



## **FINRA Arbitration: Developments in Discovery**

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### **Background on discovery rules and guide list.**

A. Customer dispute discovery guide list changes in 2012.

### **Changes to non-party discovery.**

A. Regulatory Notice 13-04, Effective February 18, 2013.

B. New procedures for subpoenas, orders, objections, production, and cost allocation.

C. Changes affect both the Customer Code and the Industry Code.

D. Subpoenas

1. Continue to be utilized for witness appearance or document production from those outside the industry.
2. Non-party may file written objections with the Director within ten days of service.
3. Propounding party may then respond to objections within ten days.
4. Arbitrator rules on objections.
5. Propounding party pays the reasonable costs of industry non-party's appearance or production, unless panel directs otherwise, even if a subpoena is utilized.

E. Orders

1. Adoption of procedures for orders to non-party FINRA members.
2. Arbitrators now issue orders when industry parties seek witness appearance or document production from non-party firms or their employees/associated persons.
3. Subpoena procedures adopted for industry orders.
  - a. Motions for orders must now be accompanied by draft order.
  - b. Party objection procedures adopted.
  - c. Party obligated to complete service.
  - d. Non-party objection procedure tracks new subpoena procedure.
  - e. Party notice procedures adopted.

4. Propounding party still pays the reasonable costs of non-party's appearance or production unless panel directs otherwise.

### **Case law trends on enforceability of FINRA subpoenas.**

### **Proposed changes to discovery guide.**

A. Proposed rule SR-FINRA-2013-024.

1. FINRA filed proposed rule changes on June 3, 2013.
2. Appeared in June 20, 2013 Federal Register.
3. Comments solicited through July 11, 2013.

B. Guidance on e-discovery issues.

1. Parties encouraged to discuss the form of document production.
2. Electronic files must be produced in a reasonably useable format.
3. Factors in deciding disputes over the form of production.
  - a. Form in which document is ordinarily maintained.
  - b. Form in which the document was provided by a non-party.
  - c. If converted:
    - (i) The reasons for conversion.
    - (ii) How the documents are affected.
    - (iii) Whether utility is diminished, including appearance, searchability, metadata, or maneuverability.

C. Modifications for product cases.

1. Applies to claims of widespread mismarketing or defective development of specific security or groups of securities.
2. Parties are not limited to Document Production Lists.
3. Party may request panel determination of whether a product case.

D. Revisions to affirmation language.

1. Now applicable to partial productions.

2. Affirming party must state the particular sources searched.

**Implications on cost.**

**FINRA DR Portal Update.**



# FINRA DR Portal

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## User Guide

**July 2013**

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## Welcome to the FINRA DR Portal

### Introduction

FINRA Dispute Resolution developed this user guide to help neutrals become familiar with the FINRA Dispute Resolution Portal (DR Portal). The DR Portal is a web-based system that allows neutrals to log into a secure section of our website for self-service access to update their profile and view assigned case information.

### Portal Access

Neutrals can access the DR portal from FINRA.org after completing the initial registration step. Neutrals can also create a “favorite” or “bookmark” in their browser for easy access to the DR Portal. We recommend that you create the bookmark **after** you successfully log into the portal. You should use the following URL as the bookmark for the portal: <https://DRPortal.finra.org>

**Note: you can NOT use your FINRA Firm Gateway account to access the DR Portal. You must create a separate account using the self-registration procedures described below.**

### Compatible Browsers

The DR Portal is compatible with the following browsers: Internet Explorer 8 and higher; Firefox 13 and higher; and Google Chrome.

### Mobile Devices

Neutrals can access the DR Portal on a mobile device—such as a smartphone or tablet (e.g., iPhone, iPad)—using the same URL as you would on your computer: <https://DRPortal.finra.org>. Although you can view your case and profile information, you will **not** be able to update your profile using these devices. To update your profile, you will need to log into the portal using your desktop or laptop computer.

## Registration Process

FINRA sent you an invitation containing a personalized link to your neutral profile. Please follow these steps to create your personal profile and register:

1. Click on the link in the email with the subject line **“Welcome to the FINRA Dispute Resolution Portal.”** You will be brought to the **“Welcome to Dispute Resolution”** log-in page and have the option to log into or create your FINRA account.
2. Click on **“Register Now”** to create a new user profile.

Welcome to FINRA

**New** The Login process has changed. [Learn More](#)

User ID

[Forgot Password?](#) New Users, [Register Now](#)

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[I Agree](#) [I Disagree](#)

If you are experiencing any difficulties logging into the system, please contact your Administrator for assistance. If you are a Super Account Administrator, contact the Gateway Call Center at 301-869-6699 for Assistance.

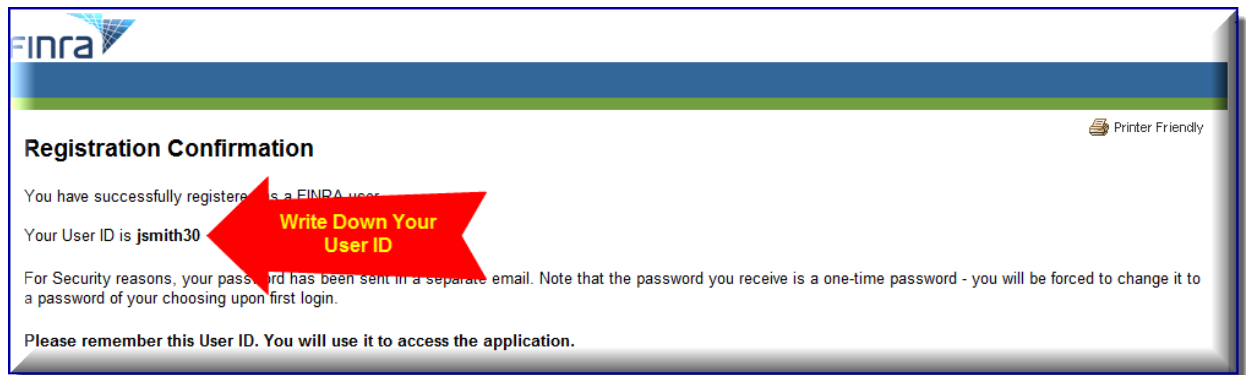
Do NOT bookmark this page or add it to your favorites. If you would like to create a bookmark or add this application to your favorites, please create the bookmark or add it to your favorites after successfully logging in.

