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Page 1 of * 13

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

File No.* SR - 2013 - * 024
Amendment No. (req. for Amendments *) 1

Filing 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) * ☐

Pilot ☐

Extension of Time Period for Commission Action * ☐

Date Expires *

Rule

- ☐ 19b-4(f)(1)
- ☐ 19b-4(f)(2)
- ☐ 19b-4(f)(3)
- ☐ 19b-4(f)(4)
- ☐ 19b-4(f)(5)
- ☐ 19b-4(f)(6)

Notice of proposed change pursuant to the Payment, Clearing, and Settlement Act of 2010

Section 806(e)(1) ☐ Section 806(e)(2) ☐

Security-Based Swap Submission pursuant to the Securities Exchange Act of 1934

Section 3C(b)(2) ☐

Exhibit 2 Sent As Paper Document ☐ Exhibit 3 Sent As Paper Document ☐

Description

Provide a brief description of the action (limit 250 characters, required when Initial is checked *).

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 action.

First Name * Margo Last Name * Hassan

Title * Assistant Chief Counsel, FINRA Dispute Resolution

E-mail * margo.hassan@finra.org

Telephone * (212) 858-4481 Fax (301) 527-4761

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.

Date 09/04/2013

By Kenneth Andrichik

(Name *)

(Title *)

Senior VP, Chief Counsel, FINRA Dispute Resolution

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.

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SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

For complete Form 19b-4 instructions please refer to the EFFS 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 1A- Notice of Proposed Rule Change, Security-Based Swap Submission, or Advance Notice by Clearing Agencies

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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, security-based swap submission, or advance notice 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.

Financial Industry Regulatory Authority

September 4, 2013

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

Re: File No. SR-FINRA-2013-024 – Proposed Rule Change Relating to Amendments to the Discovery Guide Used in Customer Arbitration Proceedings; Response to Comments and Partial Amendment No. 1

Dear Ms. Murphy:

The Financial Industry Regulatory Authority, Inc. ("FINRA") 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 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.[1]

The SEC received 18 comment letters on the proposed rule change with 16 of the commenters expressing support, in whole or in part, for the amendments.[2] Several commenters suggest further revisions to the Guide as detailed below.

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[1] See Securities Exchange Act Rel. No. 69761 (June 13, 2013), 78 FR 37261 (June 20, 2013) (File No. SR-FINRA-2013-024).

[2] Comment letters were submitted by Steven B. Caruso, Esq., Maddox Hargett & Caruso, P.C., dated June 20, 2013 ("Caruso letter"); John R. Snyder and Matthew C. Applebaum, Bingham McCutchen LLP, dated July 8, 2013 ("Snyder and Applebaum letter"); Matthew W. Woodruff, Esq., Attorney at Law, dated July 10, 2013 ("Woodruff letter"); Katrina Boice, Aidikoff, Uhl and Bakhtiari, dated July 10, 2013 ("Boice letter"); Leonard Steiner, Attorney, dated July 10, 2013 ("Steiner letter"); Debra G. Speyer, Esq., dated July 10, 2013 ("Speyer letter"); Seth E. Lipner, Professor of Law, Zicklin School of Business, Baruch College, Member Deutsch & Lipner, dated July 11, 2013 ("Lipner letter"); Jill I. Gross, Director, Crystal Green, Student Intern, Susan Papacostas, Student Intern, Investor Rights Clinic, Pace University School of Law, dated July 11, 2013 ("Pace letter"); Glenn S. Gitomer, McCausland Keen & Buckman, dated July 11, 2013 ("Gitomer letter"); Victoria Mikhelashvili, Legal Intern, Nathaniel R. Torres, Legal Intern, and Christine Lazaro, Director, Securities Arbitration Clinic, St. Vincent DePaul Legal Program, Inc., St. John's University School of Law, dated July 11, 2013 ("St. John's Letter"); Mary Alice McLarty, President, American Association for Justice, dated July 11, 2013 ("AAJ letter"); Carl J. Carlson, Tousley Brain Stephens, PLLC, dated July 11, 2013 ("Carlson letter"); Scott Silver, Silver Law Group, dated July 11, 2013 ("Silver letter"); Scott C.

