

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-62584; File No. SR-FINRA-2010-035)

July 28, 2010

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of Proposed Rule Change Amendments to the Discovery Guide and Rules 12506 and 12508 of the Code of Arbitration Procedure for Customer Disputes

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder,² notice is hereby given that on July 12, 2010, the Financial Industry Regulatory Authority, Inc. (“FINRA”) filed with the Securities and Exchange Commission (“SEC” or “Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by FINRA. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

FINRA is proposing to amend the Discovery Guide, which includes Document Production Lists, and to make conforming changes to Rules 12506 and 12508 of the Code of Arbitration Procedure for Customer Disputes (“Customer Code”).

The text of the proposed rule change is available on FINRA’s Web site at <http://www.finra.org>, at the principal office of FINRA and at the Commission’s Public Reference Room.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, FINRA included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. FINRA has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

FINRA proposes to revise the Discovery Guide (“Guide”) to expand the guidance FINRA gives to parties and arbitrators on the discovery process and to update the Document Production Lists (“Lists”). The proposal includes conforming changes to Rules 12506 and 12508 of the Customer Code.

Background

The SEC approved the current Guide in 1999 and FINRA made it available for use in arbitration proceedings involving customer disputes upon the publication of Notice to Members (NTM) 99-90 (November 1999). The Guide provides guidance to parties on which documents parties should exchange without arbitrator or staff intervention, and to arbitrators in determining which documents customers and member firms or associated persons are presumptively required to produce in customer arbitrations.

In March 2004, FINRA determined to review the Guide and consider whether FINRA should update the Guide after more than four years of use. A FINRA Advisory Committee, the National Arbitration and Mediation Committee (“NAMC”), conducted

the review. The NAMC is a majority public committee made up of attorneys who represent investors, attorneys who represent brokerage firms, arbitrators, and mediators. In addition, FINRA staff met with other frequent users of the forum representing both the public and the industry to listen to the concerns of each side about the current lists, their proposals for changes, and their reactions to other constituents' proposals. FINRA worked for three years to build a consensus on revisions to the Guide.

In 2008, FINRA filed a proposed rule change with the SEC to update the Guide ("the 2008 proposal"). The 2008 proposal added clarifying and conforming language to the introduction in the Guide and updated the Lists. The SEC received 53 comment letters on the 2008 proposal that clearly signaled that the consensus reached on revisions to the Guide was not broad enough. In light of the comment letters, FINRA withdrew the filing.³

FINRA staff drafted a new Guide which would replace the current Guide in its entirety. The starting point was the 2008 proposal and the comment letters submitted to the SEC on the 2008 proposal. NAMC members shared the staff's draft with interested parties including, among others, attorneys who represent investors, in-house counsel at brokerage firms, and attorneys who handle investor claims at Law School clinics. The NAMC recommended that FINRA appoint a Subcommittee to review the proposal. The Subcommittee, comprised of public and industry NAMC members, reached consensus on a number of revisions to the Guide. The NAMC reviewed the Subcommittee's recommended changes and agreed to make additional revisions. The proposed rule change incorporates the NAMC's suggested revisions.

³ FINRA filed SR-FINRA 2008-024 on June 11, 2008 and withdrew the filing on May 21, 2009.

Commenters on the 2008 proposal suggested that it may be appropriate to eliminate the Lists for specific types of claims since claimants are not required to plead causes of action under the Customer Code. In response to these comments, FINRA proposes to replace the 14 current Lists (two general Lists and 12 separate Lists for specific types of claims) with two Lists. The Lists identify “presumptively discoverable” documents – one for firms/associated persons to produce and one for customers to produce. Although each item on the Lists (with a few exceptions) would be presumptively discoverable in every customer case, parties can still urge that certain documents should not be discoverable. Likewise, parties can ask arbitrators to order production of additional documents that are not on the Lists. The proposed rule change emphasizes that arbitrators retain the flexibility necessary to tailor the Guide to the facts and circumstances of each case. This is especially important because, with the reduction of the Lists from 14 to two, production is no longer dependent on the nature of the claim.

Proposed Revisions to the Guide’s Introduction

FINRA is proposing a number of revisions to the Guide’s introduction that expand the guidance given to parties and arbitrators on the discovery process generally and clarify how arbitrators should apply the Guide in arbitration proceedings.

The current Guide states that it does not intend to remove the arbitrators’ and parties’ flexibility in the discovery process and that arbitrators can order parties to produce documents that are not on the Lists or alter the parties’ production schedule. FINRA would revise the introduction to add that arbitrators also can order that parties do not have to produce certain documents on the Lists. The proposed revision would add

clarity to the Guide by indicating that the arbitrator's flexibility also includes the ability to order that parties do not have to produce particular documents.

