

## Discovery Guide

### SEC Approves Amendments to Discovery Guide Used in Customer Arbitration Proceedings to Address Electronic Discovery, Product Cases and Affirmations

Effective Date: December 2, 2013

#### Executive Summary

The SEC approved amendments to the Discovery Guide used in customer arbitration proceedings.<sup>1</sup> The amended guide provides arbitrators with guidance on resolving electronic discovery (e-discovery) disputes relating to the form for producing electronic documents. It explains how product cases are different from other customer cases and describes the types of documents that parties typically request in product cases. Finally, it clarifies the circumstances under which a party may request an affirmation when an opposing party does not produce documents specified in the guide.

The amendments are effective on December 2, 2013, for all customer cases filed on or after the effective date.

The text of the amendments is set forth in Attachment A.

Questions concerning this *Notice* should be directed to:

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#### Notice Type

- ▶ Rule Amendment

#### Suggested Routing

- ▶ Compliance
- ▶ Legal
- ▶ Registered Representatives

#### Key Topics

- ▶ Affirmations
- ▶ Arbitration
- ▶ Code of Arbitration Procedure
- ▶ Discovery Guide
- ▶ Electronic Discovery
- ▶ Product Cases

## Background & Discussion

The guide supplements the discovery rules contained in the FINRA Code of Arbitration Procedure for Customer Disputes (Customer Code). It includes an introduction which describes the discovery process generally, and explains how arbitrators should apply the guide in arbitration proceedings. The introduction is followed by two Document Production Lists, one for firms/associated persons and one for customers, which enumerate the documents that parties should exchange without arbitrator or staff intervention. The guide only applies to customer arbitration proceedings, not to intra-industry cases. The SEC approved amendments to the guide to provide general guidance on e-discovery issues and product cases and to clarify the provision relating to affirmations made when a party does not produce documents specified in the guide.

### E-discovery

The guide's introduction states that electronic files are documents within the meaning of the guide and that arbitrators decide any disputes that arise about the form in which a party produces a document. FINRA amended the guide to provide that parties are encouraged to discuss the form in which they intend to produce documents and, whenever possible, to agree to the form of production. The provision requires parties to 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 difficult or burdensome for the requesting party to use in connection with the arbitration.

The guide instructs arbitrators who are resolving contested motions about the form of production, to consider the totality of the circumstances, including, among other matters, the following three factors:

- ▶ for documents in a party's possession or custody, whether the chosen form of production is different from the form in which a document is ordinarily maintained;
- ▶ for documents that must be obtained from a third party (because they are not in a party's possession or custody), whether the chosen form of production is different from the form in which the third party provided it; and
- ▶ for documents converted from their original format, a party's reasons for choosing a particular form of production; how the documents may be affected by the conversion to a new format; and whether the requesting party's ability to use the documents is diminished by a change in the documents' appearance, searchability, metadata or maneuverability.<sup>2</sup>

In conjunction with the new guidance on e-discovery, FINRA amended the guide's discussion on cost or burden of production. Currently, the guide states that if the arbitrators determine that the document is relevant or likely to lead to relevant evidence, they should consider whether there are alternatives that can lessen the impact of producing it, such as narrowing the time frame or scope of an item on the Document Production Lists, or determining whether another document can provide the same information. FINRA is mindful of the costs associated with e-discovery and amended the cost or burden of production provision to advise arbitrators that they may order a different form of production if it would lessen the impact of producing electronic documents.

### Product Cases

FINRA amended the guide's introduction to add guidance on product cases. Product cases are unique customer cases that differ from other customer cases in several ways. The amended text provides that a product case is one in which one or more of the asserted claims centers around allegations regarding the widespread mismarketing or defective development of a specific security or specific group of securities. It enumerates some of the ways that product cases are different from other customer cases, including that:

- ▶ the volume of documents tends to be much greater;
- ▶ multiple investor claimants may seek the same documents;
- ▶ the documents are not client specific;
- ▶ the product at issue is more likely to be the subject of a regulatory investigation;
- ▶ the cases are more likely to involve a class action with documents subject to a mandatory hold;<sup>3</sup>
- ▶ the same documents may have been produced to multiple parties in other cases involving the same security or to regulators; and
- ▶ documents are more likely to relate to due diligence analyses performed by persons who did not handle the claimant's account.