[Privacy](#) | [Legal](#) | [Terms & Conditions](#)

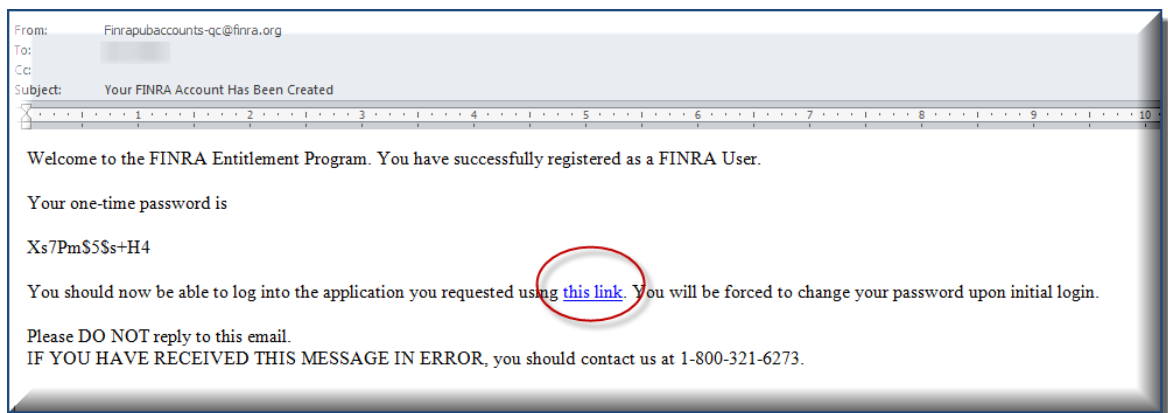
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3. Enter the registration information. The email address that you use in this initial registration form will be the email that is reflected as your primary email address in your disclosure profile with FINRA. If you need to update your email address with FINRA, you will need to make this change by updating your account information in the portal. Please see **“Email Address”** on page 15. Note that this change cannot be made by FINRA staff.

4. You will receive a "Registration Confirmation" with your User ID. Be sure to write down your User ID and/or print this screen. If you leave this screen and cannot remember your user name, you will need to re-register.

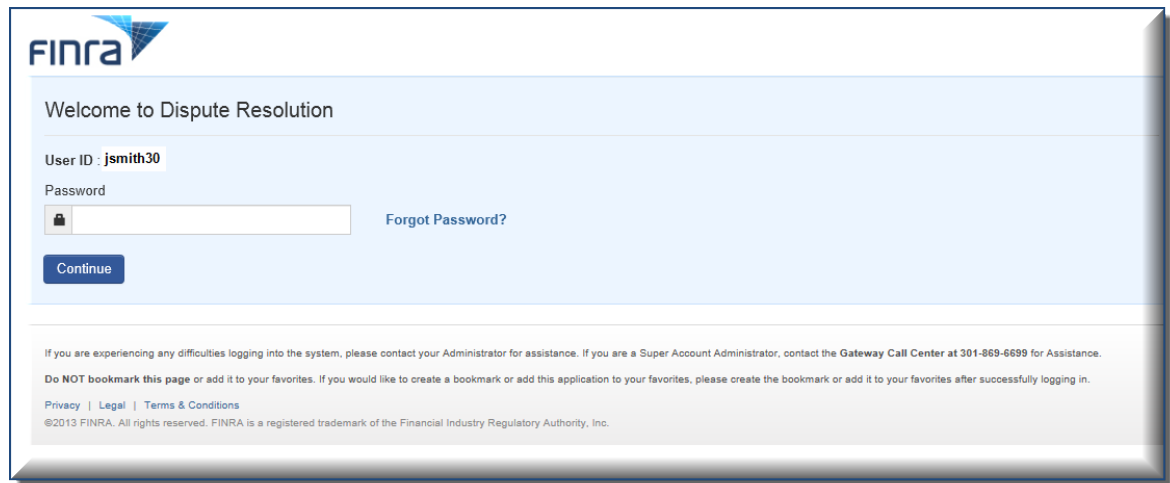


5. You will receive an email with a temporary password. Copy the password and click on the words "this link" in the email to change your password.



6. On the "Welcome to Dispute Resolution" page, enter your User ID and click "I agree."

7. The system will capture your User ID and prompt you to enter your password. Enter your temporary password and click “continue.”