FINRA is proposing to add guidance on how arbitrators should handle objections based on cost or burden of production. The introduction would state that if a 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 of production, such as narrowing the time frame or scope of an item, or determining whether another document can provide the same information. Since FINRA is proposing to require production of most of the List items in every case, it is important to emphasize that arbitrators may consider alternative ways to facilitate discovery. FINRA believes the discussion will help arbitrators to balance the parties' discovery needs with the need to keep the arbitration process expeditious and cost effective.

FINRA is proposing to move to the introduction the content in current footnote one, which explains that only parties must produce documents pursuant to the Guide. FINRA is not proposing to make any substantive changes to the content of the footnote.

FINRA is proposing to state that certain items on the Lists may not be relevant in a particular case when the firm's business model (e.g., full service firm, discount broker, or online broker) is considered. FINRA members create and retain various documents for business and regulatory purposes. Depending on how a firm operates, a particular item on the Lists may or may not be relevant. The proposed addition to the introduction

would enhance the Guide because it makes parties and arbitrators aware that it is appropriate to recognize firm differences during the discovery process.

FINRA considers electronic files to be documents within the meaning of the Guide. FINRA is proposing to update the Guide by expressly stating that electronic files are documents within the meaning of the Guide and that arbitrators shall decide any disputes that arise about the form in which a party produces a document.

Commenters on the 2008 proposal expressed concerns that FINRA does not give arbitrators and parties enough guidance about what information they should treat as confidential. The commenters asked FINRA to incorporate into the Guide language from an article in FINRA's newsletter for arbitrators and mediators, the Neutral Corner,⁴ that advises arbitrators that the party asserting confidentiality in the discovery process has the burden of establishing that the documents require confidential treatment and enumerates factors that arbitrators should consider when deciding questions about confidentiality. In response to the comments, FINRA is proposing to expand the discussion on confidentiality in the Guide to include the statement relating to the burden of establishing that documents require confidential treatment and to enumerate factors that arbitrators should consider when deciding questions about confidentiality. The factors include:

- Whether the disclosure would constitute an unwarranted invasion of personal privacy (e.g., an individual's Social Security number, or medical information);
- Whether there is a threat of harm attendant to disclosure of the information;

⁴ The article, Arbitrators and Orders of Confidentiality, The Neutral Corner, April 2004, is available at: <http://www.finra.org/ArbitrationMediation/Neutrals/Education/NeutralCorner/P010040>.

- Whether the information contains proprietary confidential business plans and procedures or trade secrets;
- Whether the information has previously been published or produced without confidentiality or is already in the public domain;
- Whether an excessively broad confidentiality order could be against the public interest or could otherwise impede the interests of justice; and
- Whether there are legal or ethical issues which might be raised by excessive restrictions on the parties.

Currently, if a party states that no responsive documents for a particular item “exist,” and the requesting party asks for an affirmation to that effect, the responding party is required to make such an affirmation. FINRA is proposing to delete the word “exist” and to refer instead to documents “in the party’s possession, custody, or control.” FINRA believes that “exist” is vague and that the new phrase would add clarity to the Guide by explaining which documents parties are required to produce. FINRA would clarify that, in appropriate cases, the arbitrators may order a party to provide an affirmation regarding a discovery request for documents beyond those contained in the Guide. FINRA also proposes to revise the Guide to emphasize that 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.

List 1 – Documents the Firm/Associated Persons Shall Produce in All Customer Cases

The documents identified in each numbered item are presumptively discoverable in every case unless the item specifically limits production to a specific type of claim. To distinguish between customers who are parties to an arbitration and other customers of a

brokerage firm, the discussion below refers to customer parties as “claimants” throughout.

Proposed List 1, Item 1 – In the current Guide, firms/associated persons are required to produce agreements with claimants relating to account opening documents, and new account forms, cash, margin, and option agreements, trading authorizations, discretionary authorizations, and powers of attorney (see current List 1, Item 1). FINRA is also proposing to expand this item to require firms/associated persons to produce account record information, (including the claimants’ names, tax identification numbers, addresses, telephone numbers, dates of birth, employment statuses, annual incomes, net worth, and account investment objectives) and documents relating to the claimants’ risk tolerance. The account record contains information about the claimants that the firm recorded. The record also indicates whether the associated persons responsible for the account signed the record and whether a principal at the firm approved or accepted the record.

