

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹²

Brent J. Fields,
Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-79296; File No. SR-FINRA-2016-029]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Order Approving Rule Change Amending the Code of Arbitration Procedure for Customer Disputes and the Code of Arbitration Procedure for Industry Disputes To Require All Parties Other Than Pro Se Customers To File and Serve Pleadings and Documents Through the FINRA Office of Dispute Resolution's Party Portal and To Permit Mediation Parties To Use the Portal

November 14, 2016.

I. Introduction

On July 27, 2016, Financial Industry Regulatory Authority, Inc. ("FINRA") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Exchange Act")¹ and Rule 19b-4 thereunder,² a proposed rule change to amend the Code of Arbitration Procedure for Customer Disputes ("Customer Code") and the Code of Arbitration Procedure for Industry Disputes ("Industry Code") and, together with the Customer Code, "Codes"), to require all parties, except customers who are not represented by an attorney or other person ("pro se customers"), to use the FINRA Office of Dispute Resolution's Party Portal ("Party Portal") to file initial statements of claim and to file and serve pleadings and other documents on FINRA or any other party. Under the proposed rule change, FINRA would require parties to use the Party Portal to file and serve correspondence relating to discovery requests, but would not permit parties to file documents produced in response to discovery requests through the Party Portal. FINRA is also proposing to amend the Code of Mediation Procedure ("Mediation Code") to permit mediation parties to agree to use the Party Portal to submit and retrieve all documents and other communications. In addition,

FINRA is revising other provisions in the Codes to conform to existing practice.

The proposed rule change was published for comment in the **Federal Register** on August 17, 2016.³ The public comment period closed on September 7, 2016. On September 26, 2016, FINRA extended the time period in which the Commission must approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to approve or disapprove the proposed rule change to November 15, 2016.⁴ The Commission received five comment letters in response to the Notice.⁵ On October 28, 2016, FINRA responded to the comment letters received in response to the Notice.⁶ This order grants approval of the proposed rule change.

II. Description of the Proposed Rule Change⁷

Background

In 2004, FINRA implemented an online, web-based arbitration claim notification and filing system that allowed a claimant⁸ or claimant's counsel to file voluntarily an arbitration

claim through that system ("online claim filing system").⁹ Currently, the Codes allow a claimant to file a claim¹⁰ either in hard copy or by using the online claim filing system.¹¹ The online claim filing system allows a claimant to complete forms, submit documents, and pay filing fees online.

In June 2013, FINRA introduced a separate secure, online service called the Dispute Resolution Portal ("DR Portal") to facilitate interactions among parties, arbitrators, mediators, and FINRA staff on arbitration case-related matters. As further discussed below, the DR Portal includes both a Party Portal and an Arbitrator and Mediator Portal. The Party Portal uses an invitation/registration process that provides a way to send and receive arbitration and mediation case documents. For example, once a party notifies FINRA of the name of the person who should be given access to the arbitration or mediation case file (typically the party's representative), FINRA sends an email to the named person with an invitation to register on the Party Portal via a personalized web address link that provides complete access to the specified case. Once registered, the representative can provide other individuals (such as legal assistants and co-counsel) with access to appropriate cases on the Party Portal.

FINRA initially opened the Party Portal to a small number of firms to gain experience with the technology and to incorporate user feedback. Over time, FINRA expanded access to the Party Portal, and as of July 20, 2015, FINRA allowed all parties to use the Party Portal voluntarily in all arbitration and mediation cases filed as of that date. Through the Party Portal, parties can, among other things, receive documents from and send documents to FINRA, receive service¹² of a claim, submit an answer to a claim, submit additional case documents, view the status of a case, and select arbitrators.

FINRA has periodically upgraded the Party Portal to allow parties to, among other things, schedule hearings, receive automated messages when new documents are posted, see an indication of received documents not yet viewed, and send documents to other Party Portal case participants. FINRA believes that using the online claim filing system improves the forum by hastening the

³ See Exchange Act Release No. 78549 (Aug. 11, 2016), 81 FR 54858 (Aug. 17, 2016) (File No. SR-FINRA-2016-029) ("Notice").

⁴ See Letter from Margo A. Hassan, Associate Chief Counsel, FINRA, to Lourdes Gonzalez, Assistant Chief Counsel—Sales Practices, Division of Trading and Markets, Securities and Exchange Commission, dated September 26, 2016.

⁵ See Letters from Steven B. Caruso, Maddox Hargett & Caruso, P.C., dated August 12, 2016 ("Caruso Letter"); David Lagziel, CEO, Conflictteam, dated August 30, 2016 ("Conflictteam Letter"); David T. Bellaire, Executive Vice President and General Counsel, Financial Services Institute ("FSI"), dated September 7, 2016 ("FSI Letter"); Nicole Iannarone, Assistant Clinical Professor, and Michael F. Williford, Student Intern, Investor Advocacy Clinic ("IAC"), Georgia State University College of Law, dated September 7, 2016 ("IAC Letter"); and Hugh Berkson, President, Public Investors Arbitration Bar Association ("PIABA"), dated September 7, 2016 ("PIABA Letter"). The comment letters are available on FINRA's Web site at <http://www.finra.org>, at the principal office of FINRA, at the Commission's Web site at <https://www.sec.gov/comments/sr-finra-2016-029/finra2016029.shtml>, and at the Commission's Public Reference Room.

⁶ See Letter from Margo A. Hassan, Associate Chief Counsel, FINRA, to Brent J. Fields, Secretary, Securities and Exchange Commission, dated October 28, 2016 ("FINRA Letter"). The FINRA Letter is available on FINRA's Web site at <http://www.finra.org>, at the principal office of FINRA, at the Commission's Web site at <https://www.sec.gov/comments/sr-finra-2016-029/finra2016029.shtml>, and at the Commission's Public Reference Room.

⁷ The subsequent description of the proposed rule change is substantially excerpted from FINRA's description in the Notice. See Notice, 81 FR 54858-66.

⁸ See Rules 12100(e) and 13100(e). The term "claimant" means a party that files the statement of claim that initiates an arbitration proceeding.

⁹ See Notice to Members 04-56.

¹⁰ See Rules 12302(a) and 13302(a).

¹¹ See FINRA, Arbitration Online Claim Filing, available at <http://www.finra.org/arbitration-and-mediation/online-claim-filing>.

¹² Service is the process of delivering a pleading (e.g., the statement of claim or answer) or other documents to the opposing party.

¹² 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

processing of claims, and reducing the burden of using hard-copy documents by parties and FINRA staff. Accordingly, FINRA believes that it would be appropriate to require parties, with limited exceptions, to use the Party Portal on a mandatory basis.

The Arbitrator and Mediator Portal is open to all FINRA arbitrators and mediators to use on a voluntary basis. In this portal, arbitrators and mediators can view and update their profile and disclosure information, access information about their assigned cases, schedule hearing dates, and view case documents. FINRA believes that use of the Arbitrator and Mediator Portal has enhanced efficiencies at the forum.

Proposed Rule Change

FINRA is proposing to require parties to use the Party Portal to submit documents and view their arbitration case information and documents in most instances. There would be an exception for *pro se* customers.¹³ FINRA would invite *pro se* customers to use the Party Portal, but would not require them to do so. However, if a *pro se* customer files a claim using the Party Portal, then FINRA would require the customer to use the Party Portal for the duration of the arbitration process.

FINRA would require parties to use the Party Portal to file and serve correspondence relating to discovery requests, but would not permit parties to file documents produced in response to discovery requests through the Party Portal. FINRA believes that maintaining the correspondence in the Party Portal makes sense because it is part of the case record. However, depending on the subject of a case, discovery production can be voluminous, and FINRA does not believe it would be efficient for the Party Portal to be used as the receptacle for parties' exchanged discovery. FINRA states that this approach is consistent with its current practice.

Finally, under the proposed rule change, because mediation is voluntary in all instances, FINRA would permit parties to a mediation proceeding to use the Party Portal on a voluntary basis to submit and view their mediation case information and documents.