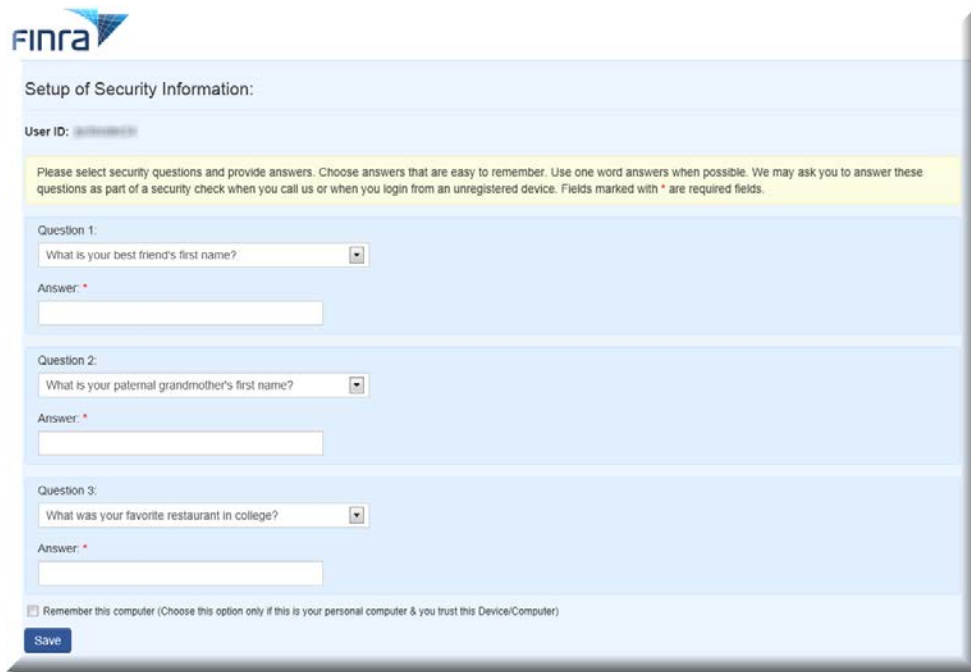


The screenshot shows the FINRA Dispute Resolution Portal login interface. At the top left is the FINRA logo. Below it, the text "Welcome to Dispute Resolution" is displayed. The "User ID" field is populated with "jsmith30". The "Password" field is empty, with a lock icon to its left. To the right of the password field is a link that says "Forgot Password?". Below the password field is a blue "Continue" button. At the bottom of the page, there is a small disclaimer: "If you are experiencing any difficulties logging into the system, please contact your Administrator for assistance. If you are a Super Account Administrator, contact the Gateway Call Center at 301-869-6699 for Assistance. Do NOT bookmark this page or add it to your favorites. If you would like to create a bookmark or add this application to your favorites, please create the bookmark or add it to your favorites after successfully logging in." Below the disclaimer are links for "Privacy", "Legal", and "Terms & Conditions". At the very bottom, it says "©2013 FINRA. All rights reserved. FINRA is a registered trademark of the Financial Industry Regulatory Authority, Inc."

8. You will be prompted to reset your password. Once you reset your password click “Continue.”



9. Log into the DR Portal by entering your **new password**. The first time you log in you will be asked to answer three security questions. From time to time, the system may ask you one of these questions and ask you to provide the correct answer.



The screenshot shows the 'Setup of Security Information' page in the FINRA Dispute Resolution Portal. At the top left is the FINRA logo. Below it, the title 'Setup of Security Information:' is displayed. A 'User ID:' field is shown with a masked value. A yellow instructional box contains the text: 'Please select security questions and provide answers. Choose answers that are easy to remember. Use one word answers when possible. We may ask you to answer these questions as part of a security check when you call us or when you login from an unregistered device. Fields marked with \* are required fields.' Below this, there are three question sections. Each section has a 'Question' label, a dropdown menu for the question, and an 'Answer' field marked with a red asterisk. The questions are: 'What is your best friend's first name?', 'What is your paternal grandmother's first name?', and 'What was your favorite restaurant in college?'. At the bottom, there is a checkbox labeled 'Remember this computer (Choose this option only if this is your personal computer & you trust this Device/Computer)' and a blue 'Save' button.

10. You will see a new screen with additional challenge questions to answer. You will only need to answer these questions once.
11. You will then receive a message **“Welcome to the FINRA Dispute Resolution Portal.”** Click on the link to access the portal.

## DR Portal Functionality

### Overview

On the FINRA DR Portal Homepage, you will see a menu of options across the top heading bar:

- **Home – Dashboard** displays the neutrals current and upcoming arbitration and mediation cases;
- **Cases – All Cases** page displays all cases a neutral has ever been assigned to; and
- **Profile – View & Update** page is where you can view and update your profile information.



There are quick links to **view my profile**, **view my Arbitrator Disclosure Report**, **view my Mediator Disclosure Report** and **change password**. There are also quick access links to **Resources** like **FINRA Learning Management System** and **Arbitration Awards Online**.

## Home – Dashboard

The FINRA DR Portal allows neutrals to view information about their assigned cases. The Dashboard page provides a display of open arbitration and mediation cases, as well as a list of the upcoming arbitration hearings and mediation sessions that neutrals are scheduled to attend.

Welcome John Smith (A58831)  
Public Arbitrator  
[Help](#) | [FINRA.org](#) | [Sign-Out](#)

**Home** **Cases** **Profile**  
Dashboard All Cases View & Update

**I want to...**

- [view my profile](#)
- [view my Arbitrator Disclosure Report](#)
- [change password](#)

**Resources**

- [FINRA Learning Mgmt System](#)
- [Arbitration Awards Online](#)

**My Current Arbitration Cases**

| ID       | Case Name                                 | Status | Filed on Date | Role     | DR Staff |
|----------|---|--------|---------------|----------|----------|
| 12-03556 | Jane and Joe Claimant v. Securities Corp. | Open   | 08/24/2012    | Panelist | S. Green |

**Upcoming Arbitration Hearings** [Expand All](#)

| Date       | Time         | Type            | Location                                    | ID       | Case Name                   |
|------------|--------------|-----------------|---|----------|-----------------------------|
| 12/20/2012 | 09:00 AM EST | Regular Hearing | <a href="#">FINRA Dispute Resolution...</a> | 12-03556 | Jane and Joe Claimant v.... |
| 12/19/2012 | 09:00 AM EST | Regular Hearing | <a href="#">FINRA Dispute Resolution...</a> | 12-03556 | Jane and Joe Claimant v.... |
| 12/18/2012 | 09:00 AM EST | Regular Hearing | <a href="#">FINRA Dispute Resolution...</a> | 12-03556 | Jane and Joe Claimant v.... |
| 12/17/2012 | 09:00 AM EST | Regular Hearing | <a href="#">FINRA Dispute Resolution...</a> | 12-03556 | Jane and Joe Claimant v.... |

## Cases

By clicking onto a listed case name, you can see the Case Abstract.