Proposed List 1, Item 2 – The current Guide requires firms/associated persons to produce all correspondence between the claimants and the firm/associated person relating to the transactions at issue (see current List 1, item 5). Firms/associated persons are also required to produce account statements for the claimants’ accounts (see current List 1, Item 2) and confirmations for the claimants’ transactions at issue (see current List 1, Item 3).

FINRA is proposing to add clarity to the item by: (1) specifying that the required documents are those that were sent to the claimants or received by the firm and relate to the accounts or transactions at issue; and (2) specifying that firms/associated persons are

required to produce, among other documents, those that relate to asset allocation, diversification, trading strategies, and market conditions.

Commenters on the 2008 proposal requested that FINRA require firms/associated persons to produce statement inserts and marketing materials if requested. In response to the commenters' request, FINRA proposes to expand the item to require firms/associated persons to produce all advertising materials sent to customers of the firm that refer to the securities and/or account types that are at issue. This addition would provide claimants with documents the firm disseminated which advertised the specific products or account types that are at issue in the case, without requiring firms to produce all generic materials sent to all customers.

FINRA is proposing to eliminate the requirement that firms/associated persons produce account statements for the claimants' accounts and confirmations for the claimants' transactions at issue. In many instances, the claimants have retained account statements and/or confirmations, and requiring production of these documents in every case adds unnecessary delay and cost to the discovery process. If necessary, the claimants may request these documents separately.

Proposed List 1, Item 3 – FINRA is proposing to require firms/associated persons to produce documents evidencing investment or trading strategies utilized or recommended in the claimants' accounts, including, but not limited to, options programs, and any supervisory review of such strategies. This new item in the Guide would ensure that claimants have access to evidence of trading strategies utilized or recommended that the firm/associated persons may not have publicly disseminated. The proposal also

provides claimants with documentation of any management supervision over the accounts.

Proposed List 1, Item 4 – In the current Guide, for claims alleging unauthorized trading, firms/associated persons are required to produce the documents they relied on to establish that claimants authorized the transactions at issue (See current List 11, Item 3). For claims alleging unauthorized trading, the proposed Guide would also require firms/associated persons to produce all documents relating to the claimants' authorization of transactions. This addition acknowledges that there may be documents in addition to those relied on by the firm that are relevant or could lead to relevant evidence.

Proposed List 1, Item 5 – The current Guide requires firms/associated persons to produce, for specified claim types, all materials prepared or used by the firm/associated persons relating to the transactions or products at issue, including research reports, prospectuses, and other offering documents such as documents intended or identified as being “for internal use only,” and worksheets or notes indicating the associated persons reviewed or read such documents. As an alternative, the firm/associated persons may produce a list of such documents that contains sufficient detail for the claimants to identify each document listed. Upon request by a party, the firm/associated persons are required to provide any documents identified on that alternative list (see current List 7 titled Misrepresentation/Omissions, List 9 titled Negligence/Breach of Fiduciary Duty, and List 13, Item 1 relating to claims alleging unsuitability).

FINRA is proposing to add clarity to this item by specifying that, in addition to materials prepared or used by the firm/associated persons, the firm/associated persons must produce the materials provided to the claimants. The amendments would also

require production of sales materials and performance or risk data. FINRA is proposing to delete the alternative two-step production procedure to reduce delays in the discovery process.

Proposed List 1, Item 6 – The current Guide requires firms/associated persons to produce all notes, including entries in any diary or calendar, relating to the claimants' accounts at issue (see current List 1, Item 6). FINRA is proposing to expand the scope of the item by requiring production of notes relating to the claimants in addition to the claimants' accounts or transactions at issue. For example, notes about the claimants' other accounts may provide evidence in the case.

Proposed List 1, Item 7 – The current Guide requires firms/associated persons to produce records relating to the claimants' accounts at issue, such as internal reviews and exception and activity reports, which reference the claimants' accounts at issue (see current List 1, Item 11). FINRA is proposing to clarify the item by specifying that firms/associated persons would be required to produce notes or memoranda evidencing supervisory, compliance, or managerial review of the claimants' accounts or trades for the period at issue. The item would also require production of correspondence between the claimants and the firm/associated persons relating to the claimants' accounts or transactions that bear indications of managerial, compliance, or supervisory review of such correspondence. The Guide would address exception reports and supervisory reviews, among other documents, in proposed Item 13.

