. FINRA has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

Background

The Guide supplements the discovery rules contained in the FINRA Code of Arbitration Procedure for Customer Disputes ("Customer Code"). It includes an introduction which describes the discovery process generally, and explains how arbitrators should apply the Guide in arbitration proceedings. The introduction is followed by two Document Production Lists (Lists), one for firms/associated persons, and one for customers, which enumerate the documents that

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the Guide on a periodic basis to keep the Guide current as products change and new discovery issues arise. FINRA pledged to ask the Task Force to review e-discovery issues and product cases.

parties should exchange without arbitrator or staff intervention. The Guide only applies to customer arbitration proceedings, not to intra-industry cases.

As stated above, in 2011 FINRA updated the Guide and established the Task Force. To fulfill the commitment FINRA made to the SEC during the rulemaking process, the first topics that the Task Force discussed were e-discovery and product cases. The Task Force also reviewed concerns raised by forum users about the affirmation language in the Guide's introduction.

E-Discovery

FINRA considers electronic files to be documents within the meaning of the Guide. As part of the 2011 revisions, FINRA updated the Guide to expressly state that electronic files are documents within the meaning of the Guide and that arbitrators decide any disputes that arise about the form in which a party produces a document. Commenters on the proposed rule change asked FINRA for additional guidance on e-discovery. The Task Force discussed e-discovery over numerous meetings and recommended that FINRA amend the Guide to include general guidelines for arbitrators to consider when deciding disputes relating to the form of production for electronic documents.

FINRA is proposing to amend the Guide's introduction to state that parties are encouraged to discuss the form in which they intend to produce documents and, whenever possible, to agree to the form of production. The provision would require parties to produce electronic files in a "reasonably usable format." The term reasonably usable format would refer, generally, to the format in which a party ordinarily maintains a document, or to a converted format that does not make it more difficult or burdensome for the requesting party to use during a proceeding.

The proposed guidance would also state that when arbitrators are resolving contested motions about the form of document production, they should consider the totality of the circumstances, including:

- For documents in a party's possession or custody, whether the chosen form of production is different from the form in which a document is ordinarily maintained;
- For documents that must be obtained from a third party (because they are not in a party's possession or custody), whether the chosen form of production is different from the form in which the third party provided it; and
- For documents converted from their original format, a party's reasons for choosing a particular form of production; how the documents may have been affected by the conversion to a new format; and whether the requesting party's ability to use the documents is diminished by any change in the documents' appearance, searchability, metadata, or maneuverability.

The third factor would advise arbitrators to consider, among other things, whether a party's ability to use a converted document is diminished by a change in the documents' appearance, searchability, metadata, or maneuverability. If the SEC approves the proposed rule change, FINRA intends to provide arbitrators with guidance on the terms "appearance," "searchability," "metadata," and "maneuverability" in training materials to be posted on FINRA's website. FINRA would include the substance of the following descriptions of each term in the training materials:

- Appearance – In many instances, converting a document from its "native format" (the form in which the electronic file was created) to a hard copy or static format will not affect the appearance of the document. However, that is not always the case. If, for

example, a party prints a Microsoft Word® document ("Word document") and produces it in hard copy, it will look the same. However, a party might configure some native files to print only certain portions of the document. For example, a party could set the print area on a Microsoft Excel® spreadsheet ("Excel spreadsheet") to print only certain rows or columns. A hard copy print-out of such an Excel spreadsheet would contain less information than the native file. Similarly, a hard copy print-out of a Microsoft PowerPoint® presentation may not contain speaker's notes that appear in the electronic file.