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E-Discovery

The main principle incorporated into the proposed guidance on e-discovery is that parties would be required to produce electronic documents in a reasonably usable format. Several commenters express support for this tenet.[3] Commenters also state that the guidance will help streamline e-discovery, improving efficiency at the forum.[4] Several commenters suggest revisions to the new e-discovery text.

The Woodruff letter suggests several revisions to the e-discovery language. It asserts that production of a document in one format should not preclude its production in other formats, and states that a party should be permitted to seek production of a document in the format in which it was given to the customer and also in a summary format. The Woodruff letter suggests that, at the request of the customer, FINRA should require a firm to produce a document in any/all of the formats that the firm makes available to customers online.

The hallmark of discovery in the FINRA forum is cooperation between the parties. The Code of Arbitration Procedure for Customer Disputes ("Customer Code") requires parties to cooperate to the fullest extent practicable in the exchange of documents to expedite the arbitration.[5] In addition, the proposed amendments to the Guide state that "parties are encouraged to discuss the form(s) in which they intend to produce documents… and, whenever possible, agree to the form(s) for production." FINRA expects the parties to discuss their discovery needs and parties may agree to provide documents in a summary format. However, under the Guide parties are not required to create documents that are not already in their possession, custody or control.[6] As stated above, the proposed text would require parties to

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Ilgenfritz, President, Public Investors Arbitration Bar Association, dated July 11, 2013, ("PIABA letter"); David T. Bellaire, Esq., Executive Vice President and General Counsel, Financial Services Institute, dated July 11, 2013 ("FSI letter"); Dale Ledbetter, Ledbetter & Associates, P.A., dated July 11, 2013 ("Ledbetter letter"); Brian Smiley, Smiley Bishop Porter, LLP, dated July 11, 2013 ("Smiley letter"); and Peter Mougey, Levin, Papantonio, Thomas, Mitchell, Rafferty, & Proctor, P.A., dated July 11, 2013 ("Mougey letter"). The Woodruff and Carlson letters are silent on whether the commenters support or oppose the proposed rule change.

[3] See the Caruso, Snyder and Applebaum, Speyer, Lipner, Pace, Gitomer, St. John's, Smiley, and Mougey letters.

[4] See the Boice, Speyer, and FSI letters.

[5] See FINRA Rule 12505 – Cooperation of Parties in Discovery.

[6] The Guide provides, in the section titled *No Obligation of Create Documents*, that "[p]arties are not required to create documents in response to items on the Lists that are not already in the parties' possession, custody, or control." To the extent that a summary format would require a party to create a new document, a party would not be required to do so under the

produce electronic files in a reasonably usable format. FINRA believes that requiring cooperation in discovery, and requiring parties to produce documents in a reasonably usable format, will ensure that parties are able to get the documents they need in a suitable format. Therefore, FINRA declines to amend the proposal as requested in the Woodruff letter.

The Woodruff letter asks FINRA to add "the size of the proceeding and the relative resources of the parties" to the list of factors that arbitrators consider when they are determining whether electronic files have been produced in a reasonably usable format. The Pace letter urges FINRA "to train its arbitrators that customers of limited means may have difficulty producing documents in any format other than hard copy." The St. John's letter asks FINRA to state in the Guide that parties are expected to discuss keywords, phrases, or other words that are to be used in a search prior to production. FINRA believes that these concerns are best addressed in arbitrator training, and agrees to discuss these concerns in its arbitrator training materials if the SEC approves the proposed rule change. FINRA publishes its training materials on the FINRA website and all forum users have access to the materials.

