

August 10, 2009

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

Re: File No. SR-FINRA-2009-041 – Proposed Rule Change to Amend Rules 12100, 12506, and 12902 of the Code of Arbitration Procedure for Customer Disputes and Rule 13100 of the Code of Arbitration Procedure for Industry Disputes to Implement Conforming Changes; Response to Comments

Dear Ms. Murphy:

The Financial Industry Regulatory Authority, Inc. (FINRA) (formerly known as the National Association of Securities Dealers, Inc. (NASD)) hereby responds to the comment letter received by the Securities and Exchange Commission (SEC) with respect to the above rule filing. In this rule filing, FINRA is proposing to amend Rules 12100, 12506, and 12902 of the Code of Arbitration Procedure for Customer Disputes (Customer Code) and Rule 13100 of the Code of Arbitration Procedure for Industry Disputes (Industry Code) (together, Codes) to implement conforming changes.

Specifically, the proposal would amend: FINRA Rules 12100(r) and 13100(r) of the Codes (the definition of “person associated with a member”) so that the definition in the Codes conforms to the definition in the By-Laws of the Corporation; Rule 12506(a) of Customer Code (Document Production Lists) to encourage parties to download the *Discovery Guide* from FINRA’s Web site instead of having a copy mailed to them automatically when a claim is filed; and Rule 12902(a) of the Customer Code (Hearing Session Fees, and Other Costs and Expenses) to add language to clarify that the arbitrators may assess hearing session fees against a customer in connection with a claim filed by a member against a customer in cases where there is also a responsive customer claim.¹

¹ Exchange Act Rel. No. 60159 (June 22, 2009), 74 Federal Register 31779 (July 2, 2009) (File No. SR-FINRA-2009-041).

The SEC received one comment letter.² The commenter supports the proposed change to Rules 12100(r) and 13100(r) because it believes that “the definition of “associated person” should include those individuals who have applied for registration, in addition to those who are currently registered.”³ The commenter also supports the proposed changes to Rule 12506(a), because it agrees with FINRA that many parties and counsel who use FINRA’s arbitration forum are frequent users of the forum who are likely to have a current copy of the document in their files, and do not need a copy sent with each new case.⁴

The commenter suggests, however, that FINRA continue to make parties and their representatives aware of the *Discovery Guide* through conspicuous notification.⁵

FINRA notes that when a claim is filed in its arbitration forum, Dispute Resolution staff (staff) sends a letter to the parties notifying them of case administration procedures as well as other information that will be useful to them. Staff also includes a copy of the *Discovery Guide* with this letter. Once the rule is approved, FINRA will continue to raise awareness of the *Discovery Guide* in the notification letter by providing the link to it on FINRA’s Web site.⁶

The commenter also suggests that FINRA “provide a paper copy of the *Discovery Guide* to a party upon request.”⁷

FINRA notes that the proposed change to Rule 12506(a) states expressly that “the Director will notify parties of the location of the FINRA *Discovery Guide* and Document Production Lists on FINRA’s Web site, but will provide a copy to the parties upon request.”

The commenter recommends that FINRA “ensure that the version of the *Discovery Guide* that is posted is actually the version that was disseminated by way of *Notice to Members 99-90*.”⁸ The commenter continues that a recent version posted on FINRA’s Web site “did not contain the same introductory language and formatting as the 99-90 version.”⁹

First, FINRA acknowledges that the 1999 version of the *Discovery Guide* (old *Discovery Guide*) was re-formatted and re-designed in March 2003.¹⁰ Substantively, however, it is the same document that the SEC approved in September 1999.¹¹

² A comment letter was submitted by Brian N. Smiley, President, Public Investors Arbitration Bar Association, July 29, 2009.

³ *Id.* at 1.

⁴ *Id.*

⁵ *Id.* at 2.

⁶ *Infra* note 16.

⁷ Note 2.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Infra* note 16.

¹¹ “NASD Regulation Announces New Discovery Guide to be Used In Arbitration Proceedings,” *Notice to Members 99-90* (Nov. 1999).