FINRA is proposing to amend each of the rules in the Codes affected by required use of the Party Portal. The changes would update the rule language

¹³ FINRA would define *pro se* in the Customer Code as a party that is not represented by an attorney or others during an arbitration or mediation. FINRA would not define *pro se* in the Industry Code. Under the proposed rule change, FINRA would not exempt *pro se* parties from the requirement under the Industry Code to submit documents through the Party Portal.

to reflect how parties comply with the Codes through use of the Party Portal. FINRA Rules 12300 and 13300 describe how parties file pleadings¹⁴ and documents with FINRA and serve pleadings and documents on other parties through the Party Portal. The terms "file" and "serve"—terms associated with use of the Party Portal—are used throughout the Codes. Under the proposed rule change, when a party submits pleadings or documents through the Party Portal, the party would accomplish both filing with the Director¹⁵ and, in most instances, service on all other parties and the arbitrators.¹⁶ Therefore, in most of the proposed rule amendments, FINRA would delete references to parties filing pleadings and documents with the Director at the same time as on other parties, and providing copies for arbitrators.

For reader convenience, the discussion below only details the proposed changes to the FINRA rules in the Customer Code. However, FINRA is proposing to make substantively similar amendments to the Industry Code. The primary difference between the proposed amendments to the Customer Code and the Industry Code is that the Customer Code provides an exemption from required use of the Party Portal for *pro se* customers. The Industry Code would not provide an exemption for any party.

As a result of the proposed rule change, FINRA would need to update several cross-references in the Codes. The proposed updates are noted as applicable. In addition, FINRA states that its forum users have indicated that for ease of citation, they would prefer that FINRA use numbers and letters instead of bullets. Therefore, FINRA is proposing to replace bullets with numbers or letters in each of the rules affected by the proposed rule change. The proposed replacements are noted where applicable.

¹⁴ FINRA Rule 12100 defines a pleading as "a statement describing a party's causes of action or defense. Documents that are considered pleadings are: A statement of claim, an answer, a counterclaim, a cross claim, a third party claim, and any replies."

¹⁵ The Director refers to the FINRA Office of Dispute Resolution Director as described in FINRA Rule 12103 (Director of Dispute Resolution).

¹⁶ For example, FINRA Rule 12304 (Answering Counterclaims) currently provides that a claimant must directly serve any answer to a counterclaim on each other party and at the same time must file the answer to the counterclaim with the Director with additional copies for the arbitrator. Under the proposed rule change, as described further in the discussion, once the claimant submits the answer through the Party Portal, the claimant has also filed the answer with the Director.

In addition to changes in the Codes, FINRA is proposing to amend the Mediation Code to permit parties to agree to use the Party Portal to submit and retrieve all documents and other communications and to view mediation case information. The proposed amendments are discussed below.

Customer Code

FINRA Rule 12100—Definitions

FINRA is proposing to amend FINRA Rule 12100 to add new definitions and to amend several definitions in the Customer Code relating to the required use of the Party Portal.

Arbitrator and Mediator Portal—FINRA is proposing to add a new definition to the rule to define "Arbitrator and Mediator Portal" as the web-based system that allows invited arbitrators and mediators to access a secure section of FINRA's Web site to submit documents and information and to view their arbitration and mediation case information and documents.¹⁷

Claim Notification Letter—FINRA is proposing to add a new definition to the rule to define "Claim Notification Letter" as the notice that FINRA would send respondents indicating that they have been named as a party in a statement of claim.¹⁸ The new definition would specify that the Claim Notification Letter will provide information about accessing the Party Portal to obtain a copy of the statement of claim filed by the claimants and information about the arbitration, including the hearing location selected by the Director and the deadline for filing a statement of answer.

Day—In the current rule, FINRA defines the term "day" as a calendar day.¹⁹ The definition provides that if a deadline specified in the Code falls on a Saturday, Sunday or any FINRA holiday, the deadline is extended until the next business day. Under the proposed rule change, other than the statement of claim, which FINRA serves upon all respondents, parties will be able to serve documents on each other through the Party Portal on any day and at any time. Service would occur immediately after FINRA receives a document, regardless of the day or time of receipt. If, for example, a party submits a document on a Saturday, the Party Portal will immediately transmit the documents to the appropriate parties on that day. Certain deadlines in the Code are triggered by a party's receipt of

¹⁷ See proposed FINRA Rule 12100(a).

¹⁸ See proposed FINRA Rule 12100(f).

¹⁹ See FINRA Rule 12100(j).

a pleading.²⁰ FINRA does not believe it would be appropriate to trigger a deadline based on an opposing party's weekend use of the Party Portal. Therefore, FINRA is proposing to amend the definition of "day" to clarify that if a party receives pleadings or other documents on a Saturday, Sunday or any FINRA holiday, the date of receipt shall be the next business day.

Non-Public Arbitrator—FINRA is proposing to amend the definition of non-public arbitrator²¹ to update cross-references in the rule.

Party Portal—FINRA is proposing to add a new definition to the rule to define "Party Portal" as the Web-based system that is accessible by arbitration and mediation parties and their representatives. The Party Portal allows invited participants to access a secure section of FINRA's Web site to submit documents and view their arbitration and mediation case information and documents.²²

Pro Se—FINRA is proposing to add a new definition to the rule to define "Pro Se" to mean a party that is not represented by an attorney or others during an arbitration or mediation.²³

Public Arbitrator—FINRA is proposing to amend the definition of Public Arbitrator²⁴ to update cross-references in the rule.

In addition, FINRA would reletter the definitions to reflect the addition of the new terms.

FINRA Rule 12211—Direct Communication Between Parties and Arbitrators

Subject to specified limitations, FINRA allows parties that are represented by counsel to communicate directly with arbitrators during an arbitration proceeding. FINRA Rule 12211, which outlines the procedures that parties and arbitrators must follow when they agree to direct communication, currently indicates that parties may send items by regular mail, overnight courier, facsimile, or email. Under the proposed rule change, because parties would be required to use the Party Portal for transmitting documents to each other, and would continue to use other methods to send items to the arbitrators, FINRA is proposing to: (1) Amend FINRA Rule

12211(e) to specify that parties are allowed to send items to the arbitrators by first-class mail, overnight mail service, overnight delivery service, hand delivery, email, or facsimile as specified in an order issued by the arbitrators; (2) amend Rule 12211(f) to delete the requirement that the parties send copies of the materials they sent to the arbitrators to each other and the Director at the same time and in the same manner, requiring instead that they serve the materials on each other and filed with the Director through the Party Portal; and (3) amend Rule 12211(g) to clarify that parties must file copies of arbitrator orders and decisions with the Director through the Party Portal.

Rule 12211(b) provides that if at some point during an arbitration a party chooses to appear *pro se*, which the rule defines in a parenthetical as meaning "without counsel," then the rule no longer applies. As stated above, FINRA is proposing to amend Rule 12100 to define *pro se* to mean a party that is not represented by an attorney or others during an arbitration or mediation. FINRA believes that the new definition of *pro se* in Rule 12100 is inconsistent with the current definition in Rule 12211. Therefore, FINRA is proposing to amend Rule 12211(b) to delete the reference to "*pro se*." Instead, the rule would provide that if a party chooses to appear without counsel, then the rule would no longer apply.²⁵

FINRA Rule 12300—Filing and Serving Documents

FINRA is proposing to delete the content in FINRA Rule 12300 (Filing and Serving Documents) in its entirety and replace it with new language which describes how filing and service, among other things, would operate when FINRA requires parties to use the Party Portal.

Party Portal—New Rule 12300(a)(1) would provide that parties must use the Party Portal to file initial statements of claim and to file and serve pleadings and any other documents on the Director or any other party. The rule would also provide that the Director may exercise authority to permit the use of other means of filing or service in the case of an extended Party Portal outage or in other extraordinary circumstances.²⁶

Rule 12300(a)(2) would provide an exemption for *pro se* customers and would outline the procedures for *pro se* customers who do not wish to use the Party Portal. While a *pro se* customer would not be required to take any affirmative steps to opt out of using the Party Portal, if a *pro se* customer files a claim using the Party Portal, then the *pro se* customer must use the Party Portal for the duration of the arbitration process. The Party Portal would include a warning to *pro se* customers that if they file their claim using the online filing facility, they will be required to use the Party Portal for the remainder of the arbitration proceeding.