The proposed text states that "reasonably usable format refers, 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 Woodruff letter requests that FINRA replace the phrase "during a proceeding" with "in connection with the arbitration" to clarify that the requirement applies to all pre-hearing phrases of the arbitration and is not limited to the arbitration hearing itself. FINRA intended the requirement to apply all phases of the proceeding and agrees to amend the Guide text as follows:

* * * * *

Form of Production

The parties are encouraged to discuss the form(s) in which they intend to produce documents (hard copy production or electronic production in its original format or some other format) and, whenever possible, agree to the form(s) of production. Both hard copy documents and electronic files are "documents" within the meaning of the Discovery Guide. Parties must produce electronic files in a reasonably usable format. The term reasonably usable format refers, generally, to the format in which a party ordinarily maintains a document, or to a converted format that does not make it more

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Guide. FINRA is not proposing to amend the portion of the Guide relating to the creation of documents.

difficult or burdensome for the requesting party to use **[**during a proceeding**]** <u>in connection with the arbitration</u>.

* * * * *

The proposed rule change directs arbitrators to consider certain factors when determining whether documents are being produced in a reasonably usable format including "whether the requesting party's ability to use the documents is diminished by a change in the documents' appearance, searchability, metadata, or maneuverability." The Woodruff letter asks FINRA to replace the term "maneuverability" with the term "versatility." FINRA defined the term maneuverability as "the party's ability to manipulate data using the native application" and believes the term is appropriate in the described context. Therefore, FINRA declines to amend the Guide as proposed in the Woodruff letter.

The AAJ letter raises a concern that allowing arbitrators to determine the relevance of documents as well as to consider alternatives to e-discovery will make it more difficult for plaintiffs to discover relevant information. The AAJ letter also states that FINRA should not limit the parties' ability to collect electronic documents and suggests that FINRA use the Federal Rules relating to e-discovery as a guidepost for discovery.

FINRA staff believes that the arbitrators are in the best position to manage the discovery process and to determine the relevance of requested documents. The current Guide emphasizes the arbitrators' flexibility in the discovery process and encourages arbitrators to tailor discovery orders to the facts and circumstances of the case. The new guidance directs arbitrators to consider the totality of the circumstances when resolving contested motions relating to the form of production and requires parties to produce electronic documents in a reasonably usable format. FINRA staff believes that the proposed rule change will ensure that the arbitration process remains efficient and cost effective. Moreover, none of the proposed guidance conflicts with the Federal Rules cited in the AAJ letter.[7] For the reasons

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[7] The AAJ letter states that "Rule 26(f), adopted in 1980, requires the parties to meet and confer early in the case to develop a discovery plan. Rule 26(g), adopted in 1983, directs that an attorney signing a discovery request or response certifies that it is proper under the rules. Perhaps most importantly, Rule 26(b)(2)(C) adopted limitations on the frequency of discovery and provides that "the court must limit the frequency or extent of discovery" if:

(i) The discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;
(ii) The party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or
(iii) The burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties'

stated, FINRA declines to amend the proposed rule change as suggested in the AAJ letter.

The Carlson letter raises a concern that under the proposal, parties will not know if an opposing party reformatted a document prior to production. The commenter requests that FINRA include language in the Guide to the effect that the producing party must state whether or not the documents being produced are in the format in which they are ordinarily maintained, or in the case of documents obtained from a third party, the format in which the third party provided them. If a party produces them in a different format, the party should explain the differences in detail sufficient for the recipient to understand their significance, including whether the party omitted any information from the original format.

The proposed rule text encourages parties to discuss the form in which they intend to produce documents and to agree to the form whenever possible. When arbitrators are resolving disputes relating to the form of production, the Guide instructs them to consider whether the form of production is different from the form in which the document is ordinarily maintained, and whether it is different from the form that was received from a third party. If a party converts a document, the Guide directs the arbitrators to consider, among other things, a party's reasons for choosing a particular form of production, and how the documents may be affected by the conversion. FINRA staff believes that the proposed text already addresses the commenter's concern. Therefore, FINRA declines to amend the proposal as requested in the Carlson letter.

The Mougey letter states that the proposed guidance is vague as to production protocols and suggests that it state that if parties are unable to reach an agreement as to production protocols, the responding party must produce an electronic document in the form in which it is ordinarily maintained (native format) or in a reasonably usable format. As stated above, under the proposed rule change, parties must produce electronic documents in a reasonably usable format in all instances. Further, FINRA believes its proposed definition of reasonably usable – the format in which a party ordinarily maintains a document, or a converted format that does not make it more difficult or burdensome to use – gives parties and arbitrators clear direction on the standard for reasonably usable. Therefore, FINRA declines to amend the proposed rule change as suggested in the Mougey letter.