- Searchability – Converting a native file may affect the searchability of the document. If a party prints a Word document and produces it in hard copy form, the document is not electronically searchable. In its native form, the contents of a Word document can be searched electronically for key words or information. Static electronic formats may or may not be searchable, depending on how they are converted.
- Metadata – Converting a native file may also affect the availability of metadata. Metadata describes how, when, and by whom electronically stored information ("ESI") was collected, created, accessed, or modified, and how it is formatted. For example, an e-mail contains many pieces of metadata, such as the date and time it was sent, and information about who sent it, and who received it. It is possible to convert a native file to a static format and keep all the metadata attached. It is also possible to produce some, but not all, metadata associated with a native file.
- Maneuverability – Converting a native file into another format may affect the maneuverability of a document – the party's ability to manipulate data using the native application. For example, an Excel spreadsheet in its native format can be sorted and

filtered for data and the user can examine embedded formulas and references. If the Excel spreadsheet is printed or converted to certain formats, that ability is lost.

FINRA recognizes that parties have legitimate reasons for converting documents into different formats, and for requesting particular document formats. For example, a firm may need to convert a document into a particular format to comply with legal requirements to redact personal confidential information, such as customer Social Security numbers. A customer may need a document to contain metadata in order to establish when a broker learned specific information. FINRA believes that requiring production in a reasonably usable format and providing general guidance on e-discovery would provide arbitrators with the flexibility to tailor document production to the needs of each case.

In conjunction with the proposed guidance on e-discovery, FINRA is proposing to amend the Guide's discussion on cost or burden of production. Currently, the Guide states that if the arbitrators determine that the document is relevant or likely to lead to relevant evidence, they should consider whether there are alternatives that can lessen the cost or burden impact, such as narrowing the time frame or scope of an item on the Lists, or determining whether another document can provide the same information. FINRA is mindful of the costs associated with e-discovery and is proposing to amend the cost or burden of production provision to advise arbitrators that they may order a different form of production if it would lessen the cost or burden impact of producing electronic documents. FINRA believes the additional guidance would raise arbitrator awareness of alternative ways to help parties to resolve an e-discovery dispute in a cost effective manner.

Product Cases

In its 2011 order approving revisions to the Guide, the SEC noted that several commenters raised concerns that the revised Guide does not sufficiently address product cases, as described below.[4] In response to these concerns, FINRA agreed to ask the Task Force to consider the topic. The Task Force recognized that product cases are unique customer cases that differ from other customer cases in several ways and recommended that FINRA add general guidelines to the Guide which describe how product cases are different from other customer cases and which outline the types of documents that parties typically request in such cases.

FINRA is proposing to amend the Guide's introduction to add guidance on product cases. The Guide would state that a product case is one in which one or more of the asserted claims centers around allegations regarding the widespread mismarketing or defective development of a specific security or specific group of securities. The Guide would enumerate some of the ways that product cases are different from other customer cases, including that:

- The volume of documents tends to be much greater;
- Multiple investor claimants may seek the same documents;
- The documents are not client specific;
- The product at issue is more likely to be the subject of a regulatory investigation;
- The cases are more likely to involve a class action with documents subject to a mandatory hold;[5]

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[4] Supra Note 3.

[5] A mandatory hold is an act by an entity to preserve documents and electronic information relevant to a lawsuit or government investigation.

- The same documents may have been produced to multiple parties in other cases involving the same security or to regulators; and
- Documents are more likely to relate to due diligence analyses performed by persons who did not handle the claimant's account.

The Guide would explain that the two existing Lists may not provide all of the documents parties typically request in a product case relating to, among other things, a firm's: creation of a product; due diligence reviews of a product; training on or marketing of a product; or post-approval review of a product. The text would emphasize that, in a product case, parties are not limited to the documents enumerated in the Lists. It would also emphasize that the Customer Code provides a mechanism for parties to seek additional documents. Finally, the Guide would explain that parties do not always agree on whether a case is a product case, and the arbitrators may ask the parties to explain their rationale for asserting that a case is, or is not, a product case.

FINRA staff considered adding an item to the firm/associated person List that would enumerate specific documents that firms/associated persons would be required to produce when a customer alleged that a claim was a product case. Staff was mindful of the economic impact on firms that is associated with the larger volume of documents in product cases and rejected that approach. Instead, FINRA is proposing general guidelines on the types of documents that customers typically request in products cases because general guidelines would encourage parties to discuss their discovery needs and would encourage arbitrators to be flexible when making a determination on whether to order additional production.

