



July 11, 2013

Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549-1090

RE: Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc., Notice of Filing of Proposed Rule Change Relating to Amendments to the Discovery Guide Used in Consumer Arbitration Proceedings (Docket No. SEC-2013-1101)

Dear Ms. Murphy:

The American Association for Justice (AAJ), formerly the Association of Trial Lawyers of America (ATLA), hereby submits comments in response to the Securities and Exchange Commission's (SEC) solicitation for input concerning the proposed amendment to the FINRA Discovery Guide used in customer arbitration proceedings to provide guidance on electronic discovery ("e-discovery") issues. *See* 78 FR 37261.

AAJ, with members in the United States, Canada and abroad, is the world's largest trial bar. It was established in 1946 to safeguard victims' rights, strengthen the civil justice system, and protect access to the courts. Discovery is a fundamental tenet of litigation in that it provides a mechanism for resolving claims on the merits. Moreover, rather than following a paper trail, today, electronic evidence cannot be readily shredded, lost, or erased and the truth lives on in a format that is not easily hidden. Thus, e-discovery has brought about new levels of accountability in litigation even as its detractors voice misplaced concerns about the cost or burdens of production.

While AAJ applauds FINRA for acknowledging that "[a] customer may need a document to contain metadata in order to establish when a broker learned specific information",¹ its current proposal to allow arbitrators the ability to determine the relevance of particular documents as well as to consider alternatives to e-discovery will inevitably make it more difficult for plaintiffs to discover information relevant to proving their cases. This is particularly important because plaintiffs carry the burden of proof yet access to investment information is most often controlled by defendants. Thus, the proposed amendment to the Discovery Guide has a disproportionate impact on plaintiffs who are subject to asymmetrical information as defendants possess the bulk of e-discovery materials. Ultimately, allowing

¹78 Fed. Reg. 37261

arbitrators discretion in deciding the relevance of electronic communications may lead to a slippery slope where the ability to obtain e-discovery becomes a tool used by defendants to gain an unfair advantage. AAJ requests that any guidance contained in FINRA's Discovery Guide acknowledge the fundamental value of electronically stored information rather than limit its availability to parties seeking resolution.

I. Amending the FINRA Discovery Guide to Allow Arbitrators to Choose Alternatives to E-Discovery Will Negatively Impact Plaintiffs

A. Concerns about the Cost or Burden Impact of E-Discovery Are Misplaced

While it is undisputed that the e-discovery process often involves vast quantities of electronically stored data, FINRA's concerns about the costs associated with production are misplaced. Parties have many strategies and techniques available to reduce costs across all stages of e-discovery including methods of preservation, collection, relevance review, and production. These may also include cooperative agreements limiting the scope of preservation or production and improved corporate records management. In addition and particular to FINRA arbitrations, multiple claimants may all seek the same or similar discovery information from a sale of a proprietary mutual fund. In such instances, e-discovery actually saves money by expediting the process, allowing the responding party to complete the discovery task one time, spreading out costs over multiple cases and effectively lowering the costs per case for respondents.

More pressingly, the proposed change to the FINRA Discovery Guide allowing arbitrators the discretion to choose less burdensome alternatives to e-discovery will likely be seized upon by corporate defendants as a way to argue against producing relevant information. Rather than provide materials critical to the resolution of a case, defendants will hide behind the excuse of cost. Such actions will only exacerbate the asymmetrical burdens plaintiffs currently face as, in most cases, defendants possess far more information than plaintiffs possess or have access to. AAJ cautions against creating this incentive for defendants to avoid reasonable requests for materials central to the resolution of an arbitration proceeding.

B. Plaintiffs Possess Incentives to Limit the Burdens of Discovery

Plaintiffs themselves are likely to control e-discovery costs. In fact, plaintiffs have little incentive to demand unnecessary or excessively burdensome e-discovery as such actions would likely incur sanctions by arbitrators and FINRA. More practically, knowingly demanding electronic communications which are outside the scope of the actual discovery sought creates a volume problem. Plaintiffs rarely possess the time and monetary resources to comb through vast quantities of superfluous e-discovery merely to gain an "edge" over defendants. Such assumptions also overlook the level of cooperation during adversarial proceedings where plaintiffs and defendants realize that by fully engaging in cooperative discovery, both parties benefit from faster and less costly e-discovery processes. Amending the FINRA Discovery Guide to include possible restrictions on e-discovery underestimates

the incentives for both parties to lower costs and AAJ urges FINRA to maintain the e-discovery procedures already in place.

II. FINRA Should Not Narrow the Scope of E-Discovery

At a time when most records are electronic and more and more communications are conducted via email, portable devices, and cell phones, the ability to collect such information must not be limited. While AAJ recognizes that the FINRA arbitration process is not governed by the Federal Rules (“Rules”) regarding electronic discovery, we propose that the current Rules act as a useful guidepost, allowing parties a framework in which to conduct controlled and effective e-discovery. Amendments limiting the scope of discovery were adopted in 1980, 1983, 1993, and 2000.² In particular, several of these amendments directly addressed the handling of e-discovery. Rule 26(f), adopted in 1980, requires the parties to meet and confer early in the case to develop a discovery plan.³ Rule 26(g), adopted in 1983, directs that an attorney signing a discovery request or response certifies that it is proper under the rules.⁴ Perhaps most importantly, Rule 26(b)(2)(C) adopted limitations on the frequency of discovery and provides that “the court must limit the frequency or extent of discovery” if:

- (i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;
- (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or
- (iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.⁵

AAJ appreciates this opportunity to submit comments in response to the SEC’s request for input regarding amendments to the FINRA Discovery Guide on e-discovery issues. If you have any questions or comments, please contact Ivanna Yang, AAJ’s Assistant Regulatory Counsel at (202) 944-2806.

Sincerely,



Mary Alice McLarty

President

American Association for Justice

² See “E-Discovery Today: The Fault Lies Not In Our Rules...”, Millberg LLP and Hausfeld LLP, available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/Milberg%20LLP,%20Hausfeld%20LLP,%20E-Discovery%20Today.pdf>.

³ *Id.*

⁴ *Id.*

⁵ FED. R. CIV. P. 26(b)(2)(C)(i)-(iii). AAJ is aware that the Judicial Conference is currently proposing to amend the language of Rule 26(b)(2)(C)(iii) to limit the frequency or extent of discovery when the proposed discovery is outside the scope permitted by Rule 26(b)(1).