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resources, the importance of the issues at stake in the action and the importance of the discovery in resolving the issues."

Cost or Burden of Production

In conjunction with the proposed guidance on e-discovery, FINRA proposed to amend the Guide's language on cost or burden of production. Currently, the Guide provides that if a party *demonstrates* that the cost or burden of production is disproportionate to the need for the document, the arbitrators should determine if the document is relevant, or likely to lead to relevant evidence. 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 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. To address constituent concerns about the costs associated with e-discovery, FINRA proposed to add to the alternatives already enumerated that arbitrators may order a different form of production.

Several commenters addressed the new alternative. One commenter objects to the addition.[8] Three commenters ask for more specificity on how parties would be required to make a demonstration.[9] One commenter believes that FINRA should require firms making objections based on cost or burden to be specific and to submit an affidavit with their objection[10] and another commenter recommends requiring an affirmation.[11] One commenter recommends that the text state that firm objections as to the cost or burden of e-discovery must be highly scrutinized.[12] Finally, one commenter suggests that FINRA educate its arbitrators about the wisdom of making parties substantiate cost and burden objections.[13]

FINRA Rule 12508 provides that if a party objects to producing documents enumerated in the Document Production Lists or pursuant to a request made under FINRA Rule 12507 (Other Discovery Requests), the party must explain, in writing, why the party is objecting to production. Like any other objection, a party objecting to production on the basis of cost or burden must make the required explanation to the arbitrators. It is then the arbitrators' duty to determine if the party's demonstration is sufficient or if an affidavit or affirmation should be required. FINRA staff believes that its arbitrator training materials are sufficient to make arbitrators aware of their

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[8] See the AAJ letter.

[9] See the Speyer, Pace and St. John's letters.

[10] See the PIABA letter.

[11] See the Caruso letter.

[12] See the Mougey letter.

[13] See the Smiley letter.

obligation to require parties to substantiate cost and burden objections. FINRA staff also believes the Customer Code and the Guide are sufficient to ensure that parties are required to support their objections and declines to amend the Guide as suggested by the commenters.

Product Cases

FINRA is proposing to add general guidance which describes how product cases are different from other customer cases and which describes the types of documents that parties typically request in such a case. Several commenters express support for the new guidance,[14] with commenters noting as beneficial the understanding that parties typically request certain types of documents in product cases that may not be included in the Document Production Lists.[15] Several commenters suggest revisions to the new language on product cases.

Three commenters recommend that FINRA adopt a Document Production List specific to product cases.[16] The Pace letter asserts that without a list of presumptively discoverable documents, arbitrators could perceive the documents as less discoverable. The St. John's letter raises a concern that by including the types of documents that parties typically request in the introduction, FINRA has created a new category of documents which might be confusing for arbitrators and customers.

As stated in the rule filing, FINRA staff considered adding an item to the firm/associated person Document Production List relating to product cases and determined that adopting general guidance would be better. FINRA staff noted the economic impact on firms that is associated with the larger volume of documents in product cases as one reason for providing general guidance instead of a list of presumptively discoverable documents. In addition, staff believes that the threshold issue of whether a claim centers around a product must be resolved before the parties can discuss which documents they need to establish their case. Therefore, having a list of presumptively discoverable documents for parties to exchange without arbitrator or staff intervention might not be appropriate in the context of products cases. For the reasons stated, FINRA declines to amend the proposal as suggested by the commenters.

The Snyder and Applebaum letter recommends that FINRA specify in the Guide that, in deciding whether to order the production of product specific documents at the request of a customer, arbitrators should take into account the cost or burden of production as discussed elsewhere in the Guide. Similarly, the FSI letter asks

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[14] See the Caruso, Boice, Speyer, Pace, Gitomer, Silver, PIABA, FSI, and Smiley letters.