Concerning *pro se* customers who opt out of using the Party Portal, Rule 12300(a) would provide that they: (1) May file claims and serve documents by first-class mail, overnight mail service, overnight delivery service, hand delivery, email or facsimile; (2) must comply with the provisions relating to filing an initial statement of claim outlined in FINRA Rule 12302 (Filing an Initial Statement of Claim); and (3) must provide proof of service for any documents served outside of the Party Portal (except for the initial statement of claim because the Director will serve the Claim Notification Letter or initial statement of claim on the respondents).

FINRA stated that it does not want parties to use the Party Portal to submit documents they produce during discovery because FINRA does not believe that it would be efficient, particularly in cases where discovery production is voluminous. Therefore, FINRA is proposing to provide in Rule 12300(a)(3) that parties shall not file with FINRA or serve on any other party, through the Party Portal, documents produced during discovery pursuant to the Rule 12500 Series. Available service methods for such documents are first-class mail, overnight mail service, overnight delivery service, hand delivery, email, or facsimile. FINRA states that this approach is consistent with its current practice.

Filing—New Rule 12300(b) would provide that with the exception of *pro se* customers who opt out of using the Party Portal, parties must file initial statements of claim and all pleadings and other documents with the Director through the Party Portal. This includes pleadings and documents served on *pro se* customers and other parties by other means. The rule would provide that parties must file with the Director any written responses relating to discovery requests under Rules 12506 and 12507, but must not file any of the documents produced in response to discovery

²⁰ See FINRA Rules 12304 and 12305 for examples of deadlines triggered by receipt of a pleading.

²¹ See proposed FINRA Rule 12100(r).

²² See proposed FINRA Rule 12100(t).

²³ See proposed FINRA Rule 12100(x). FINRA does not define *pro se* in the Industry Code because there would not be an exemption for any *pro se* parties in intra-industry disputes.

²⁴ See proposed FINRA Rule 12100(y).

²⁵ FINRA is proposing to amend FINRA Rule 13211 to remove the reference to *pro se* in the rule. Although FINRA is not proposing to define *pro se* in the Industry Code, FINRA believes the amendment would add clarity to the rule and avoid forum user confusion because FINRA is proposing to define *pro se* in the Customer Code.

²⁶ As an example of an extraordinary circumstance, FINRA referenced a severe weather event causing an extended power outage.

requests as provided in Rule 12300(a)(3).

The rule would also provide that parties must file arbitrator ranking lists²⁷ through the Party Portal, and that filing is accomplished on the day of submission through the Party Portal. Filing by first-class mail or overnight mail is accomplished on the date of mailing, and filing by any other means is accomplished on the date of delivery as is provided in the current rules.

Service—New Rule 12300(c) would provide that the Director will serve the Claim Notification Letter or initial statement of claim on the respondents. In practice, this means that as a first step FINRA would serve only the Claim Notification Letter on respondents that are not identified as customers. If a respondent does not access the Party Portal and view the statement of claim, FINRA would contact the respondent and ask if they received the Claim Notification Letter. If the respondent indicates that they did not receive the letter, FINRA staff would offer to serve the statement of claim in another manner such as by email or regular mail to afford the respondent an additional opportunity to receive the statement of claim and instructions on how to access the Party Portal.

Concerning customers, upon receipt of an initial statement of claim, where a customer is a claimant, FINRA states that it would know if the customer is represented by counsel or another person. However, where a customer is a respondent, FINRA states that it would not know if the customer intends to be represented by counsel or any other individual. Therefore, FINRA would serve all customer respondents with the initial statement of claim along with the Claim Notification Letter explaining that parties other than *pro se* customers are required to use the Party Portal, and that *pro se* customers are invited to use the Party Portal.

The Claim Notification Letter would specify that except for *pro se* customers who opt out of using the Party Portal, parties must serve all pleadings and other documents, except as provided in Rule 12300(a)(3) relating to documents produced in discovery, through the Party Portal. It would explain that parties serve *pro se* parties who opt out of using the Party Portal by first-class mail, overnight mail service, overnight delivery service, hand delivery, email or facsimile. Under the proposed rule, service would be accomplished on the day of submission through the Party Portal, on the date of mailing by first-

class mail or overnight mail service,²⁸ and on the date of delivery by other means. Finally, for documents not served through the Party Portal, parties would have to provide proof of service to the Director through the Party Portal.

General Rules—FINRA is proposing to incorporate into proposed Rule 12300(d)(1)(A), the current provision in Rule 12300(g)(1) concerning the redaction of personal confidential information. The current provision in Rule 12300(g)(2) specifying that the redaction requirements do not apply to documents that parties exchange with each other and do not file with the Director, or to documents parties submit to a panel at a hearing would be renumbered as Rule 12300(d)(1)(B). The current provision in Rule 12300(g)(3) providing that the redaction requirements do not apply to Simplified Arbitrations would be renumbered as Rule 12300(d)(1)(C).

Proposed Rule 12300(d)(2) would provide that a party must serve any change of email or mailing address during an arbitration on all other parties and file this information with the Director. The former rule referred only to “address” changes.

FINRA Rule 12301—Service on Associated Persons

FINRA is proposing to amend FINRA Rule 12301 relating to service on associated persons to delete the reference to the Director serving the initial statement of claim on a respondent associated person. As explained above, under the proposed rule change, associated persons who are parties to an arbitration would be required to use the Party Portal. Therefore, FINRA would serve an associated person with a Claim Notification Letter instead of a statement of claim.

FINRA states that in practice its staff will know if an associated person did not access the Party Portal to view the statement of claim. FINRA states that in such an instance it would contact the associated person and ask if he or she received the Claim Notification Letter. If the associated person indicates that he or she did not receive the letter, FINRA states that its staff would offer to serve the statement of claim in another manner such as by email or regular mail to afford the respondent an additional

opportunity to receive the statement of claim and instructions on how to access the Party Portal.

If a member and an associated person who is currently associated with the member are named as respondents in the same arbitration, and the Director cannot complete service directly on the associated person as described above, then the proposed rule would provide that the Director may serve the member with the Claim Notification Letter on behalf of the associated person.

12302—Filing and Serving an Initial Statement of Claim

FINRA is proposing to amend FINRA Rule 12302 to reflect how: (1) Parties would file an initial statement of claim; (2) parties would submit required fees; and (3) FINRA would serve the initial statement of claim through the Party Portal.

Filing—Because most parties would be required to file an initial statement of claim through the Party Portal as provided in Rule 12300(a), FINRA is proposing to amend Rule 12302(a) to delete the reference to filing documents in hard copy or electronically through the Online Arbitration Claim Filing system. FINRA is also proposing to amend Rule 12302(b) to delete the instruction to parties to file enough copies for the Director, each arbitrator and each other party. Once a party files the initial statement of claim through the Party Portal, FINRA states that its staff would handle service through the Party Portal or Arbitrator and Mediator Portal as applicable. FINRA states that if it needs to provide copies of the documents in another manner, *e.g.*, because a *pro se* customer has opted out of using the Party Portal, or an arbitrator is not using the Arbitrator and Mediator Portal, then FINRA staff would handle reproduction and distribution of the documents.

Fees—FINRA is proposing to amend Rule 12302(c) to require the claimant to pay all required filing fees by credit card or automated clearing house (“ACH”) through the Party Portal unless the party is a *pro se* customer who opts out of using the Party Portal. FINRA states that these payment options are currently available to forum users and requiring payment through the Party Portal would make case administration more efficient. FINRA states that its staff would know immediately if a filing was deficient for lack of payment and would not have to ensure that checks that parties submit separately, by U.S. mail or other method, are correctly matched up to statements of claim submitted through the Party Portal.

²⁸ FINRA states that “overnight mail” service includes, for example, overnight delivery by Federal Express. FINRA also identifies common methods parties use at the forum for overnight mail delivery as Federal Express, United Parcel Service, and United States Postal Service. FINRA also states that “other means” includes, for example, hand delivery.

²⁷ See FINRA Rules 12402(d) and 12403(c).

