

VIA ELECTRONIC MAIL

July 11, 2013

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

Re: File Number SR-FINRA-2013-024: Proposed Rule Change to Amend the Discovery Guide Used in Customer Arbitration Proceedings

Dear Ms. Murphy:

On June 3, 2013, the Financial Industry Regulatory Authority (FINRA) filed with the Securities and Exchange Commission (SEC), a proposed rule change amending the Discovery Guide (Guide)¹ used in customer arbitration proceedings to provide general guidance on electronic discovery (e-discovery) issues and product cases and to clarify the existing provision relating to affirmations made when a party does not produce documents specified in the Guide (Proposed Amendments).² Most importantly, the Proposed Amendments provide guidance on e-discovery production and provide deeper guidance on how e-discovery should be handled in cases involving particular products. The Financial Services Institute³ (FSI) appreciates the opportunity to comment on this important proposal.

Background on FSI Members

The independent broker-dealer (IBD) community has been an important and active part of the lives of American investors for more than 30 years. The IBD business model focuses on comprehensive financial planning services and unbiased investment advice. IBD firms also share a number of other similar business characteristics. They generally clear their securities business on a fully disclosed basis; primarily engage in the sale of packaged products, such as mutual funds and variable insurance products; take a comprehensive approach to their clients' financial goals and objectives; and provide investment advisory services through either affiliated registered investment adviser firms or such firms owned by their registered representatives. Due to their unique business model, IBDs and their affiliated financial advisers are especially well positioned to provide Main Street Americans with the financial advice, products, and services necessary to achieve their financial goals and objectives.

¹ The Guide, along with the Document Production Lists, supplement the discovery rules in the FINRA Code of Arbitration Procedure for Customer Disputes, Rules 12505-12511.

² Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of Proposed Rule Change Relating to Amendments to the Customer and Industry Codes of Arbitration Procedure To Revise the Public Arbitrator Definition, 78 Fed. Reg. 37267 (June 20, 2013).

³ The Financial Services Institute, Voice of Independent Broker-Dealers and Independent Financial Advisors, was formed on January 1, 2004. Our members are broker-dealers, often dually registered as federal investment advisers, and their independent contractor registered representatives. FSI has 100 Broker-Dealer member firms that have more than 138,000 affiliated registered representatives serving more than 14 million American households. FSI also has more than 35,000 Financial Advisor members.

In the United States, approximately 201,000 independent financial advisers – or approximately 64% percent of all practicing registered representatives – operate in the IBD channel.⁴ These financial advisers are self-employed independent contractors, rather than employees of the IBD firms. These financial advisers provide comprehensive and affordable financial services that help millions of individuals, families, small businesses, associations, organizations, and retirement plans with financial education, planning, implementation, and investment monitoring. Clients of independent financial advisers are typically “main street America” – it is, in fact, almost part of the “charter” of the independent channel. The core market of advisers affiliated with IBDs is comprised of clients who have tens and hundreds of thousands as opposed to millions of dollars to invest. Independent financial advisers are entrepreneurial business owners who typically have strong ties, visibility, and individual name recognition within their communities and client base. Most of their new clients come through referrals from existing clients or other centers of influence.⁵ Independent financial advisers get to know their clients personally and provide them investment advice in face-to-face meetings. Due to their close ties to the communities in which they operate their small businesses, we believe these financial advisers have a strong incentive to make the achievement of their clients’ investment objectives their primary goal.

FSI is the advocacy organization for IBDs and independent financial advisers. Member firms formed FSI to improve their compliance efforts and promote the IBD business model. FSI is committed to preserving the valuable role that IBDs and independent advisers play in helping Americans plan for and achieve their financial goals. FSI’s primary goal is to ensure our members operate in a regulatory environment that is fair and balanced. Our advocacy efforts include industry surveys and research, and outreach to legislators, regulators, and policymakers. FSI also provides our members with an appropriate forum to share best practices in an effort to improve their compliance, operations, and marketing efforts.

Comments

FSI supports the Proposed Amendments as they will provide additional guidance on the increasingly complex nature of discovery to member firms that are parties to FINRA arbitration cases and their outside legal counsel. FINRA Arbitration was once a process that was intended to simplify dispute resolution in the broker dealer industry. However, it has now become an expensive and complex system with numerous cases involving substantial discovery costs. These cases have increasingly required the production of electronic documents. While this trend is regrettable, the guidance introduced in the Proposed Amendments is helpful for firms in terms of specifying how electronic documents should be produced and providing clarity on how disputes over e-discovery production should be resolved. This guidance will likely result in the streamlining of the arbitration process, thereby promoting greater efficiency. As a result, FSI supports its adoption.

FSI also supports the addition of the section specifically dealing with product cases, which often involve substantial e-discovery. This section is particularly helpful to broker dealer firms because it recognizes the significant differences between claims that center on allegations regarding the widespread mis-marketing or defective development of a specific security or specific group of securities, as opposed to other types of arbitrations. Although FSI applauds the decision to include a section recognizing the significance of product cases, we believe FINRA should include additional language to this section reminding arbitrators that they should take into account the “cost or burden of production” when deciding whether to compel production of voluminous e-discovery in product cases. This weighing of the costs and burdens of document production is present in other sections of the *Discovery Guide* and plays a crucial role in keeping FINRA Dispute Resolution a cost-efficient and streamlined forum for securities arbitrations.⁶ This addition would also be in keeping with FINRA’s ongoing effort to encourage arbitrators to “balance the parties’ discovery

⁴ Cerulli Associates at <http://www.cerulli.com/>.

⁵ These “centers of influence” may include lawyers, accountants, human resources managers, or other trusted advisers.

⁶ See FINRA Code of Arbitration Procedure for Customer Disputes Rule 12508(c) (“In making any rulings on objections, arbitrators may consider the relevance of documents or discovery requests and the relevant costs and burdens to parties to produce this information”).

needs with the need to keep the arbitration process expeditious and cost effective.”⁷ The addition of a new section on product cases that specifically outlines criteria for recognizing whether a particular case is a product case will likely produce more efficient arbitrations by limiting the number of discovery disputes among the parties and setting requirements for what specific production is required in product cases.

Conclusion

In conclusion, FSI supports FINRA’s efforts to promote clarity and efficiency in the arbitration process. We believe the Proposed Amendments are carefully designed to achieve these goals and, therefore, support their adoption with the additional suggested language.

We are committed to constructive engagement in the regulatory process and, therefore, welcome the opportunity to work with you on this and other important regulations.

Thank you for your consideration of our comments. Should you have any questions, please contact me at (202) 803-6061.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "D. T. Bellaire". The signature is fluid and cursive, with a large initial "D" and "T" followed by "Bellaire".

David T. Bellaire, Esq.
Executive Vice President & General Counsel

⁷ See SEC Release No. 34-62584, 75 Fed. Reg. 45685, 45686 (July 28, 2010), available at: <http://www.finra.org/web/groups/industry/@ip/@reg/@rulfil/documents/rulefilings/p121844.pdf>