[15] See the Caruso, Boice, Speyer, Gitomer, and PIABA letters.

[16] See the Pace, St. John's and Mougey letters.

FINRA to include language reminding arbitrators that they should take into account the cost or burden of production when deciding whether to compel production of voluminous e-discovery in product cases. As described above, and noted in the Snyder and Applebaum letter, FINRA instructs arbitrators on how to handle objections based on the cost or burden of production in its introductory guidance. This guidance is general, and FINRA expects arbitrators to apply it as appropriate throughout the discovery process. If the SEC approves the proposed rule change, FINRA intends to publish arbitrator training materials specific to product cases. The training materials would address the cost or burden issue in this context. For the reasons stated, FINRA declines to amend the proposal as suggested.

In describing how product cases are different from other cases, the proposed guidance provides that the product at issue is more likely to be the subject of a regulatory investigation and also that the documents may have been produced to multiple parties in other cases involving the same security or to regulators. The Snyder and Applebaum letter suggests that the language specify that FINRA does not intend to sanction "shortcut" discovery requests for production made in other cases or in response to a regulatory request. As stated above, the Customer Code and the Guide require parties to cooperate in discovery. If a party objects to a request because it is overly broad and/or it lacks appropriate specificity, the parties should discuss the issue. If the parties fail to resolve their discovery issue, FINRA staff believes that the party objecting to production has the responsibility of articulating the objection. Therefore, FINRA declines to amend the proposal as suggested.

The proposed guidance lists several ways that product cases differ from other customer cases. The Snyder and Applebaum letter asks FINRA to recognize that the presence of the enumerated differences may not justify a threshold finding that a claim is a product case. The proposed text also describes the types of documents that parties typically request in products cases. The Snyder and Applebaum letter asserts that the list should not be the touchstone for what is relevant and/or discoverable in a product case. FINRA staff disagrees with the commenter's assertions. FINRA designed the proposed guidance to educate parties and arbitrators about product cases, and, where the parties disagree about whether a claim centers around a product, to provide a mechanism for arbitrators to make a threshold determination that a claim is, or is not, a product case. If the arbitrators determine that a claim is a product case, FINRA included the description of the types of documents that parties typically request in these cases to signal to the arbitrators that discovery in product cases might reasonably go beyond the documents enumerated in the Document Production Lists. For these reasons, FINRA declines to amend the proposal as suggested.

The Mougey letter raises a concern that firms may try to limit product discovery to information given to the claimant or communications regarding the claimant, rather than to information or communications relating to the product. The

commenter asserts that specific guidance is needed regarding the appropriate scope of discovery in product cases. FINRA believes that the proposed rule change responds to the commenter's concerns. It explains how products cases are different from other customer cases, including that: 1) the documents are not client specific; and 2) the documents are more likely to relate to due diligence analyses performed by persons who did not handle the claimant's account. Further, FINRA has instructed arbitrators that the scope for discovery in the forum is whether a document is relevant or likely to lead to relevant evidence.[17] For these reasons, FINRA declines to amend the proposed rule change as suggested in the Mougey letter.

Affirmations

Pursuant to the Guide, if a party indicates that there are no responsive documents in the party's possession, custody, or control, at the request of the party seeking production, the producing party must provide an affirmation concerning the efforts made to search for the requested documents. The text also states that arbitrators may order affirmations regarding discovery requests for documents beyond those contained in the Guide. 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. The proposed rule change would amend the affirmation language to, among other things, make it clear that a party could be required to submit an affirmation in instances where a party makes a partial production.

Four commenters believe that the affirmation language in the Guide should not distinguish between documents on the Document Production Lists and additional documents requested. The commenters ask FINRA to amend the Guide to also require parties to submit an affirmation at the request of a party seeking additional documents as opposed to providing that arbitrators may order an affirmation regarding additional documents.[18] One commenter supports maintaining the distinction between documents on the Document Production Lists and additional documents.[19] The commenter notes that the documents enumerated on the Document Production Lists were subject to SEC review and a public comment period. Any additional documents requested were not subject to the same process.