Proposed List 1, Item 8 – The current Guide requires firms/associated persons to produce recordings and notes of telephone calls or conversations about the claimants' accounts at issue that occurred between the associated persons and the claimants (see

current List 1, Item 7). FINRA proposes to expand this item to include telephone logs. Currently, telephone logs are only required in cases alleging unauthorized trading (see current List 11, Item 2). However, FINRA would narrow the item from records relating to the claimant's "accounts at issue" to records relating to the "transactions at issue." Producing recordings of telephone calls is labor intensive, expensive, and difficult for firms unless the claimants are able to specify a telephone call's date and time, provide the name of a person the claimants spoke to at the firm, and/or specify the trade placed during the conversation.

Proposed List 1, Item 9 – FINRA is proposing to require firms/associated persons to produce writings reflecting communications between the associated persons assigned to the claimants' accounts at issue during the time period at issue and members of the firm's compliance department relating to the securities/products at issue and/or the claimants' accounts. FINRA believes that such writings may provide evidence relating to, among other matters, supervision of the associated persons handling the claimants' accounts. This item would be new in the Guide.

Proposed List 1, Item 10 – The current Guide requires firms/associated persons to produce Forms RE-3, U-4, and U-5, including all amendments, customer complaints identified in the forms, and customer complaints of a similar nature against the associated persons handling the accounts at issue (see current List 1, Item 8).

FINRA proposes to amend this item to require that firms/associated persons produce Forms RE-3, U-4, and U-5, and the Disclosure Reporting Pages for the associated persons assigned to the claimants' accounts at issue during the time period at issue. Disclosure Reporting Pages, which are actually part of Forms U-4 and U-5,

provide claimants with valuable, detailed information about prior customer complaints. FINRA would narrow production of these forms to the associated persons assigned to the claimants' accounts at issue during the time period at issue, to ease the burden of production for the firms. Because of the sensitive nature of the personal information, FINRA would permit the firm to redact the associated persons' Social Security numbers.

Commenters on the 2008 proposal requested that FINRA require firms/associated persons to produce all customer complaints against the associated persons. To respond to these comments, FINRA proposes to require firms/associated persons to produce all customer complaints filed against the associated persons assigned to the accounts at issue that were generated between three years prior to the first transactions at issue through filing of the Statement of Claim, redacted to prevent disclosure of nonpublic personal information about complaining customers.

Proposed List 1, Item 11 – The current Guide requires firms/associated persons to produce all sections of the firm's Compliance Manuals related to the claims alleged in the Statement of Claim, including any separate or supplemental manuals governing the duties and responsibilities of the associated persons and supervisors, any bulletins (or similar notices) issued by the compliance department, and the table of contents and index to each Manual (see current List 1, Item 9).

FINRA is proposing to amend this Item to replace compliance manuals with "manuals and all updates thereto" and compliance department with "firm." The proposal would clarify that the firm/associated persons must produce the manuals regardless of whether the firm characterizes them as "compliance manuals," and firms/associated persons must produce bulletins from any department issuing them. FINRA is also

proposing to clarify that production of manuals, bulletins, and updates is required for all years in which the Statement of Claim alleges that the conduct occurred. Updates are material to establishing the firm procedures in place during a specified time frame.

FINRA would also amend the item to require firms/associated persons to provide a list of all of manuals and bulletins which may contain directives related to the conduct or product at issue in the claim. The list would enable claimants to identify any additional manual or bulletin sections that may be relevant to their claims.

Proposed List 1, Item 12 – The current Guide requires firms/associated persons to produce all analyses and reconciliations of the claimants’ accounts during the time period and/or relating to the transactions at issue (see current List 1, Item 10). FINRA is proposing to amend this item to clarify that production is limited to analyses and reconciliations “prepared” during the time period at issue, and includes analyses and reconciliations prepared as part of a review of the claimants’ accounts or transactions at issue. These documents are valuable because they may contain firm findings concerning reviews of claimants’ accounts.

Proposed List 1, Item 13 – For claims alleging failure to supervise, the current Guide requires the production of all exception reports and supervisory activity reviews relating to the associated persons and/or the claimants’ accounts generated not earlier than one year before or not later than one year after the transactions at issue, and all other documents reflecting supervision of the associated persons and the claimants’ accounts (see current List 5, Item 2).

FINRA is proposing to require firms/associated persons to produce all exception reports, supervisory activity reviews, concentration reports, active account runs, and

similar documents produced to review for activity in the claimants' accounts related to the allegations in the Statement of Claim or in which the transactions at issue are referenced or listed.

For claims alleging failure to supervise, FINRA is proposing to expand production beyond the review of activity in the claimants' accounts also to cover other customer accounts handled by associated persons at the firm. In such cases, FINRA is proposing to require firms/associated persons to produce all exception reports, supervisory activity reviews, concentration reports, active account runs, and similar documents produced to review for activity in customer accounts handled by associated persons and related to the allegations in the Statement of Claim that were generated not earlier than one year before or not later than one year after the transactions at issue.