Second, the old *Discovery Guide* was amended in 2007 when the SEC approved the Code Revision.¹² The Code of Arbitration Procedure (old Code) did not contain detailed provisions relating to the discovery process, but instead relied on the old *Discovery Guide*. FINRA believed that because certain provisions of the old *Discovery Guide* were not incorporated into the old Code, parties routinely ignored the discovery guidelines, resulting in significant delays in arbitrations and the frequent need for arbitrator intervention. To address these concerns and to expedite the discovery process, FINRA codified in the Codes certain discovery rules from the old *Discovery Guide* that address making or responding to other discovery requests, objecting to discovery, depositions, and discovery sanctions.¹³ The amended *Discovery Guide* is a streamlined version of the old *Discovery Guide*. In addition to the Document Production Lists, the amended *Discovery Guide* contains a brief introduction and procedures relating to confidentiality, affirmations in the event that there are no responsive documents or information, and admissibility.

When the Code Revision became effective, the amended *Discovery Guide* also became effective, and, together, they applied to claims filed on or after the April 16, 2007 effective date.¹⁴ However, for claims filed prior to the April 16, 2007 effective date, the old Code and the old *Discovery Guide* apply.¹⁵ Thus, there are two versions of the *Discovery Guide*, which FINRA publishes on its Web site, and each is conspicuously labeled with the relevant date of applicability.¹⁶ Currently, when a claim is filed in the arbitration forum, FINRA sends the amended *Discovery Guide* to the parties.

Finally, the commenter opposes the changes to Rule 12902 because the “new language could discourage customers from filing counterclaims against member firms that bring claims against them,” and “suggests that the customer could still be liable for such hearing fees.”¹⁷

FINRA notes that the proposed change to Rule 12902 does not represent a new fee that would be imposed on customers. Rule 12902(a)(4) still restricts the hearing session fees that

¹² The SEC approved the Code Revision which reorganized the old Code of Arbitration Procedure into three separate procedural codes: the Customer Code, the Industry Code, and the Mediation Code. The Code Revision simplified the language of the Code of Arbitration Procedure, codified current dispute resolution practices, and implemented several substantive changes to dispute resolution rules. Exchange Act Release No. 55158 (Jan. 24, 2007), 72 FR 4574 (Jan. 31, 2007) (Approval Order for File Nos. SR-NASD-2003-158 and SR-NASD-2004-011).

¹³ The Document Production lists do not appear in the Customer Code, and the Industry Code does not refer to the lists since they do not apply to industry disputes.

¹⁴ “SEC Approves Revision of Customer and Industry Portions of NASD Code of Arbitration Procedure,” *Notice to Members 07-07* (February 2007).

¹⁵ Id.

¹⁶ The “old” and “new” versions of the *Discovery Guide* are available at <http://www.finra.org/ArbitrationMediation/Rules/RuleGuidance/P008013>.

¹⁷ Note 2 at 2.

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arbitrators may assess against customers in claims brought by member firms.¹⁸ However, if a customer files a claim, counterclaim, cross claim, or third party claim, the Customer Code requires customers to pay a filing fee.¹⁹ FINRA assesses the filing fee against customers for filing their own claims in arbitration. Further, if that claim is heard by an arbitrator or arbitrators, the customer may also be responsible for hearing session fees.²⁰ The proposed amendment reflects current practice and would clarify that if customers file a claim in connection with a claim filed by a member, they may be subject to filing fees and hearing session fees based on their *own* claim for relief. (Emphasis added.)

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If you have any questions, please contact me on (202) 728-8151 or at mignon.mclemore@finra.org.

Very truly yours,

Mignon McLemore
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FINRA Dispute Resolution

¹⁸ Infra note 20.

¹⁹ See Rule 12900(a)(1); see also Rule 10332(c) of the old Code.

²⁰ See Rule 12902(a)(4); see also Rule 10332(c) of the old Code.