FINRA believes that the proposed rule change is an important step toward improving the Guide language on affirmations and should be approved by the SEC at

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[17] See the Arbitrator's Guide (at page 34) and the *Discovery Abuses & Sanctions* Training. Both documents are available on FINRA's website at http://www.finra.org.

[18] See the Caruso, Speyer, Pace, and St. John's letters.

[19] See the Snyder and Applebaum letter.

this time. The concerns raised by the commenters require additional analysis and consideration. Therefore, while FINRA declines to amend the proposal as suggested by the commenters, FINRA agrees to discuss the comments with the Discovery Task Force ("Task Force") and to monitor experience with the amended rule language. Thereafter, FINRA staff would consider whether to seek FINRA Board approval of additional amendments to the affirmation language.

The Snyder and Applebaum letter suggests that FINRA include additional language to confirm that the proposed amendments are not intended to result in affirmations being required in virtually every case. FINRA staff believes that the Customer Code and the Guide requirements relating to cooperation in discovery are sufficient to ensure that parties do not routinely require affirmations. Therefore, FINRA declines to amend the proposal as suggested in the Snyder and Applebaum letter.

The St. John's letter asks FINRA to amend the Guide to require a producing party to supply the exact words that they used in an electronic search for documents so that the parties can determine if the search was appropriately comprehensive. FINRA staff believes that the parties should discuss their search terms. However, staff believes that the topic should be addressed in arbitrator training, rather than in the affirmation language in the Guide. Therefore, FINRA declines to further amend the affirmation language. If the SEC approves the proposed rule change, staff will include a discussion on search terms in the arbitrator training on e-discovery.

Training Materials

The Snyder and Applebaum letter raises a concern that text in FINRA's arbitrator training course titled *Discovery, Abuses & Sanctions*, was published ahead of SEC approval of the proposed rule change. The training indicates that the types of discovery materials relating to a firm's due diligence materials, sales literature and sales training materials for non-conventional investments may extend beyond the categories of items identified in the Guide for conventional investments. The training goes on to specify that while not all of these documents are specifically identified as presumptively discoverable in the Guide, they may or may not be relevant to claims and defenses.[20] FINRA staff adopted the training course language at issue in March 2012. FINRA did not draft the language in conjunction with the proposed rule change. In its continuing efforts to prepare arbitrators to address the issues that come before them, at the recommendation of the Task Force, FINRA published this brief guidance to address, generally, the unique nature of product cases. FINRA has, however, drafted detailed arbitrator training materials on product cases and will post them to the website if the SEC approves the proposed rule change. The training materials would be consistent with the approved guidance on product cases.

[20] See the *Discovery Abuses & Sanctions* Training (at page 6).

Monitoring Implementation

The PIABA letter recommends that the Task Force monitor the implementation of the proposed guidance, including the polling of arbitrators and claimants' counsel, and suggests possible follow-up action if general guidance proves insufficient. The Smiley letter encourages FINRA and the SEC to monitor the extent to which the proposed amendments satisfy the parties' discovery needs. FINRA staff agrees that FINRA should monitor implementation of the proposed rule change. After FINRA gains experience with the new guidance, staff would work with the Task Force to design a survey for parties and arbitrators that would gauge the success of the new guidance. Thereafter, FINRA would consider next steps.

Conclusion

The comment letters express broad support for amending the Guide to add new guidance on e-discovery issues and product cases and for adding clarifying language relating to affirmations. FINRA staff drafted this response to comments in consultation with the Task Force. If the SEC approves the proposed rule change, FINRA will consult with the Task Force on its training materials, and will continue to work with the Task Force to monitor implementation of the rule amendments. FINRA staff will share the results of its survey with the Task Force and consider any recommendations the Task Force makes for further improvements to the Guide. FINRA believes that the proposed rule change will reduce the number and limit the scope of disputes involving document production in customer cases and will improve the arbitration process for all forum users. FINRA requests that the SEC approve the proposed rule change, with the additional amendment requested above.

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
FINRA Dispute Resolution