FINRA would limit production to documents related to the allegations made in the Statement of Claim to ease the burden of production for firms/associated persons. FINRA believes that narrowing the item would not negatively impact claimants because firms/associated persons would continue to produce reports related to the claimants' claims.

Proposed List 1, Item 14 – For claims alleging failure to supervise, the current Guide requires production of the portions of internal audit reports at the branch in which the claimants maintained accounts that focused on the associated persons or the transactions at issue, and were generated not earlier than one year before or not later than one year after the transactions at issue and discussed alleged improper behavior in the branch against other individuals similar to the improper conduct alleged in the Statement

of Claim (see current List 5, Item 3). FINRA is not proposing any substantive changes to this Item.

Proposed List 1, Item 15 – The current Guide requires the production of records of disciplinary action taken against associated persons by any regulator or employer for all sales practice violations or conduct similar to the conduct alleged to be at issue (see current List 1, Item 12). FINRA is not proposing any substantive changes to this item.

Proposed List 1, Item 16 – FINRA is proposing to require firms/associated persons to produce all investigations, charges, or findings by any regulator (state, federal or self-regulatory organization) and the firm/associated persons' responses to such investigations, charges, or findings for the associated persons' alleged improper behavior similar to that alleged in the Statement of Claim. This new item in the Guide would expand the scope of documents that relate to the associated persons' disciplinary history.

Proposed List 1, Item 17 – For claims alleging failure to supervise, the current Guide requires production of the portions of examination reports or similar reports following an examination or an inspection conducted by a state or federal agency or a self-regulatory organization that focused on the associated persons or the transactions at issue or that discussed alleged improper behavior in the branch against other individuals similar to the improper conduct alleged in the Statement of Claim (see current List 5, Item 4). Commenters on the 2008 proposal requested that FINRA include a time limit for production of these documents. In response to these comments, FINRA is proposing to limit production to those reports issued for the period one year before the transactions at issue through the filing of the Statement of Claim. FINRA believes that restricting the time frame for production would reduce the firms' burden of production and offset the

expansion of this production to all cases while ensuring that claimants have access to the reports that relate to their claims.

Proposed List 1, Item 18 – FINRA is proposing to require firms/associated persons to produce documents the respondents obtained by subpoena or by document requests directed to third parties. While this item would be new in the Guide, it is not a new requirement because the subpoena rule, Rule 12512(e), already requires production of subpoenaed documents. FINRA is proposing to cross-reference that rule in the Guide. FINRA would also add documents received by request directed to third parties at any time during the case to ensure that all parties have access to documents obtained without a subpoena from non-parties.

Proposed List 1, Items 19, 20, and 21 – In the current Guide, firms/associated persons are required to produce documents relating to associated persons' commissions and/or compensation when claimants allege churning (see current List 3, Items 1-3), failure to supervise (see current List 5, Item 1), or unsuitability (see current List 13, Item 2).

Proposed List 1, Item 19 – FINRA is proposing to require firms/associated persons to produce documents showing the associated persons' gross and net compensation for the transactions at issue in the Statement of Claim. This is new in the Guide. Documentation of compensation on an order-by-order basis provides parties with a clear understanding of how much firms paid associated persons for the trading at issue. If the accounts at issue were the subject of fee arrangements that are not based on remuneration per trade, firms/associated persons would be required to produce a record of compensation earned for the period when the transactions in the accounts took place.

Proposed List 1, Item 20 – The current Guide requires firms/associated persons to produce commission runs relating to the claimants’ accounts at issue or, in the alternative, a consolidated commission report relating to the accounts (see current List 3, Item 1). It also requires firms/associated persons to produce documents reflecting compensation of any kind, including commissions, from all sources generated by the associated persons assigned to the claimants’ accounts for the two months preceding, through the two months following, the transactions at issue, or up to 12 months, whichever is longer. The firm may redact all information identifying customers who are not parties to the action except for the last four digits of the non-party customer account number for each transaction (see current List 3, Item 2).

In addition, for claims related to solicited trading activity, FINRA is proposing to require the firm/associated persons to produce a record of all compensation, monetary and non-monetary, including, but not limited to, monthly commission runs for the associated persons who handled the claimants’ accounts. That record should reflect the securities traded, dates traded, whether the trades were solicited or unsolicited, and the gross and net commission from each trade. Firms would be required to produce this record for a period of time beginning three months before and ending three months after the trades at issue in the claimants’ accounts. FINRA is proposing to impose this additional production only in claims relating to solicited trading activity because the records would be most relevant to such activity. The required documents may provide claimants with evidence regarding the extent to which the associated person recommended securities to other customers.