Welcome John Smith (A58831)  
Public Arbitrator  
[Help](#) | [FINRA.org](#) | [Sign-Out](#)

Home Dashboard Cases All Cases Profile View & Update

12-03556 - Jane and Joe Claimant v. Securities Corp. [Back](#)

**Arbitration Case Abstract**

|  |   |  |
|--|---|--|
| <b>Case Status:</b> Open<br><b>Case Sub Status:</b> Open<br><b>Filed on Date:</b> 08/24/2012<br><b>Decision Basis:</b> Hearing<br><b>Office:</b> New York<br><b>Hearing Location:</b> New York, NY | <b>Milestones</b><br><b>Claim Served on Respondents:</b> 08/24/2012<br><b>Case Received:</b> 08/24/2012 | <b>Assigned Staff</b><br>Suzanne Green<br>FINRA Dispute Resolution<br>One Liberty Plaza<br>165 Broadway, 27th Floor<br>New York, New York 10006<br>Phone: 212-858-4200   Fax: 301-527-4904<br>E-mail: <a href="mailto:Suzanne.Green@finra.org">Suzanne.Green@finra.org</a> |
|--|---|--|

Case Details **Hearings** Payments

**Arbitrators**

| Name       | Role     | Type   | Status    | Assigned on Date |
|------------|----------|--------|-----------|------------------|
| Mary Jones | Chair    | Public | Appointed | 08/24/2012       |
| Jane Brown | Panelist | Public | Appointed | 08/24/2012       |
| John Smith | Panelist | Public | Appointed | 08/24/2012       |

**Arbitration Parties**

**Claimant(s)** [Expand All](#)

| Party                 | CRD# | Agreement Date | Type       | Class    | Status | Represented By                        |
|-----------------------|------|----------------|------------|----------|--------|---------------------------------------|
| Jane and Joe Claimant |      | 08/24/2012     | Individual | Customer | Active | <a href="#">Jane and Joe Claimant</a> |

**Respondent(s)**

You can view the names of your co-arbitrators and the assigned FINRA staff member. You can also view the names of the parties and their representatives. By clicking on the representatives' names, you can see their contact information.

**Arbitration Parties**

**Claimant(s)** [Expand All](#)

| Party                 | CRD# | Agreement Date | Type       | Class    | Status | Represented By                        |
|-----------------------|------|----------------|------------|----------|--------|---------------------------------------|
| Jane and Joe Claimant |      | 08/24/2012     | Individual | Customer | Active | <a href="#">Jane and Joe Claimant</a> |

[Expand/Collapse](#)

**Respondent(s)**







| Party      | CRD# | Agreement Date | Type        | Represented By  |
|------------|------|----------------|-------------|---|
| Securities |      |                | Corporation | <a href="#">Mr. John Law</a><br>John Law Firm<br>225 Main Street<br>New York, New York 10033<br>Phone: 212-858-3999<br>Mobile:<br>Fax:<br>E-mail: |

## Hearings

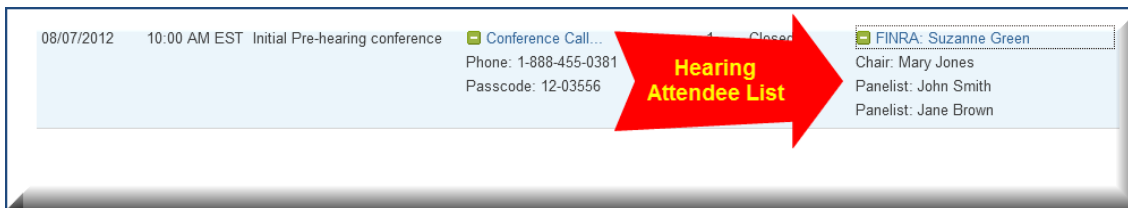
The **Hearings** tab shows all of the hearings that are scheduled or have already been held for the case. You can also view the address and phone number for a hearing location.

Case Details **Hearings** Payments

Arbitration Hearings

| Date       | Time         | Type                           | Location  | Sessions | Status          | Attendee(s)  |
|------------|--------------|--------------------------------|---|----------|-----------------|--|
| 12/20/2012 | 09:00 AM EST | Regular Hearing                |  <a href="#">FINRA Dispute Resolution...</a>   | 2        | Open            | FINRA: No Attendee   |
| 12/19/2012 | 09:00 AM EST | Regular Hearing                |  <a href="#">FINRA Dispute Resolution...</a>   | 2        | Open            | FINRA: No Attendee   |
| 12/18/2012 | 09:00 AM EST | Regular Hearing                |  <a href="#">FINRA Dispute Resolution...</a>   | 2        | Open            | FINRA: No Attendee   |
| 12/17/2012 | 09:00        |                                |  <a href="#">FINRA Dispute Resolution...</a><br>165 Broadway<br>One Liberty Plaza<br>27 Floor, New York 10006<br>Phone: 212-858-4400 | 2        | Open            | FINRA: No Attendee   |
| 08/07/2012 | 10:00 AM EST | Initial Pre-hearing conference |  <a href="#">Conference Call...</a>  | 1        | Closed-Complete |  <a href="#">FINRA: Suzanne Green</a> |

The Hearings page also provides information about which arbitrators and FINRA staff attended a particular hearing.



|            |              |                                |   |   |        |   |
|------------|--------------|--------------------------------|---|---|--------|---|
| 08/07/2012 | 10:00 AM EST | Initial Pre-hearing conference | <a href="#">Conference Call...</a><br>Phone: 1-888-455-0381<br>Passcode: 12-03556 | 1 | Closed | <a href="#">FINRA: Suzanne Green</a><br>Chair: Mary Jones<br>Panelist: John Smith<br>Panelist: Jane Brown |
|------------|--------------|--------------------------------|---|---|--------|---|

## Payments

The **Payments** tab shows all payments you have earned for a case as well as check dates and check numbers. If you do not see information in the Payments section for a hearing you participated in, the system will advise you to allow time to process the payment and to check back.