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

### Affirmations

The guide provides for affirmations when a party indicates that there are no responsive documents in the party's possession, custody or control. The affirmation language provides that, upon the request of a party seeking documents, the customer, or appropriate person at the firm who has knowledge, must state that the party conducted a good faith search for the documents, describe the extent of the search and state that based on the search there are no requested documents.

FINRA amended the affirmation language to make clear that a party may request an affirmation when an opposing party makes only a partial production. The revised language provides that, if a party does not produce a document specified in a list item on the applicable Document Production List, upon the request of the party seeking the document that was not produced, the customer or the appropriate person at the brokerage firm who has knowledge must affirm in writing that the party conducted a good faith search for the requested document. FINRA is also requiring a party to state the sources searched in the affirmation.

### Effective Date

The amendments are effective on December 2, 2013, for all customer cases filed on or after the effective date.

### Endnotes

1. See Securities Exchange Act Rel. No. 70419 (September 16, 2013), 78 Federal Register 57916 (September 20, 2013) (File No. SR-FINRA-2013-024).
2. FINRA provides guidance on the terms appearance, searchability, metadata, and maneuverability in its [Discovery, Abuses and Sanctions](#) training and [The Arbitrator's Guide](#).
3. A mandatory hold is an act by an entity to preserve documents and electronic information relevant to a lawsuit or government investigation.

## Attachment A

New language is underlined; Deletions are in brackets

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### Discovery Guide

This Discovery Guide and Document Production Lists supplement the discovery rules contained in the FINRA Code of Arbitration Procedure for Customer Disputes (“Customer Code”) (See Rules 12505-12511).

No requirement under the Discovery Guide supersedes any record retention requirement of any federal or state law or regulation or any rule of a self-regulatory organization.

#### **Flexibility in Discovery**

The Discovery Guide, including the Document Production Lists (Lists), serves as a guide for the parties and the arbitrators. While the parties and arbitrators should consider the documents described in the Lists presumptively discoverable, the parties and arbitrators retain their flexibility in the discovery process. Arbitrators can: order the production of documents not provided for by the Lists; order that parties do not have to produce certain documents on the Lists in a particular case; and alter the production schedule described in the 12500 series of rules. [Where additional documents are relevant in a particular case, parties can seek them in accordance with the time frames provided in the 12500 series of rules.]

#### **Cost or Burden of Production**

A party may object to producing a document on a List because of the cost or burden of production. If the party demonstrates that the cost or burden 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, or ordering a different form of production.

### **Requests for Additional Documents**

Where additional documents may be relevant in a particular case, parties can seek them in accordance with the time frames provided in the 12500 series of rules. Arbitrators must use their judgment in considering requests for additional documents and may not deny document requests solely on the ground[s] that the documents are not expressly listed in the Discovery Guide.

Nothing in the Discovery Guide precludes the parties from voluntarily agreeing to an exchange of documents in a manner different from that set forth in the Discovery Guide. FINRA encourages the parties to agree to the voluntary exchange of documents and to stipulate to various matters. The fact that an item appears on the Lists does not shift the burden of establishing or defending any aspect of a claim.

Only named parties must produce documents pursuant to the guidelines set forth herein. However, non-parties may be required to produce documents pursuant to a subpoena or an arbitration panel order to direct the production of documents (see Rule 12513). In addition, the arbitrators may use the Lists as guidance for discovery issues involving non-parties.

Parties and arbitrators should recognize that not all firms have the same business operations model and certain items on the Lists may not apply to a particular case when the firm's business model (e.g. full service firm, discount broker, clearing firm, or online broker) is taken into consideration. In addition, certain items on the Customer List may not apply to a particular case depending on the claims asserted. Absent a written objection or party agreement, the parties shall exchange documents on the Lists within the time frames set forth in the Customer Code. Parties should raise any objections to the production of documents, based on an established privilege, in accordance with the time frames for objections set forth in the Customer Code.

### **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 [E]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 difficult or burdensome for the requesting party to use in connection with the arbitration.