Service—Currently, Rule 12301(d) provides that unless the statement of claim is deficient, FINRA will send a copy of the Submission Agreement, the statement of claim, and any additional materials the claimant submits, to the other parties and the arbitrators. FINRA is proposing to amend the rule to specify how staff would serve each subset of participants in the arbitration case. Specifically, FINRA would:

- Send the Claim Notification Letter to all non-customer respondent(s) pursuant to Rule 12302; and
- Send the Claim Notification Letter along with a copy of the Submission Agreement, the statement of claim, and any additional materials filed by the claimant, to each customer respondent. The Director would inform the customer that if the customer is *pro se*, the customer is not required to use the Party Portal; and

- Send a copy of the Submission Agreement, the statement of claim, and any additional materials filed by the claimant to each arbitrator by first-class mail, overnight mail service, overnight delivery service, hand delivery, email, facsimile or through the Arbitrator and Mediator Portal, once the panel has been appointed.

Additional conforming changes—FINRA would amend the title of Rule 12302 to add a reference to “Service” because the rule addresses both filing and service of the initial statement of claim. FINRA is proposing to reletter the rule and to replace the bullets in Rule 12302(a) with numbers.

12303—Answering the Statement of Claim

FINRA is proposing to amend FINRA Rule 12303 to reflect how respondents would answer a statement of claim using the Party Portal.

Because most parties would be required to serve each other through the Party Portal, FINRA would eliminate the instruction in Rule 12303(a) for parties to “directly” serve each other with the executed Submission Agreement and answer. FINRA would amend Rule 12303(b) to provide that if an answer contains a third party claim,²⁹ a respondent must serve the third party with the answer containing the third party claim and all documents previously served by any party, or sent to the parties by the Director, by first-class mail, overnight mail service, overnight delivery service, hand delivery, email or facsimile, and must

²⁹ See current FINRA Rule 12100(y), which defines “Third Party Claim” to mean a claim asserted against a party not already named in the statement of claim or any other previous pleading.

file proof of service with the Director through the Party Portal. The respondent must file the third party claim with the Director through the Party Portal except as provided in Rule 12300(a)(2). In addition, because parties would file their Submission Agreement and answer through the Party Portal, FINRA would amend Rule 12303(c) to delete the instruction for a party to file sufficient copies for the Director and arbitrators. Finally, FINRA is proposing to replace the bullets in Rule 12303(a) with numbers.

12304—Answering Counterclaims

FINRA is proposing to amend FINRA Rule 12304(a) relating to answering counterclaims to eliminate the instruction for parties to “directly” serve each other with the answer to a counterclaim, as well as the requirement to file sufficient copies for the Director and arbitrators.

12305—Answering Cross Claims

As with answering counterclaims, FINRA is proposing to amend FINRA Rule 12305(a) relating to answering cross claims to eliminate the instruction for parties to “directly” serve each other with the answer to a cross claim, as well as the requirement to file sufficient copies for the Director and arbitrators because filing instructions would be covered by proposed Rule 12300.

12306—Answering Third Party Claims

FINRA is proposing to amend FINRA Rule 12306 to reflect how FINRA would handle a third party claim in the Party Portal.

As explained in the above discussion on Rule 12303, if a respondent’s answer contains a third party claim, the respondent serves the third party with the claim and all documents previously served by the parties or filed with FINRA outside of the Party Portal. FINRA states that once it is notified of the third party claim, it can invite the third party to use the Party Portal.

Because most parties would be using the Party Portal, FINRA would eliminate the instruction in Rule 12306(a) for parties to “directly” serve each other with the executed Submission Agreement and answer. Similarly, FINRA would amend Rule 12306(b) to provide that if an answer to a third party claim also contains a third party claim, a respondent would be required serve the third party with the answer containing the third party claim and all documents previously served by any party, or sent to the parties by the Director, by first-class mail, overnight mail service, overnight delivery service, hand delivery, email or facsimile, and

must file proof of service with the Director through the Party Portal. In addition, because parties would file their Submission Agreement and answer through the Party Portal, FINRA would amend Rule 12306(c) to delete the instruction for a party to file sufficient copies for the Director and arbitrators. Finally, FINRA is proposing to replace the bullets in Rule 12306(a) with numbers.

12307—Deficient Claims

The Customer Code provides that the Director will not serve any claim that is deficient. Current FINRA Rule 12307(a) sets forth various reasons that a claim might be deficient. FINRA is proposing to amend Rule 12307(a) to delete a deficiency that would not be applicable in the Party Portal—that the claimant did not file the correct number of copies of the Submission Agreement, statement of claim or supporting documents for service on respondents and for the arbitrators. FINRA is also proposing to amend the rule relating to the deficiency concerning a failure to specify the customer’s home address at the time of the events giving rise to the dispute. FINRA would replace home address with “city and state,” to conform to its stated current practice.³⁰

FINRA is also proposing to replace the bullets in Rule 12307(a) with numbers and to correct cross-references in the Rule.

12309—Amending Pleadings

Current FINRA Rule 12309 specifies procedures for parties to amend pleadings. Rule 12309(a) applies to amendments made to a statement of claim or any other pleading before FINRA appoints a panel of arbitrators. Rule 12309(c) applies to amendments made to add a party to the case once the ranked arbitrator lists are due to the Director. In both sections, FINRA is proposing to amend the rule to reflect how amendments operate in the Party Portal.

As stated above, Rule 12309(a) describes how parties amend pleadings before FINRA appoints a panel. FINRA is proposing to amend Rule 12309(a) to clarify that panel appointment occurs when the Director sends notice to the parties of the names of the arbitrators on the panel.

FINRA would amend Rule 12309(a)(1) to eliminate the requirement for parties to file sufficient copies of an amended pleading for the arbitrators and other parties, and to provide that the Director

³⁰ Industry Code Rule 13307 differs from the Customer Code rule because there is no reference to a customer’s home address.

will serve either the Claim Notification Letter, or the amended statement of claim, as applicable, under Rules 12300 and 12301. The rule would also provide that if an amended pleading adds a party to the arbitration, the party amending the pleading must serve the new party with the amended pleading and all documents previously served by any party, or sent to the parties by the Director, by first-class mail, overnight mail service, overnight delivery service, hand delivery, email or facsimile, and must file proof of service with the Director through the Party Portal. The party amending the pleading must file the amended pleading with the Director through the Party Portal except as provided in Rule 12300(a)(2).

Current Rule 12309(c) explains that after ranked arbitrator lists are due to the Director, parties may not amend the pleadings to add new parties until FINRA appoints a panel and the panel grants a motion to add a new party. Motions to add a party after panel appointment must be served on all parties, including the party that is the subject of the motion. The process for serving the new party under Rule 12309(c) is the same as it is in Rule 12309(a). FINRA is proposing to amend Rule 12309(c) to provide that the party seeking to amend the pleading to add a party may serve the party to be added by first-class mail, overnight mail service, overnight delivery service, hand delivery, email or facsimile. Service by first-class mail or overnight mail service would be accomplished on the date of mailing. Service by any other means would be accomplished on the date of delivery. FINRA would permit the party to be added to file a response with the Director and serve the response on all other parties by first-class mail, overnight mail service, overnight delivery service, hand delivery, email or facsimile. Because the arbitrators may ultimately decline the motion to add a new party, FINRA believes it makes sense to allow service by methods other than the Party Portal while the arbitrators consider the motion.³¹

12310—Answering Amended Claims

Current FINRA Rule 12310 describes how parties answer amended claims. Rule 12310(b) provides that if a claim is amended after it has been answered, but before a panel has been appointed, the respondent has 20 days from “the time the amended claim is served” to serve an amended answer. Because parties

would be serving each other through the Party Portal, FINRA is proposing to amend Rule 12310(b) to delete the phrase “the time the amended claim is served” to provide instead that the respondent has 20 days from “receipt of the amended claim” to serve an amended answer. FINRA uses time of receipt in the rules relating to parties’ time to respond to answers, among other matters, and believes consistent language would add clarity to the rule.³²

FINRA is also proposing to amend Rule 12310(d) relating to serving an amended answer to delete the reference to “directly” serving each other party, and providing copies of the pleading for the arbitrators.

Finally, FINRA is proposing to add clarity to Rule 12310(e) concerning when a new party’s answer is due, by stating that the new party’s “time to” answer is governed by Rules 12303 or Rule 12306 (which include a 45 day period for answers).