The firm may redact names and other non-public personal information concerning customers who are not parties to this claim, but would be required to provide sufficient information to identify: (1) the non-party customers' accounts, including the last four digits of the non-party customers' account numbers; (2) the associated persons' own and related accounts, including the last four digits of the associated persons' account numbers; and (3) the type of account (IRA, 401(k), etc.). Activity in the associated persons' account may be correlated to the transactions in the customers' accounts.

Proposed List 1, Item 21 – The current Guide requires firms/associated persons to produce documents describing the basis upon which the firm compensated the associated persons during the years in which the transactions or occurrences in question occurred, including any bonus or incentive program, and compensation and commission schedules (see current List 3, Item 3 and current List 13, Item 2). FINRA would add clarity to this item by requiring production of a record of all agreements pertaining to the relationship between the associated person and the firm, summarizing the associated person's compensation arrangement or plan with the firm, including commission and concession schedules, bonus or incentive plans, and schedules showing compensation. If the firm based the associated persons' compensation on factors other than remuneration per trade, the item would require documentation of the method by which compensation was determined.

Proposed List 1, Item 22 – For claims with allegations relating to an insurance product that includes a death benefit, FINRA is proposing to require firms/associated persons to produce all information concerning the claimants' insurance holdings and the recommendations, if any, to the claimants regarding insurance products. This new

requirement in the Guide could provide parties with evidence in cases involving annuities.

Items Firms/Associated Persons Would No Longer Be Required to Produce

Holding Pages – In the current Guide, firms/associated persons are required to produce holding pages for the claimants’ accounts at issue (see current List 1, Item 4). FINRA is proposing to delete this item from the Guide because holding pages (hand written records of transactions made and kept by associated persons) are, generally, no longer in use. Firms provide transaction information to customers on account statements and/or confirmations.

Order tickets – In the current Guide, firms/associated persons are required to produce order tickets for the claimants’ transactions in cases alleging unauthorized trading (see current List 11, Item 1). FINRA is proposing to delete this requirement from the Guide because production of order tickets is burdensome and evidence relating to whether the claimants authorized a particular transaction would be produced under proposed List 1, Items 4, 6, and 8.

List 2 – Documents the Customers Shall Produce in All Customer Cases

The documents identified in each numbered item are presumptively discoverable in every case unless the item specifically limits production to a specific type of claim.

As stated above, to distinguish between customers who are parties to an arbitration and other customers of a brokerage firm, the discussion below refers to customer parties as “claimants” throughout.

Proposed List 2, Item 1 – In the current Guide, claimants are required to produce all claimant and claimant-owned business (including partnership or corporate) federal

income tax returns, limited to pages 1 and 2 of Form 1040, Schedules B, D, and E, or the equivalent for any other type of return, for the three years prior to the first transaction at issue in the Statement of Claim through the date the Statement of Claim was filed (see current List 2, Item 1). FINRA is proposing to expand this item to require production of Form 1040 schedule A and the IRS worksheets related to Schedules A, B, D, and E. The expanded production would provide parties with a broader understanding of the claimants' financial status and investment activity during the relevant period. The amendments would provide that the income tax returns must be identical to those that the claimants filed with the Internal Revenue Service.

Because of the sensitive nature of the personal information, FINRA would permit claimants to redact their Social Security numbers. FINRA would also permit claimants to redact information relating to medical and dental expenses and the names of charities on Schedule A unless the information relates to the allegations in the Statement of Claim.

Proposed List 2, Item 2 – The current Guide requires claimants to produce financial statements or similar statements of the claimants' assets, liabilities, and/or net worth for the period covering the three years prior to the first transaction at issue in the Statement of Claim through the date the claimants filed the Statement of Claim (see current List 2, Item 2). FINRA is proposing to add clarity to this item by specifying that financial statements include statements within a loan application. The item would also provide that claimants are not required to create financial statements in order to comply with the item.

Proposed List 2, Item 3 – The current Guide requires claimants to produce copies of all documents received from the firm/associated persons and from any entities in

which the claimants invested through the firm/associated persons, including monthly statements, opening account forms, confirmations, prospectuses, annual and periodic reports, and correspondence (see current List 2, Item 3). FINRA is proposing to expand this item to include research reports. Research reports may provide evidence concerning the basis for the claimants' investment decisions.

FINRA is proposing to eliminate mandatory production of account statements and confirmations if claimants stipulate to having received them. The amendments would require claimants to produce any statements or confirmations with hand written notations on them or which are not identical to those sent by the firm. The amendments would decrease claimants' discovery costs while preserving the requirement to produce documents that may have probative value.