The arbitrators shall decide any dispute that arises concerning the form in which a document will be produced. When resolving contested motions relating to the form of production, arbitrators should consider the totality of the circumstances including, among other matters, the following in determining whether the electronic files are in a reasonably usable format:

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

### **Confidentiality**

If a party objects to document production on grounds of privacy or confidentiality, the arbitrators or one of the parties may suggest a stipulation between the parties that the documents in question will not be disclosed or used in any manner outside of the arbitration of the particular case, or the arbitrators may issue a confidentiality order. When deciding contested requests for confidentiality orders, arbitrators should consider the competing interests of the parties. The party asserting confidentiality has the burden of establishing that the documents in question require confidential treatment. In deciding questions about confidentiality, arbitrators should, taking into account the facts of a particular case, consider factors such as the following:

1. Whether the disclosure would constitute an unwarranted invasion of personal privacy (*e.g.*, an individual's Social Security number, or medical information).
2. Whether there is a threat of harm attendant to disclosure of the information.
3. Whether the information contains proprietary confidential business plans and procedures or trade secrets.
4. Whether the information has previously been published or produced without confidentiality or is already in the public domain.

5. Whether an excessively broad confidentiality order could be against the public interest or could otherwise impede the interests of justice.
6. Whether there are legal or ethical issues which might be raised by excessive restrictions on the parties.

#### **Privileged Documents**

Parties are not required to produce documents that are otherwise subject to an established privilege, including the attorney-client privilege and the attorney work product doctrine. The arbitrators shall not issue an order or use a confidentiality agreement to require parties to produce documents otherwise subject to an established privilege, including attorney work product.

#### **Affirmation in the Event that [There Are No Responsive] a Party Does Not Produce Documents Specified in the Document Production Lists**

[If a party responds that there are no responsive documents in the party's possession, custody, or control,] If a party does not produce a document specified in a List item on the applicable Document Production List, upon the request of the party seeking the document that was not produced, the customer or the appropriate person in the brokerage firm who has knowledge, [upon the request of the party seeking the documents,] must: 1) [state] affirm in writing that the party conducted a good faith search for the requested document[s]; 2) describe the extent of the search including, but not limited to, stating the sources searched; and 3) state that, based on the search, the party does not have the requested document [there are no requested documents] in the party's possession, custody, or control. [In appropriate cases, t] The arbitrators may also order a party to provide such affirmations regarding discovery requests for documents beyond those contained in the Discovery Guide.

#### **No Obligation to Create Documents**

Parties are not required to create documents in response to items on the Lists that are not already in the parties' possession, custody, or control.

#### **Admissibility**

Production of documents in discovery does not create a presumption that the documents are admissible at the hearing. A party may object to the introduction of any document as evidence at the hearing to the same extent that a party can raise any other objection at an arbitration hearing.



### **Product Cases**

Product cases are cases in which one or more of the asserted claims center around allegations regarding the widespread mismarketing or defective development of a specific security or specific group of securities. Product cases are different from other customer cases in several ways:

1. The volume of documents tends to be much greater
2. Multiple investor claimants may seek the same documents
3. The documents are not client specific
4. The product at issue is more likely to be the subject of a regulatory investigation
5. The cases are more likely to involve a class action with documents subject to a mandatory hold
6. The same documents may have been produced to multiple parties in other cases involving the same security or to regulators
7. Documents are more likely to relate to due diligence analyses performed by persons who did not handle the claimant's account.

In a product case, parties typically request documents relating to, among other things, a firm's: creation of a product; due diligence reviews of a product; training on or marketing of a product; or post-approval review of a product. The Document Production Lists may not provide all of the documents parties usually request in a product case. Pursuant to this Discovery Guide, parties are not limited to the documents enumerated in the Document Production Lists. As stated earlier in this Discovery Guide, where additional documents may be relevant in a particular case, parties can seek them in accordance with the time frames provided in the 12500 series of rules.

Parties do not always agree on whether a claim centers around a product as defined above and may ask the arbitrators to make that determination. The arbitrators may ask the parties to explain their rationale for asserting that a claim is, or is not, a product case. Parties may also ask the arbitrators to resolve disputes concerning which additional documents they must produce, and the scope of the additional documents.

**Document Production Lists**

Throughout the Lists, FINRA refers to customers that are parties to an arbitration case as “customer parties” and other firm/associated persons’ customers as “customers.” The Guide provides separate Lists for firms/associated persons and for customer parties. For ease of reference, throughout the Lists, the terms “customer parties,” “customers,” “documents,” “associated persons,” “accounts,” “claims” and “transactions” include the singular terms “customer party,” “customer,” “document,” “associated person,” “account,” “claim” and “transaction,” respectively. In addition, unless otherwise specifically stated, the term “firm” refers to a firm that is a party to the arbitration case.

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