12400—Neutral List Selection System and Arbitrator Rosters

FINRA is proposing to amend FINRA Rule 12400(b) relating to its arbitrator rosters and Rule 12400(c) concerning eligibility for chairperson roster to update cross-references and replace bullets with numbers.

12402—Cases With One Arbitrator and 12403—Cases With Three Arbitrators

FINRA is proposing to amend FINRA Rules 12402(d)(3) and 12403(c)(3) concerning striking and ranking arbitrators to provide that parties must complete arbitrator ranking through the Party Portal unless a party is a *pro se* customer who opted out of using the Party Portal. The rule would list the approved methods for *pro se* customers to return ranked lists. FINRA is also proposing to amend to Rule 12402(e) to replace bullets with numbers.³³

12404—Additional Parties

Current FINRA Rule 12404 describes procedures for newly added parties to

rank and strike arbitrators. FINRA is proposing to amend Rule 12404(a) to reflect that because parties would complete the ranking and striking process in the Party Portal, they would no longer “return” lists to the Director. FINRA would also amend this provision to correct a typographical error by adding “(s)” to the term “list” in the paragraph’s last sentence because in cases with three arbitrators, parties return three lists of arbitrators, not just one.

Current Rule 12404(b) explains that after ranked arbitrator lists are due to the Director, parties may not amend pleadings to add new parties until FINRA appoints a panel and the panel grants a motion to add a new party. Motions to add a party must be served on all parties. FINRA is proposing to amend Rule 12404(b) to provide that the party seeking to amend the pleading must serve the party to be added by first-class mail, overnight mail service, overnight delivery service, hand delivery, email or facsimile. Service by first-class mail or overnight mail service would be accomplished on the date of mailing. Service by any other means would be accomplished on the date of delivery. FINRA would permit the party to be added to file a response with the Director and serve the response on all other parties by first-class mail, overnight mail service, overnight delivery service, hand delivery, email or facsimile. Because the arbitrators may ultimately decline the motion to add a new party, FINRA believes it makes sense to allow service by methods other than the Party Portal while the arbitrators consider the motion.

12500—Initial Prehearing Conference

Current FINRA Rule 12500(c) describes the subject matter of the initial prehearing conference and provides that parties may forgo the conference if they provide certain information (as described in accompanying bullets) in writing to the Director. FINRA is proposing to amend the rule to delete the requirement that parties provide copies of the written submission for the arbitrators. FINRA is also proposing to replace the bullets with numbers.

12502—Recording Prehearing Conferences and 12606—Record of Proceedings

Current FINRA Rule 12502 provides that FINRA does not record prehearing conferences unless the panel orders a recording, and FINRA Rule 12606(a) specifies that FINRA records hearings. Both rules provide that the Director will provide copies of a tape, digital, or other recording to parties for a nominal fee.

³¹ FINRA Rule 13309(c) in the Industry Code contains an erroneous cross-reference to Rule 13404(c). FINRA is proposing to amend Rule 13309(c) to refer to Rule 13404(d) which relates to the time frame when ranked lists are due.

³² See FINRA Rules 12303 (Answering the Statement of Claim), 12304 (Answering Counterclaims), 12305 (Answering Cross Claims), and 12306 (Answering Third Party Claims).

³³ The Industry Code rules relating to arbitrator appointment, while substantially similar to the Customer Code rules, are not identical to the Customer Code and are numbered differently. FINRA is proposing to amend FINRA Rule 13404(d) concerning striking and ranking arbitrators, to provide that parties must complete arbitrator ranking through the Party Portal. FINRA is proposing to amend FINRA Rule 13406 relating to appointment of arbitrators to update a cross-reference and to replace bullets with letters. FINRA is also proposing to amend FINRA Rule 13411 concerning replacing arbitrators to update a cross-reference.

FINRA is proposing to amend the rules to delete the reference to a fee because FINRA currently provides parties with copies of recordings free of charge. Current Rule 12606(a) also provides that the panel may order parties to provide a transcription of the recording. FINRA is proposing to amend Rule 12606(a) to clarify that if the arbitrators order the parties to provide a transcript, the parties must provide copies for the arbitrators and must file the transcript with the Director and serve it on the other parties. Current Rule 12606(b) provides that parties may make stenographic records of a hearing. FINRA is proposing to amend Rule 12606(b) to clarify that if the stenographic record is the official record of the proceeding, the parties must provide copies for the arbitrators and must file the transcript with the Director and serve it on the other parties.

FINRA states that some arbitrators have indicated a preference to review long documents in hard copy. Therefore, FINRA would continue to require parties to provide copies of transcripts for the arbitrators.

12503—Motions

Current FINRA Rule 12503 specifies how parties make motions at the forum. Under the proposed rule change, parties would be required to file motions with the Director and serve other parties through the Party Portal. Therefore, FINRA is proposing to amend Rule 12503(a)(2) to delete the requirement that parties serve motions on each other directly, at the same time and in the same manner, and provide FINRA with copies for each arbitrator. FINRA would make the same deletions to Rule 12503(b) relating to responding to motions and Rule 12503(c) concerning replying to responses to motions.

FINRA is also proposing to amend Rule 12503(a)(4) to delete the text specifying how parties make motions to amend a pleading to add a party to a case, because these motions would be addressed in Rule 12309(c) (discussed above). FINRA would add a cross-reference to Rule 12309(c).

12506—Document Production Lists

Current FINRA Rule 12506(a) provides that when the Director serves respondents with the statement of claim, the Director notifies parties of the location of the FINRA Discovery Guide and Document Production Lists on FINRA's Web site. In view of the Party Portal, FINRA is proposing to amend the rule to delete the reference to "when the Director serves the statement of claim." The rule would continue to state that the Director will notify parties of the

location of the FINRA Discovery Guide and Document Production Lists on FINRA's Web site.

Current FINRA Rule 12506(b) specifies, among other matters, the time for parties to respond to the Document Production Lists. FINRA wants parties to file through the Party Portal their explanations about why they are not timely producing documents and why they are objecting to production. FINRA believes that having this correspondence in the Party Portal would be efficient for FINRA staff and the parties. However, as stated above, FINRA does not want the parties to file with the Director the documents and information that they produce during discovery. Therefore, FINRA is proposing to amend Rule 12506(b) to specify that parties must serve each other with documents produced pursuant to the rule by first-class mail, overnight mail service, overnight delivery service, hand delivery, email or facsimile as provided in Rule 12300(a)(3). The proposed rule would also provide that parties are required to file any written responses relating to discovery, such as objections to producing items in the Document Production Lists, with the Director through the Party Portal.

FINRA is also proposing to amend to Rule 12506(b) to replace bullets with letters.³⁴

12507—Other Discovery Requests

Current FINRA Rule 12507(a) provides that parties may request additional documents from a party by serving the party directly with a written request. The rule requires the requesting party to serve copies of the request on all other parties at the same time. Because parties would be serving each other through the Party Portal, FINRA is proposing to amend the rule to delete the requirement for direct service in Rule 12507(a)(1) and the requirement to serve all other parties at the same time in Rule 12507(a)(2).

Current FINRA Rule 12507(b) specifies how parties may respond to an additional discovery request. The parties can: (1) Produce the documents or information (Rule 12507(b)(1)(A)); (2) identify specific documents that will not be produced within the required time and state when the documents will

be produced (Rule 12507(b)(1)(B)); or (3) object to the request (Rule 12507(b)(1)(C)). As explained earlier, FINRA does not want parties to file with the Director the documents and information that they produce during discovery. Therefore, FINRA is proposing to amend Rule 12507(b)(1)(A) to specify that if a party produces documents or information pursuant to a request, the party must serve all other parties with copies of the requested documents or information by first-class mail, overnight mail service, overnight delivery service, hand delivery, email or facsimile.

However, FINRA wants to receive party explanations about why they are not timely producing documents and why they are objecting to production. Therefore, FINRA would amend Rule 12507(b)(1)(B) concerning non-production to provide that a party must file a response with the Director and serve it on all other parties (through the Party Portal). FINRA would also amend Rule 12507(b)(1)(C) concerning objections to provide that a party must file the objection with the Director and serve it on all other parties (through the Party Portal).

Finally, FINRA is proposing to replace the bullets in Rule 12507 with numbers.