**Arbitration Case Abstract**

|  |   |  |
|--|---|--|
| <b>Case Status:</b> Open<br><b>Case Sub Status:</b> Open<br><b>Filed on Date:</b> 08/24/2012<br><b>Decision Basis:</b> Hearing<br><b>Office:</b> New York<br><b>Hearing Location:</b> New York, NY | <b>Milestones</b><br><b>Claim Served on Respondents:</b> 08/24/2012<br><b>Case Received:</b> 08/24/2012 | <b>Assigned Staff</b><br>Suzanne Green<br>FINRA Dispute Resolution<br>One Liberty Plaza<br>165 Broadway, 27th Floor<br>New York, New York 10006<br>Phone: 212-858-4200   Fax: 301-527-4904<br>E-mail: <a href="mailto:Suzanne.Green@finra.org">Suzanne.Green@finra.org</a> |
|--|---|--|

Case Details | Hearings | **Payments**

**Arbitrator Payments**

| Earned Date | Type                                    | Amount   | Check Date | Check Number |
|-------------|---|----------|------------|--------------|
| 08/07/2012  | Initial Pre-Hearing Conference - Single | \$200.00 |            |              |

*If you do not see your payment, please check back in a few days. The payment process can take up to two weeks.*

## All Cases

By selecting **Cases** from the menu at the top of the **Dashboard**, you can see a list of every case on which you have served, regardless of whether the case resulted in an award. Clicking on any of these listed cases—open or closed—will display the same detailed case view and allow you to access the **Case Details**, **Hearings** and **Payments** information for any of these cases.

Home | **Cases** | Profile

Dashboard | All Cases | View & Update

**All Cases**

**My Arbitration Cases**

| ID      | Case Name                          | Status | Current Milestone           | Filed on Date | Role  | DR Staff  |
|---------|------------------------------------|--------|-----------------------------|---------------|-------|-----------|
| 11-0000 | <a href="#">Smith vs. Jones</a>    | Open   | Claim Served on Respondents | 08/29/2011    | Chair | A. Baumg  |
| 10-0000 | <a href="#">Grey vs. Johnson</a>   | Open   | Claim Served on Respondents | 01/13/2010    | Chair | V. Martin |
| 99-9999 | <a href="#">ABC vs. XYZ</a>        | Closed | Case Closed                 | 06/28/2011    | Chair | R. Rowsel |
| 88-8888 | <a href="#">Doe vs. Securities</a> | Closed | Case Closed                 | 10/15/2010    | Chair | B. Aguda  |

## Neutral Profile View

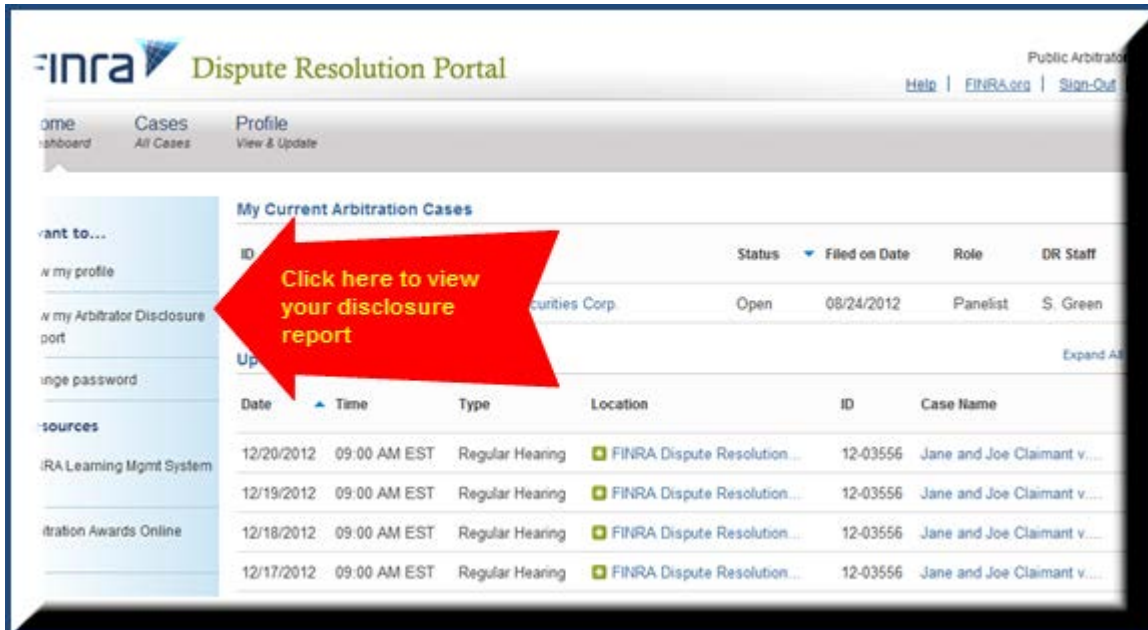
Neutrals will be able to view their profile information in the portal. To view your profile:

Click on **Profile – View & Update** in the heading bar. The **Profile** page will open on the **Personal Information** tab. Click on any of the headings in the left hand menu to view the specific information in your profile.



## Viewing Your Disclosure Report

If you would like to see your current disclosure report before making updates, click on “**view my Arbitrator Disclosure Report**” or “**view my Mediator Disclosure Report**.” You will see a PDF version of your disclosure report. You can also choose to print the report by selecting print from your browser menu or typing the “**control**” key and the “**p**” keys simultaneously.



## Neutral Profile Update

Neutrals will be able to make updates to their disclosure reports through the portal. To update your profile please take the following steps:

1. Click on **Profile – View & Update** in the heading bar.





- The **Profile** page will open on the **Personal Information** tab. Click “**I want to....update my profile**” from the left navigation menu or the “**Update**” button.

Home Dashboard Cases All Cases Profile View & Update

**View Profile**

Personal Information

Addresses & Contacts

Honorarium Information

Business Background

Employment History

Educational History

Training

Arbitrator Classifications

Security Disputes Exp.