Proposed List 2, Item 4 – The current Guide requires claimants to produce account statements and confirmations for accounts maintained at securities firms other than the respondent firm for the three years prior to the first transaction at issue in the Statement of Claim through the date the claimants filed the Statement of Claim (see current List 2, Item 4). FINRA is proposing to amend this item to permit claimants to provide written authorization allowing the firm/associated persons to obtain account statements directly from the securities firms instead of providing copies of the statements. If the claimants elect to provide written authorization to the firm/associated persons to obtain the account statements, the claimants would still be required to provide all account statements in the claimants' possession, custody, or control with hand written notations on them or which are not identical to those sent by the firm. The proposal would ensure that other parties to the matter have a complete understanding of the claimants' investing

history. FINRA proposes to eliminate confirmations from the item to ease the burden for investors. If necessary, firms would be able to request confirmations separately.

Proposed List 2, Item 5 – The current Guide requires claimants to produce agreements, forms, information, or documents relating to the accounts at issue signed by or provided by the claimants to the firm/associated persons (see current List 2, Item 5). FINRA is proposing to expand the scope of this item by requiring production of documents relating to accounts or transactions at the firm regardless of whether claimants signed the documents.

Proposed List 2, Item 6 – The current Guide requires claimants to produce account analyses and reconciliations prepared by or for the claimants relating to the accounts at issue (see current List 2, Item 6). FINRA is proposing to provide clarity to this item by changing “the account(s) at issue” to “the accounts at the respondent firm or transactions with the respondent firm during the time period at issue.”

Proposed List 2, Item 7 – The current Guide requires claimants to produce notes, including entries in diaries or calendars, relating to the accounts at issue (see current List 2, Item 7). FINRA is proposing to amend this item to provide clarity by changing “the account(s) at issue” to “accounts at the respondent firm or transactions at issue with the respondent firm.”

Proposed List 2, Item 8 – The current Guide requires claimants to produce recordings and notes of telephone calls or conversations about the claimants’ accounts at issue that occurred between the associated persons and the claimants (and any person purporting to act on behalf of the claimants) (see current List 2, Item 8). For claims alleging unauthorized trading, claimants are also required to produce telephone records,

including telephone logs, evidencing telephonic contact between the claimants and the firm/associated persons (see current List 12, Item 1). FINRA is proposing to combine these items into new Item 8. FINRA is not proposing any substantive changes to the items.

Proposed List 2, Item 9 – The current Guide requires claimants to produce correspondence between the claimants (and any person acting on behalf of the claimants) and the firm/associated persons relating to the accounts at issue (see current List 2, Item 9). FINRA is proposing to amend this item to broaden the scope of production by deleting the reference to firm/associated persons. The claimants may have corresponded with persons/entities unrelated to the firm concerning the transactions at issue.

Proposed List 2, Item 10 – The current Guide requires claimants to produce previously prepared written statements by persons with knowledge of the facts and circumstances related to the accounts at issue, including those by accountants, tax advisors, financial planners, other associated persons, and any other third party (see current List 2, Item 10). FINRA is not proposing any substantive changes to the current item.

Proposed List 2, Item 11 – The current Guide requires claimants to produce complaints/Statements of Claim and answers filed in all civil actions involving securities matters and securities arbitration proceedings, and all final decisions and awards entered in these matters (see current List 2, Item 12). FINRA is proposing to expand the scope of this item by requiring claimants to produce non-confidential settlements entered in these matters because the subject matter of non-confidential settlements may be relevant to the

pending case. The item would specify that claimants must produce the documents for all claims or complaints filed prior to the filing of the current Statement of Claim.

FINRA is also proposing to add that, if a person is party to a confidential settlement agreement that by its terms does not preclude identification of the existence of the settlement agreement, the party must identify the documents comprising the confidential settlement agreement. The proposed change would state that, although not presumptively discoverable, the panel could order the claimants to produce a confidential settlement agreement. The proposal would ensure that parties are aware of other securities actions in which the claimants were parties.

Proposed List 2, Item 12 – For claims alleging misrepresentation/omissions (see current List 8, Item 1), negligence/breach of fiduciary duty (see current List 10, item 1), or unsuitability (see current List 14, Item 1), the current Guide requires claimants to produce documents showing the claimants’ ownership in or control over any business entity, including general and limited partnerships and closely held corporations. FINRA is proposing to expand the scope of this item to require that if the claimants are Trustees, they must also provide documents showing all accounts over which they have trading authority. The Trustees’ trading activity for other accounts may provide evidence of the Trustees’ investment sophistication.