Affirmations

The Guide provides for affirmations when a party indicates that there are no responsive documents in the party's possession, custody, or control. The affirmation language provides

that, upon the request of a party seeking documents, the customer, or appropriate person at the firm who has knowledge, must state that the party conducted a good faith search for the documents, describe the extent of the search, and state that based on the search there are no requested documents. Forum users raised concerns that the language creates a "loop hole" in which parties might assert that they are only required to provide an affirmation relating to production when *no* documents are produced, as opposed to situations where there is partial production. Some users were also concerned that parties might affirm that they did not find documents where they looked as opposed to looking for documents in all appropriate places. The Task Force discussed the forum users' concerns and recommended that FINRA amend the affirmation language to add clarity to the provision.

To respond to these concerns, FINRA is proposing to amend the affirmation language to make it clear that a party may request an affirmation when an opposing party makes only a partial production. The revised language would provide that, if a party does not produce a document specified in the Document Production Lists, upon the request of the party seeking the document that was not produced, the customer or the appropriate person at the brokerage firm who has knowledge must affirm in writing that the party conducted a good faith search for the requested document. FINRA is also proposing to require a party to state the sources searched in the affirmation. FINRA believes the proposed revision would add clarity to the affirmation text and reduce disputes over requests for affirmations.

Clarifying Amendments

FINRA is proposing to add additional sub-headings to the Guide's introduction to break the introduction into distinct sections that address specific concerns. The new headings would be: Flexibility in Discovery; Cost or Burden of Production; Requests for Additional Documents;

Form of Production; and Product Cases. FINRA believes the new headings will add clarity to the Guide.

FINRA is proposing to move the sentence that reads: "[w]here additional documents are relevant in a particular case, parties can seek them in accordance with the time frames provided in the 12500 series of rules" to the section that would be titled Requests for Additional Documents. FINRA also proposes to add the phrase "may be" before relevant to reflect that relevancy is not always established at the time that a party requests additional documents. Finally, FINRA proposes to amend the sentence in that paragraph that states that "[a]rbitrators must use their judgment in considering requests for additional documents and may not deny document requests on the grounds that the documents are not expressly listed in the Discovery Guide" to add the term "solely" before the phrase "on the grounds." FINRA believes that adding "solely" adds clarity to the Guide by ensuring that arbitrators understand that they should not automatically sustain an objection to production because a document is not expressly listed in the Guide.

2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,[6] which requires, among other things, that FINRA rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. FINRA believes that the proposed rule change will reduce the number and limit the scope of disputes involving document production in customer cases, thereby improving the arbitration process for the benefit of public investors, broker-dealer firms, and associated persons.

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[6] 15 U.S.C. 78o-3(b)(6).

B. Self-Regulatory Organization's Statement on Burden on Competition

FINRA does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. FINRA considered the potential impact of the proposed rule change on efficiency, competition, and capital formation. FINRA is concerned that production relating to e-discovery and product cases can be time-consuming and costly for parties. The proposed revisions to the Guide would provide parties and arbitrators with guidance on how to handle e-discovery matters and document production relating to product cases in a flexible, efficient, and cost effective manner. The proposal would also clarify the provisions relating to affirmations and should reduce the inefficiency associated with disputes concerning affirmations.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) by order approve or disapprove such proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's Internet comment form (http://www.sec.gov/rules/sro.shtml); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-FINRA-2013-024 on the subject line.

Paper Comments:

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-FINRA-2013-024. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (http://www.sec.gov/rules/sro.shtml). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F

Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of FINRA. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-FINRA-2013-024 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[7]

Elizabeth M. Murphy
Secretary

[FR Doc. 2013-14683 Filed 06/19/2013 at 8:45 am; Publication Date: 06/20/2013]

[7] 17 CFR 200.30-3(a)(12).