Conflicts/Disclosures

**I want to...**

update my profile

view my Arbitrator Disclosure Report

Neutral Profile updates are sent as requests to FINRA Neutral Management and will be processed in a timely manner. Changes will not be reflected immediately on your Profile or your Arbitration and/or Mediation Disclosure Reports. The ability to update your Profile is not currently available on mobile devices or tablets.

**Personal Information**

Neutral ID: A12345 Title of Courtesy: Mr. Suffix 1: CRD Number: 0 Full Name: John Smith Suffix 2:

**Are you an attorney?**  
Yes

**What is your preferred method of communication with FINRA?**  
E-mail

**DR Portal Login Name:**  
jsmith

**Arbitrator Information**

meet the requirements to serve as a chairperson in the Code of Arbitration Procedure, are you eligible to serve as a chairperson?

**Mediator Information**

**Update**

**Click here to update your profile**

**Click here to update your profile**

- The Profile Update form will begin with **Personal Information**, however, you may skip to a specific section either by clicking “**Next**” at the bottom of the page, or by clicking on the section name in the left hand menu. You do not need to complete each section or go in sequential order. However, you must review and affirm your responses in the Arbitrator Classifications and Conflicts/Disclosures sections **each** time you submit an update form.

Some of the profile information is view only and cannot be updated. The system will identify what information you can and cannot modify.

Please read the specific update instructions on the top of each page. All questions with a red asterisk (\*) are required.

## Personal Information

The following information is part of your personal information section. You may update some of this information. Any sections that are view only are indicated below.

- Neutral ID (view only)
- Title
- First Name
- CRD Number (view only; you must call FINRA if there is a change to your CRD number)
- Are you an attorney?
- Preferred method of communication
- Login name to DR Portal (view only)
- Arbitration specific question: willing to serve as chairperson
- Mediator specific questions: style, mediation by phone, etc.

Personal information can be updated by entering text in the free text fields and using the drop-down options.

The screenshot shows the 'Personal Information' form with the following fields and annotations:

- Login Name:** jsmith30 (view only)
- E-mail:** jsmith@mail.com (view only)
- Title of courtesy:** Ms. (drop-down menu)
- First name:** Mary (free text field)
- Last name:** Smith (free text field)
- Suffix 1:** (drop-down menu)
- Suffix 2:** (drop-down menu)
- CRD Number (if applicable):** (text field)
- Are you an attorney?:** Yes (radio button), No (radio button)
- What is your preferred method of communication?:** Phone (drop-down menu)
- Comoros:** (drop-down menu)

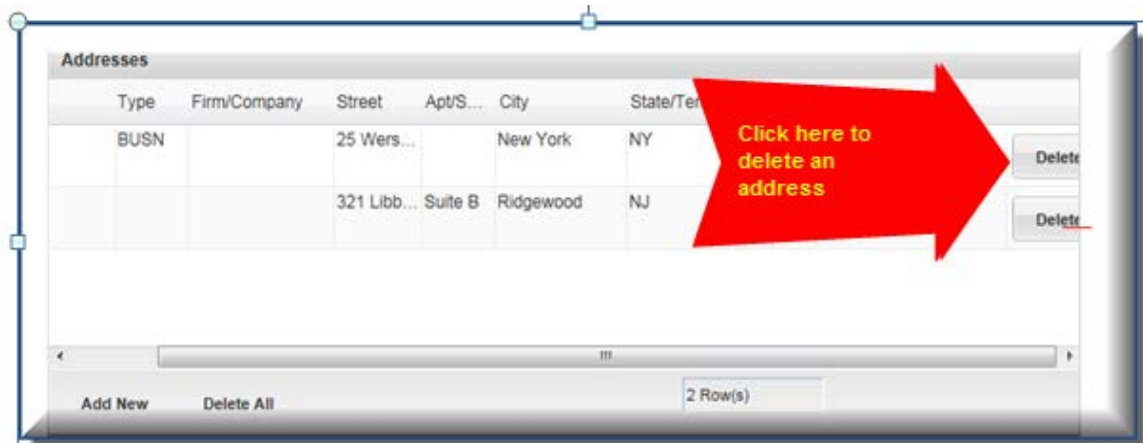
Annotations with red arrows:

- This information can not be edited:** Points to the Login Name and E-mail fields.
- Free text field:** Points to the First name and Last name fields.
- Drop-down box:** Points to the What is your preferred method of communication? field.

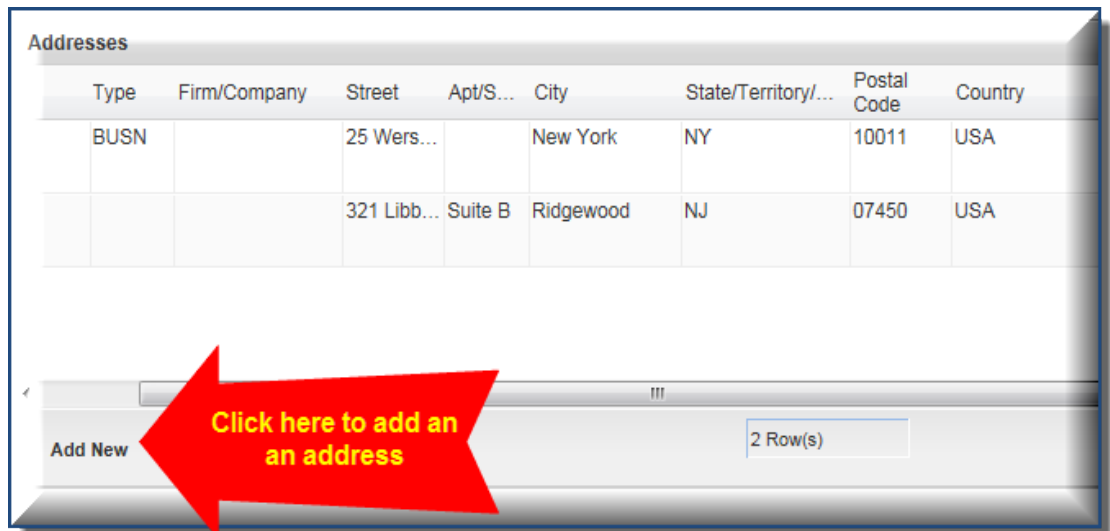
## Addresses and Telephone/Fax Numbers

You can update your address and change which address should be the preferred address.