Proposed List 2, Item 13 – For claims alleging unsuitability, the current Guide requires claimants to produce written documents they relied upon in making the investment decisions at issue (see current List 14, Item 2). FINRA is proposing to delete the reference to “documents relied upon” and require production of all documents the claimants “received, including documents found through the claimants’ own efforts,

relating to the investments at issue.” Documents the claimants received that relate to the investment at issue could provide relevant evidence in a case even if the claimants did not rely on them in making an investment decision.

Proposed List 2, Item 14 – For claims alleging unauthorized trading, the current Guide requires claimants to produce documents relied on to show that transactions were made without the claimants’ knowledge or consent (see current List 12, Item 2). FINRA is not proposing any substantive changes to the item and is proposing to limit the item to claims alleging unauthorized trading.

Proposed List 2, Item 15 – FINRA is proposing to require claimants to produce all materials received or obtained from any source relating to the transactions or products at issue, and other investment opportunities, including research reports, sales literature, performance or risk data, prospectuses, and other offering documents, including documents intended or identified as being “for internal use only,” and worksheets or notes. This item would be new in the Guide. Production of these documents may provide evidence concerning the bases for claimants’ trading decisions. Therefore, FINRA also is proposing to require claimants to produce any similar materials received or obtained relating to other investment opportunities.

Proposed List 2, Item 16 – For claims alleging misrepresentation/omission (see current List 8, Item 2), negligence/breach of fiduciary duty (see current List 10, Item 2), or unsuitability (see current List 14, Item 3), claimants are required to produce a copy of their resumes. While FINRA is not proposing any substantive changes to the item, claimants would be required to produce the documents in every case.

Proposed List 2, Item 17 – For claims alleging misrepresentation/omission (see current List 8, Item 3), negligence/breach of fiduciary duty (see current List 10, Item 3), or unsuitability (see current List 14, Item 4), claimants are required to produce documents showing their educational and employment background, or a description of their background if not set forth in a resume. While FINRA is not proposing any substantive changes to the item, claimants would be required to produce the documents in every case.

Proposed List 2, Item 18 – FINRA is proposing to require claimants to produce documents the claimants obtained by subpoena or by document requests directed to third parties. While this item would be new in the Guide, it is not a new requirement because the subpoena rule, Rule 12512(e), already requires production of subpoenaed documents. FINRA is proposing to cross-reference that rule in the Guide. FINRA would also add documents received by request directed to third parties at any time during the case, to ensure that all parties have access to documents obtained without a subpoena from non-parties.

Proposed List 2, Item 19 – For claims involving an insurance product that provides a death benefit, FINRA is proposing to require claimants to produce all insurance information received from an insurance sales agent or securities broker relating to the insurance. This new requirement in the Guide could provide parties with evidence that may be relevant in cases involving annuities.

Items Customers Would No Longer Be Required to Produce

Claimants' complaints – The current Guide requires claimants to produce all prior complaints by or on behalf of the claimants involving securities matters and the firm's/associated persons' responses (see current List 2, Item 11). FINRA is proposing to

delete this item as unnecessary because the respondent firm/associated persons would be in possession of such complaints and any responsive documents.

Claimants' action to limit losses – The current Guide requires claimants to produce all documents showing action taken by the claimants to limit losses in the transactions at issue (see current List 2, Item 13). FINRA is proposing to delete this item because, in most instances, the firm/associated persons are in possession of any documents that would be responsive to this item. If necessary, firms would be able to request additional documents.

Conforming Changes

FINRA is proposing to amend Rules 12506 (Document Production Lists) and 12508 (Objecting to Discovery; Waiver of Objection) to remove references to Lists three through 14 since FINRA would delete these lists in the proposed Guide.

2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,⁵ which requires, among other things, that FINRA rules must 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. FINRA believes that these revisions to the Guide will reduce the number and limit the scope of disputes involving document production and other matters, thereby improving the arbitration process for the benefit of the public investors, broker-dealer firms, and associated persons who use the process.

⁵ 15 U.S.C. 78o-3(b)(6).

B. Self-Regulatory Organization's Statement on Burden on Competition

FINRA does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) by order approve such proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's Internet comment form

(<http://www.sec.gov/rules/sro.shtml>); or

- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-FINRA-2010-035 on the subject line.

Paper Comments:

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-FINRA-2010-035. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of FINRA. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All

submissions should refer to File Number SR-FINRA-2010-035 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁶

Florence E. Harmon
Deputy Secretary

⁶ 17 CFR 200.30-3(a)(12).