12508—Objecting to Discovery; Waiver of Objection

Current FINRA Rule 12508 addresses party objections to producing documents and information during discovery. To reflect how parties will be serving each other through the Party Portal, FINRA is proposing to amend the rule to delete the requirement that parties serve their objections on each other at the same time and in the same manner. Because FINRA wants to receive party explanations through the Party Portal about why parties object to production, FINRA is proposing to amend the rule to delete the statement that objections should not be filed with the Director.

12512—Subpoenas

Current FINRA Rule 12512 specifies that a party may make a written motion requesting that an arbitrator issue subpoenas to parties and non-parties for the production of documents and evidence, and outlines how FINRA handles motions for subpoenas at the forum. To reflect how motion practice would operate through the Party Portal, FINRA is proposing to amend Rule 12512(b) to delete the requirements that parties provide copies of the subpoena to the arbitrator, and serve the motion on each other at the same time and in

³⁴ The FINRA Discovery Guide and related Document Production Lists apply only to customer arbitrations. Therefore, the Industry Code does not contain Document Production Lists. The discovery rules in the Industry Code that are substantially similar to Rule 12507 in the Customer Code are Rule 13506 (Discovery Requests) and Rule 13507 (Responding to Discovery Requests). The proposed amendments to Rules 13506 and 13507 are substantively identical to those in Rule 12507.

the same manner. FINRA would make the same amendment to Rule 12512(c) concerning party objections to subpoenas.

Current FINRA Rule 12512(d) addresses service of an executed subpoena. FINRA is proposing to amend the rule to delete the requirement that parties serve the subpoena on each other at the same time and in the same manner. In addition, because non-parties do not have access to the Party Portal, FINRA would amend the rule to specify that when an arbitrator issues a subpoena to a non-party, the party must serve the subpoena on the non-party by first-class mail, overnight mail service, overnight delivery service, hand delivery, email or facsimile.

Current FINRA Rule 12512(e) provides for a non-party's objection to a subpoena. If a non-party receiving a subpoena objects to the scope or propriety of the subpoena, FINRA permits the non-party to file written objections with the Director. Under the rule, the party that requested the subpoena may respond to the objection. FINRA is proposing to amend the rule to provide that the non-party may file the objection by first-class mail, overnight mail service, overnight delivery service, hand delivery, email or facsimile, and that the party must serve the response on the non-party and file proof of service with the Director.

Current FINRA Rule 12512(f) outlines procedures for parties to follow when they receive subpoenaed documents from non-parties. Specifically, the rule provides that any party that receives documents in response to a subpoena served on a non-party has five days to provide notice of the receipt to the other parties. Other parties to the case may request copies of the documents, and the party in receipt of the documents must provide them within ten (10) calendar days of receipt of the request. FINRA is proposing to amend the rule to specify that a party that receives documents from a non-party in response to a subpoena must serve the other parties with notice that the party received the documents. Other parties to the case may request copies of the subpoenaed documents. Because FINRA does not want the parties to submit the documents to the Director, FINRA would amend the rule to provide that the party must serve the documents on the other parties by first-class mail, overnight mail service, overnight delivery service, hand delivery, email or facsimile. The proposed rule would also expressly prohibit parties from filing the documents with the Director.

12513—Authority To Direct Appearances of Associated Person Witnesses and Production of Documents Without Subpoenas

Current FINRA Rule 12513 authorizes arbitrators to order the appearance of firm employees and associated persons, and the production of documents from firms and their employees and associated persons without issuing a subpoena. FINRA is proposing to amend several provisions in the rule to reflect how FINRA would handle a party's motion for an arbitrator order using the Party Portal.

FINRA is proposing to amend Rule 12513(b) concerning filing the motion to delete the requirement that a party provide a copy for the arbitrator and that the party serve the motion on all other parties at the same time and in same manner as on the Director. FINRA is proposing to make the same changes to Rule 12513(c) relating to an opposing party's objection to the motion, and to Rule 12513(d) relating to party service of an order.

In addition, because FINRA will not invite a non-party to use the Party Portal, FINRA is proposing to amend Rule 12513(d) to provide that if a party obtains an arbitrator's order for a non-party's production, then the party must serve the order on the non-party. FINRA would also amend Rule 12513(e) to provide that if the non-party files an objection to the arbitrator's order, and the party requesting the order wants to file a response to the objection, then the party must serve the response on the non-party and provide the Director with proof of service. Finally, FINRA is proposing to amend Rule 12513(f) to provide that any party receiving documents from a non-party must serve notice on all other parties. If any other party requests copies of the documents, the requesting party must serve them by first-class mail, overnight mail service, overnight delivery service, hand delivery, email or facsimile. The amendments would also specify that parties must not file with the Director the documents produced pursuant to the order.

12514—Prehearing Exchange of Documents and Witness Lists, and Explained Decision Requests

Current FINRA Rule 12514 sets forth procedures for exchanging documents and witness lists prior to the first scheduled hearing date and for making joint party requests for an explained decision. FINRA is proposing to amend Rule 12514(b) to delete the requirement that parties file their witness lists with the Director at the same time as they

notify other parties and provide the Director with enough copies for the arbitrators. Instead, proposed Rule 12514(b) would require that all parties file their witness lists only with the Director. FINRA would also amend Rule 12514(d) to provide that parties must file with the Director requests for an explained decision as opposed to submitting them to the arbitrators.

12701—Settlement

Current FINRA Rule 12701 requires parties to notify the Director of settlements. FINRA is proposing to amend Rule 12701(a) to reflect use of the Party Portal by replacing "notify" with "file notice with" the Director.

12800—Simplified Arbitration

Current FINRA Rule 12800 provides special procedures for the administration of disputes involving \$50,000 or less, including procedures for parties to request documents and other information from each other. FINRA is proposing to amend Rule 12800(d) to provide that parties receiving the request must produce the requested documents or information to all other parties by serving the requested documents or information by first-class mail, overnight mail service, overnight delivery service, hand delivery, email or facsimile. The proposed rule would specify that parties must not file the documents with the Director.

12801—Default Proceedings

Current FINRA Rule 12801 specifies procedures for initiating default proceedings against certain respondents (e.g., terminated members). Because parties would be using the Party Portal to file notice with the Director and serve other parties with their request to initiate a default proceeding, FINRA is proposing to amend Rule 12801(b) to delete the requirements for parties to notify the Director in writing, and send a copy of the notification to other parties at the same time and in the same manner. FINRA is also proposing to amend Rule 12801(a) to replace bullets with numbers.

12901—Member Surcharge

Current FINRA Rule 12901 provides that FINRA will assess surcharges against members under specified circumstances. Rule 12901(a)(3) states that if the claim is filed by a member, the surcharge is due when the claim is filed. If the claim is filed against a member, or against an associated person employed by a member at the time of the events giving rise to the dispute, the surcharge is due when the claim is served. FINRA is proposing to amend

the rule to provide that if a claim is filed against a member or associated person, the surcharge is due when the Director serves the Claim Notification Letter or the initial statement of claim. FINRA is also proposing to amend Rule 12901(a) and 12901(b) to replace bullets with letters.

12094—Awards

Current FINRA Rule 12904 concerns arbitrator awards and includes, among other matters, procedures for the Director to serve awards on parties. The rule provides that the Director serves an award using any method available and convenient to the parties and the Director, and that is reasonably expected to cause the award to be delivered to all parties, or their representative, on the same day. Under the rule, the Director may serve an award by first class, registered or certified mail, hand delivery, and facsimile or other electronic transmission. Because the Director will serve the award through the Party Portal in most instances, FINRA is proposing to amend Rule 12904(c) to provide that only the Director will serve the award on each party, or their representative through the Party Portal.

Industry Code Specific Amendments

As explained earlier, while the discussion details the proposed amendments to the FINRA rules in the Customer Code, FINRA is also proposing to make substantively similar amendments to the Industry Code. In addition to the amendments discussed, FINRA is proposing to amend rules in the Industry Code that are unique to intra-industry disputes.

13802—Statutory Employment Discrimination Claims

FINRA is proposing to amend FINRA Rule 13802(a) relating to statutory employment discrimination claims to update a cross-reference concerning the definition of statutory employment discrimination. FINRA would also amend Rule 13802(c) to replace bullets with numbers.