1. You can also view the addresses on your list and delete any outdated addresses by using the “**delete**” button.



2. To add a new address, click the “**Add New**” button and enter the required fields.

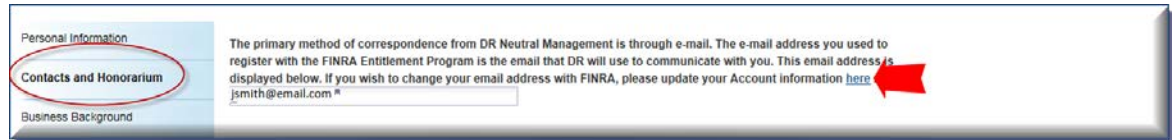


3. You can make similar changes to your **phone and fax numbers**.

## Email Address

Please note that you will not be able to change your email address by submitting a change through the portal. Your email address is tied to your FINRA portal login. Therefore, you can only change your email address by updating your account information in the portal.

1. On the Contacts and Honorarium section of the update form, click onto the link for the My Account page.



Personal Information

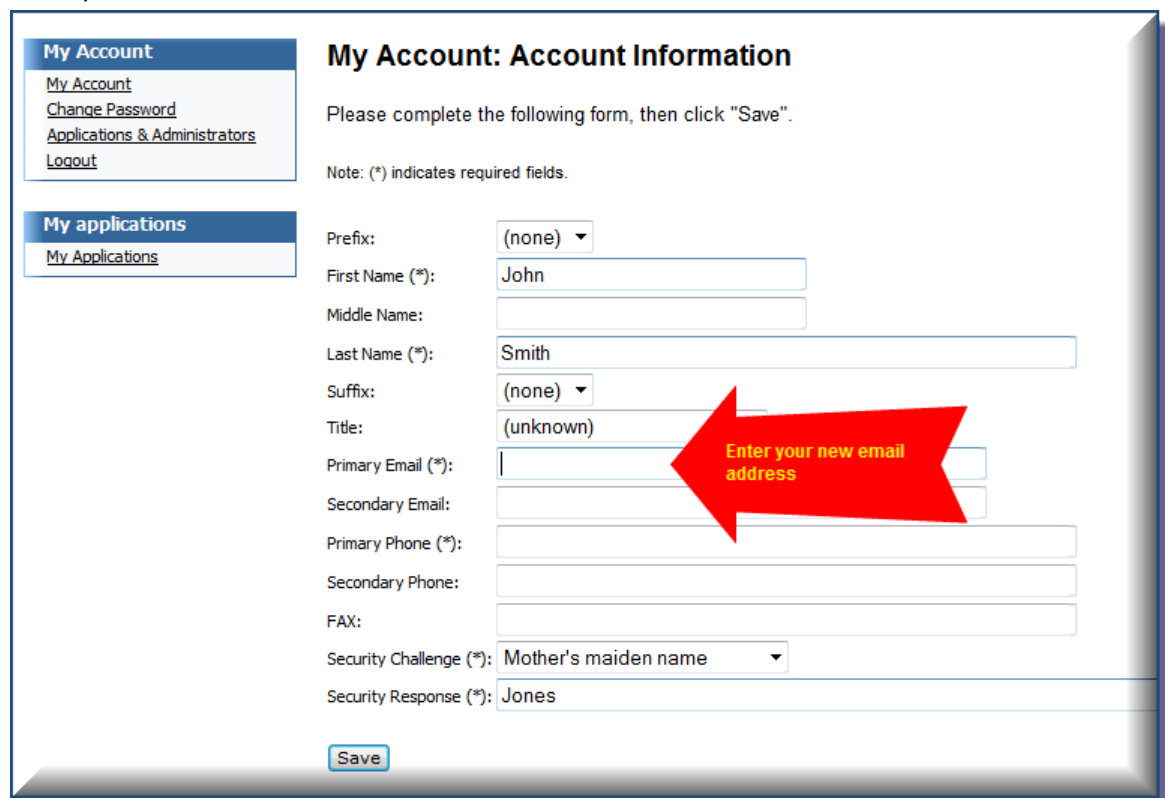
**Contacts and Honorarium**

Business Background

The primary method of correspondence from DR Neutral Management is through e-mail. The e-mail address you used to register with the FINRA Entitlement Program is the email that DR will use to communicate with you. This email address is displayed below. If you wish to change your email address with FINRA, please update your Account information [here](#).

jsmith@email.com \*

2. Enter your new email address and click "Save."



**My Account**

[My Account](#)  
[Change Password](#)  
[Applications & Administrators](#)  
[Logout](#)

**My applications**

[My Applications](#)

### My Account: Account Information

Please complete the following form, then click "Save".

Note: (\*) indicates required fields.

Prefix: (none) ▼

First Name (\*): John

Middle Name:

Last Name (\*): Smith

Suffix: (none) ▼

Title: (unknown)

Primary Email (\*):

Secondary Email:

Primary Phone (\*):

Secondary Phone:

FAX:

Security Challenge (\*): Mother's maiden name ▼

Security Response (\*): Jones

## Honorarium/Mediator Payment

You may change where you would like your honorarium to be sent. You may also choose to waive the honorarium at any time.

## Business Background


You may edit your business background by typing in new text and deleting outdated information. You can make changes directly into your existing business background. You should not leave this section blank.

You will not be able to attach documents. However, you will be able to cut and paste a document into the business background section. We ask that you do not delete any notations entered by FINRA staff in this section.


You should review your new business background for any typos and spelling errors. Once you submit your new business background, FINRA staff will review and—barring obvious mistakes—will process the new background directly into your profile.