13804—Temporary Injunctive Orders; Requests for Permanent Injunctive Relief

The Industry Code has special procedures for handling temporary injunctions with respect to an industry or clearing dispute. FINRA is proposing to amend FINRA Rule 13804(a) to provide that parties seeking temporary injunctive relief from a court must file with the Director a statement of claim requesting permanent injunctive and all other relief with respect to the same

dispute through the Party Portal, and must serve the statement of claim requesting permanent injunctive and all other relief on all other parties by overnight delivery service, hand delivery, email or facsimile. The proposed rule would require parties to serve all parties at the same time and in the same manner, unless the parties agree otherwise.

FINRA states that cases involving injunctive relief operate on an accelerated time schedule. FINRA also states, however, that it takes FINRA staff some time to review an initial submission and invite respondent parties to use the Party Portal. In view of the need to expedite these matters, FINRA believes that parties should serve each other outside of the Party Portal until FINRA establishes the identities of all relevant parties and their representatives, and invites them to access the Party Portal.

Mediation Code

Under the proposed rule change, FINRA would permit parties to a mediation proceeding to use the Party Portal on a voluntary basis. FINRA is proposing to amend the Mediation Code to reflect use of the Party Portal.

14100—Definitions

FINRA is proposing to amend FINRA Rule 14100 to define “Arbitrator and Mediator Portal” and “Party Portal.” The definitions would be identical to the definitions in the Codes. FINRA would re-letter the definitions because of the new additions.

14109—Mediation Ground Rules

FINRA also is proposing to amend FINRA Rule 14109 to provide that the parties may agree to use the Party Portal to submit all documents and other communications to each other, to retrieve all documents and other communications, and view mediation case information.

III. Comment Summary and FINRA’s Response

As noted above, the Commission received five comment letters on the proposed rule change³⁵ and a response letter from FINRA.³⁶ As discussed in more detail below, two strongly support the proposal;³⁷ two generally support the proposal but recommend modifications;³⁸ and one appears to be unrelated to substance of the proposal.³⁹

³⁵ See *supra* note 5.

³⁶ See *supra* note 6.

³⁷ See Caruso Letter and FSI Letter.

³⁸ See IAC Letter and PIABA Letter.

³⁹ See Conflictteam Letter.

Two commenters strongly supported the proposal, stating that the proposal “would facilitate interactions among parties, arbitrators, mediators, and FINRA staff on arbitration case-related matters,”⁴⁰ “further promote the efficiency of the participant experience in the FINRA arbitration forum,”⁴¹ and would result in “more efficient and equitable arbitration proceedings.”⁴² One of those commenters noted that some of its members had been invited by FINRA to participate in a beta test of the Party Portal, and stated that those members “reported that the system was efficient, simplified responses to communications, and allowed for easier tracking of progress in the dispute.”⁴³

Two additional commenters generally supported the proposal, with both commenters stating their belief that use of the Party Portal would improve efficiency.⁴⁴ One of those commenters noted that, in addition to enhancing efficiency, use of the Party Portal would “allow the [arbitration] panel to be more actively engaged in the discovery process[.]” and “provide[] FINRA with additional enforcement capability concerning potential firm rule violations relating to discovery.”⁴⁵ However, both commenters expressed concerns about the effect of the proposed rule change on claimants with smaller claims, specifically with respect to protection of personal confidential information and payment of forum fees.⁴⁶

Personal confidential information. As stated in the Notice, current FINRA Rule 12800 provides special procedures for “simplified arbitration,” disputes where the amount at issue is \$50,000 or less.⁴⁷ One commenter noted that under Rule 12800, “simplified proceedings are exempt from the redaction of Social Security, tax id, and financial accounts numbers.”⁴⁸ One commenter additionally noted that much of the personal confidential information “involved in a simplified proceeding is of the type that, according to the FBI, can be used by criminals to engage in identity theft, including financial account numbers, birth dates, addresses, and Social Security numbers.”⁴⁹ Consequently, these two commenters expressed concern that exempting

⁴⁰ See Caruso Letter; see also FSI Letter.

⁴¹ See Caruso Letter.

⁴² See FSI Letter at 2.

⁴³ See *id.*

⁴⁴ See IAC Letter at 1; see also PIABA Letter at 1.

⁴⁵ See IAC Letter at 1.

⁴⁶ See IAC Letter; see also PIABA Letter.

⁴⁷ See Notice, 81 FR at 54865.

⁴⁸ See PIABA Letter at 1.

⁴⁹ See IAC Letter at 1 (citing FBI, *Cyber Crime*, available at <https://www.fbi.gov/investigate/cyber>).

simplified proceedings from FINRA's redaction requirements, while requiring claimants to file documents electronically through the Party Portal, puts claimants in simplified proceedings at greater risk of identity theft and/or other information security breaches.⁵⁰ For these reasons, both commenters urged FINRA to extend the redaction requirements for personal confidential information to all documents submitted through the Party Portal.⁵¹

In response to these comments, FINRA, although it declined to amend the proposed rule change as suggested by the two commenters, stated that it "is concerned about identity theft" and that it "believes that the Party Portal provides parties with enhanced security over other methods of document transmittal."⁵² FINRA further noted that the Party Portal is a "secure, encrypted environment" and that parties in simplified arbitration are not prevented from redacting their documents, but that they are simply not required to do so.⁵³ Finally, FINRA noted that it "has a dedicated Web page encouraging parties to take steps to protect their [personal confidential information] regardless of any exemptions in the Codes."⁵⁴

Payment of forum fees. As stated in the Notice, FINRA is proposing to amend Rule 12302(c) to require the claimant to pay all required filing fees by credit card or automated clearing house ("ACH") through the Party Portal, unless the party is a *pro se* customer who opts out of using the Party Portal.⁵⁵ Two commenters expressed concern about this portion of the proposal.⁵⁶ One commenter urged FINRA to allow payment of fees by personal check for all parties, explaining that "it is not uncommon for individual claimants, even when represented, to pay their filing and other forum fees by personal check," and noting that "some law school securities arbitration centers do

not have the ability to pay by credit card or ACH."⁵⁷ Another commenter urged FINRA to revise the proposal to allow parties with damages under \$100,000 to pay by personal check, expressing concern that the proposal as drafted may adversely affect smaller claimants and/or claimants that are only able to proceed if they obtain fee waivers.⁵⁸ In particular, this commenter expressed concern that "[w]ithout an exception allowing payment of fees by check for these small claims," the proposal will encourage parties to evade the Party Portal requirement by initiating a *pro se* claim or discourage firms from representing clients with smaller claims.⁵⁹

In its response, FINRA stated its belief that "requiring payment through the Party Portal would make case administration more efficient."⁶⁰ In particular, FINRA stated that the electronic payment system would, among other benefits, immediately alert FINRA staff if a filing was deficient for lack of payment.⁶¹ In addition, FINRA stated that it "designed the ACH feature in the Party Portal to be self-contained and easy to use," and that a "clinic or law firm representing a party does not need any special facility to remit payment via ACH."⁶² FINRA further explained that the "Party Portal User Guide contains detailed instructions, including screen shots from the system, on how to pay by ACH" and further noted that a "party can provide the [ABA routing number and bank account number that appear on a personal check] to a representative over the phone, or a voided check with the numbers, for entry into the Party Portal."⁶³ Because of "the efficiencies afforded by electronic payment, and that any Party Portal user can remit fees, FINRA declines to amend the proposed rule change as suggested by the commenters."⁶⁴

Discovery correspondence. As stated in the Notice, FINRA is proposing to require parties to file discovery correspondence through the Party

Portal.⁶⁵ One commenter, although generally supportive of this requirement, expressed concern that the "proposal is unclear as to how matters involving *pro se* parties who chose not to utilize the Portal should be handled" and suggested that those parties be required to file discovery correspondence with FINRA outside the Party Portal.⁶⁶ The commenter "believes that brokerage firms could be less likely to engage in discovery abuse against *pro se* parties if they know FINRA can still keep an eye on the discovery process."⁶⁷

In its response, FINRA clarified that under the proposal, *pro se* parties who opt out of the Party Portal would still be required to file discovery correspondence using one of the methods enumerated in Rule 12300(a)(2)(C).⁶⁸ FINRA stated that acceptable methods of service include first-class mail, overnight mail service, overnight service, hand delivery, email, or facsimile.⁶⁹

Service. Although not a specific concern or suggestion about the proposal itself, one commenter noted that "the service requirements are spread through a number of different rules," and suggested that FINRA consider issuing a Notice to Members "setting forth a list of the specific filings which must be made outside of the Party Portal once the rule is implemented" in order to "allow practitioners an opportunity to review all the exceptions to filing via the Portal in one place."⁷⁰

In its response, FINRA agreed that such a list would be helpful and stated in its response that "[i]f the Commission approves the proposed rule change, FINRA will provide a list of such filings in a Regulatory Notice announcing approval of the proposed rule change as well as in guidance on the FINRA Web site."⁷¹

IV. Discussion and Commission Findings

The Commission has carefully considered the proposal, the comments received, and FINRA's response to the comments. Based on its review of the record, the Commission finds that the proposal is consistent with the requirements of the Exchange Act and the rules and regulations thereunder that are applicable to a national

⁵⁰ See *id.* at 1–2; see IAC Letter at 2–3.

⁵¹ See IAC Letter at 3; see also PIABA Letter at 2. One commenter urged FINRA to go one step further and extend the redaction requirements to *pro se* customers not using the Party Portal, though the commenter acknowledged "that the risk of misuse may not be as significant (though not non-existent) if the information is not sent, received, or stored electronically via the Party Portal." See IAC Letter at 3.

⁵² See FINRA Letter at 3.

⁵³ See FINRA Letter at 3. Similarly, FINRA also notes that an "exemption from the redaction requirements does not mean that *pro se* parties . . . cannot redact [personal confidential information] from their documents."

⁵⁴ See FINRA Letter at 3.

⁵⁵ See Notice, 81 FR at 54861.

⁵⁶ See IAC Letter at 2; see also PIABA Letter at 2.

⁵⁷ PIABA Letter at 2; see also IAC Letter (stating that as a law school clinic it lacks the infrastructure to pay client filing fees via credit card or ACH transfers, and that it further understands that law firms representing claimants with smaller claims "require that their clients directly remit payment to FINRA as these firms are unable to take on such a representation unless the client pays the fees directly to FINRA via a personal check.")

⁵⁸ See IAC Letter at 2.

⁵⁹ *Id.*

⁶⁰ See FINRA Letter at 2.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ See Notice, 81 FR at 54864.

⁶⁶ See PIABA Letter at 2.

⁶⁷ *Id.*

⁶⁸ See FINRA Letter at 3.

⁶⁹ See FINRA Letter at 3 n.8; see also Notice at 81 FR 54864.

⁷⁰ PIABA Letter at 2.

⁷¹ See FINRA Letter at 3–4.

securities association.⁷² In particular, the Commission finds that the proposed rule change is consistent with Section 15A(b)(6) of the Exchange Act,⁷³ which requires, among other things, that FINRA rules 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.

The Commission notes that two commenters strongly supported the proposal, two commenters generally supported the proposal but had some recommended modifications, and one commenter did not appear to address the substance of the proposed rule change. With respect to payment of fees, the Commission recognizes the recommendations by two commenters that FINRA allow payment by personal check, either for parties for damages under \$100,000 or for all parties.⁷⁴ The Commission also recognizes, however, FINRA's efforts to clarify and streamline the electronic payment process for its users, including, among other things, permitting Party Portal users to remit payment by phone if needed by providing the ABA routing number and bank account number found on the user's personal check.⁷⁵ The Commission further recognizes the "efficiencies afforded by electronic payment,"⁷⁶ including the ability for FINRA staff to immediately discern whether a filing is deficient for lack of payment.

With respect to the protection of personal confidential information, the Commission recognizes the concerns expressed by two commenters that, under the proposal, FINRA's exemption of the redaction requirements in current Rule 12300 for parties in Simplified Arbitrations—disputes where the amount at issue is \$50,000 or less—will remain unchanged.⁷⁷ The Commission recognizes the commenters' concerns that exempting Simplified Arbitrations from FINRA's redaction requirements, while requiring claimants to file documents electronically through the Party Portal, puts claimants in Simplified Arbitrations at greater risk of identity theft and/or other information security breaches.⁷⁸ The Commission

also recognizes, however, FINRA's own concerns about identity theft, and its belief that "the Party Portal provides parties with enhanced security over other methods of document transmittal."⁷⁹ The Commission further recognizes, as FINRA explained in its response to comments, that parties in Simplified Arbitrations (as well as *pro se* parties not using the Party Portal) are not restricted from redacting their documents should they choose to do so.⁸⁰ Finally, the Commission recognizes that "FINRA has a dedicated Web page encouraging parties to take steps to protect their [personal confidential information] regardless of any exemptions in the Codes."⁸¹

With respect to the proposal's requirement that parties file discovery correspondence through the Party Portal, the Commission recognizes one commenter's concern that the "proposal is unclear as to how matters involving *pro se* parties who chose not to utilize the Portal should be handled."⁸² The Commission further recognizes FINRA's clarification that, under the proposal, *pro se* parties would be required to file discovery correspondence by an alternate method as enumerated in Rule 12300(a)(2)(C).⁸³

With respect to rules regarding service, the Commission recognizes that one commenter's suggestion that FINRA issue a Notice to Members "setting forth a list of the specific filings which must be made outside of the Party Portal once the rule is implemented" in order to "allow practitioners an opportunity to review all the exceptions to filing via the Portal in one place."⁸⁴ The Commission further recognizes FINRA's agreement with this suggestion and its intent to "provide a list of such filings in a Regulatory Notice announcing approval of the proposed rule change as well as in guidance on the FINRA Web site."⁸⁵

Finally, the Commission recognizes FINRA's statement that of the 13,562 parties invited to use the portal as of May 11, 2016 (including customers, firms, and associated persons), "76 percent of customers, including *pro se* customers, have been using the Party Portal voluntarily and 82 percent of firms and associated persons, which includes firm representatives, have been using the Party Portal voluntarily (78 percent in total)."⁸⁶

Taking into consideration the comments and FINRA's response, the Commission believes that the proposal is consistent with the Exchange Act. The Commission believes that the proposal will help protect investors and the public interest by enhancing efficiencies for FINRA arbitration forum users and expediting case administration by FINRA staff by, among other things, improving the case intake process and helping ensure better data accuracy.⁸⁷ The Commission further believes that FINRA's response, as discussed in more detail above, appropriately addressed commenters' concerns and adequately explained its reasons for declining to modify its proposal to allow for payment by personal check or to extend FINRA's current redaction requirements to simplified proceedings. The Commission believes that the approach proposed by FINRA is appropriate and designed to protect investors and the public interest, consistent with Section 15A(b)(6) of the Exchange Act. For these reasons, the Commission finds that the proposed rule change is consistent with the Exchange Act and the rules and regulations thereunder.

V. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Exchange Act,⁸⁸ that the proposed rule change (SR-FINRA-2016-029) be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁸⁹

Brent J. Fields,
Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-79301; File No. SR-MIAX-2016-42]

Self-Regulatory Organizations; Miami International Securities Exchange LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fee Schedule

November 14, 2016.

Pursuant to the provisions of Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")¹ and Rule 19b-4 thereunder,² notice is hereby given that

⁸⁷ Notice, 81 FR at 54866.

⁸⁸ 15 U.S.C. 78s(b)(2).

⁸⁹ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

⁷² In approving the proposed rule change, the Commission has also considered its impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

⁷³ 15 U.S.C. 78o-3(b)(6).

⁷⁴ See IAC Letter at 2; PIABA Letter at 2.

⁷⁵ See FINRA Letter at 2.

⁷⁶ *Id.*

⁷⁷ See PIABA Letter at 1; see also IAC Letter at 2-3.

⁷⁸ See PIABA Letter at 1-2; see also IAC Letter at 2-3.

⁷⁹ See FINRA Letter at 3.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² PIABA Letter at 2.

⁸³ See FINRA Letter at 3.

⁸⁴ PIABA Letter at 2.

⁸⁵ FINRA Letter at 3-4.

⁸⁶ Notice, 81 FR at 54867.