**Business Background**

All questions marked as \* are mandatory.

**Arbitrator Business Background**  
Please update the narrative summary of your business background. Please note that this narrative will appear as you have entered it on your Arbitrator Disclosure Report to parties. If you have made changes to other sections of your profile, please make corresponding changes in your business background statement. You may view sample business background statements  [here](#) .  
Note: This information will be made available to parties.

My law practice generally focuses on representing customers in securities disputes. Prior to opening my own firm, I worked as associate general counsel for a brokerage firm. I also have experience working at a large law firm as well as working on the regulatory side for the SEC. I am a member of the New York City Bar Association. I received my bachelor's degree at Bowdoin College and my JD at New York University. I recently received an LLM in taxation from Harvard Law School. I am a member of PIABA and SIFMA. I serve on the commercial litigation section of the NY State Bar Association.

Free text field

You have 10000 character(s) left.

## Employment History

You will only be able to add new employment information and edit existing entries. You will not be able to delete any previous employment information.

FINRA will continue to use the same rules when it comes to employment information. You cannot have an unexplained gap of more than 30 days in between employment. The system will not automatically flag your entry if it contains an unexplained gap of more than 30 days, so you must carefully review it to ensure that there are no gaps.

## Continuing Benefits

You must enter information about continuing benefits from a previous employer. For example, if you are no longer employed by a firm but continue to receive benefits such as health insurance, pension, office space, use of company email and letterhead, administrative services, etc., you should indicate that you continue to receive benefits.

## Retired or Unemployed

If you are retired or unemployed, please indicate this by entering an end date for your last employment and adding a new entry for your time of retirement or unemployment.

Please update your employment information if anything has changed.

- Do not submit an update with an unexplained employment gap of more than 30 days. You should record that time as unemployed.
- If you are currently unemployed or retired, indicate that fact by entering the end date of your previous employment. Add a new record with "Unemployed" or "Retired" in the firm field, and enter the start date of the period of unemployment or retirement.
- If you are retired from the listed business activity, indicate whether you are or will be receiving benefits from your former employer(s).
  - Benefits may include, but are not limited to pension, health care/insurance, office space, clerical assistance, letterhead, etc.
- If you have ever worked in the securities industry, confirm that the information that you enter here matches the information in your CRD record.
- If your employment at a company has concluded, please enter an end date. Do not delete or overwrite previous employment with new employer information. FINRA is required to maintain the complete employment history of all active neutrals.

All questions marked as \* are mandatory.

| Receiving Benefits | End Date | Firm Name                          | Position/Title       | Full/Part-time |
|--------------------|----------|------------------------------------|----------------------|----------------|
| 04/2002            |          | Smith & Associates                 | Attorney             | Full-Time      |
| 01/1996            | 03/2002  | ABC Securities                     | Associate General... | Full-Time      |
| 08/1990            | 12/1995  | Securities and Exchange Commission | Counsel              | Full-Time      |
| 05/1988            | 07/1990  | Large Law Firm, LLP                | Associate            | Full-Time      |

**Add New** 4 Row(s)

### **Educational History**

You will only be able to add new education information and edit existing entries. You will not be able to delete any previous education information.

### **Training**

You will only be able to add new training information and edit existing entries. You will not be able to delete any previous training information.

You will have the option to classify training as

- Arbitration;
- Mediation; or
- Other.

You should enter the name of the course under the “Details” field.

### **Arbitrator Classifications (action required)**

To ensure that arbitrators are properly classified as “public” or “non-public,” FINRA will ask you to affirm your classification. On your first visit to the update section of the portal, you will be required to answer a series of questions related to your classification.

On subsequent visits, you will be required to affirm your previous answers to these classification questions—if further modification is not necessary. However, you will not need to re-answer the same questions each time you make an update to your profile.

If you provide responses that raise a question about your classification, you will receive a message to contact FINRA.

### **Statutory Discrimination Qualifications**

In order to serve as the chairperson on statutory discrimination cases, you must qualify under [Rule 13802](#) of the Code of Arbitration Procedure. If you are interested in serving in this capacity, you may answer the questions in this section of the update form. You must also provide a summary of your qualifications in this area of law.

Staff will review your responses to make sure that you qualify under the Code of Arbitration Procedure before making this update to your profile.

## Securities Disputes Experience

You may add new controversies or securities disputes expertise to your profile. These skills are listed on your disclosure report that parties review during the arbitrator selection process. For example, if you have a particular expertise in breach of contract disputes or auction rate securities, you can add this information.

You will also need to provide a written explanation justifying your expertise. The form will require you to enter text, explaining your expertise. Staff will review this information before adding it to your profile. In some cases, staff may contact you for additional information.

**Securities Disputes Experience**

Please update or delete the types of securities-related disputes in which you have expertise and/or experience. You may add multiple entries. A text explanation is required for each addition and deletion. You should rely on the expertise derived from your business, securities or employment experience, not wholly from any prior experience as an arbitrator. No areas of expertise/experience in securities will be listed on your record without such explanation. All questions marked as \* are mandatory.

**a. Account Related**

☐ Breach of Contract

☐ Dividends

☐ Margin Calls

☐ Transfer

**b. Employment**

☒ Age Discrimination

Please explain the basis for this expertise/experience. You should rely on the expertise derived from your business, securities or employment experience, not wholly from any prior experience as an arbitrator. \*

**Free text field**

You have 1000 character(s) left.



### Conflicts/Disclosures (action required)

This section captures information that you provided in the Legal/Regulatory and Conflicts/Disclosures sections of the arbitrator application. For example, you may update or add information about your brokerage accounts, litigation, professional licenses, service as an expert witness, service on boards of directors, disclosures related to your spouse or [immediate family member](#) (definition for immediate family member is part of the definition for “public arbitrator,”), etc. This section captures any and all disclosures that may not fit neatly into another section of your disclosure profile.

You will **not** be able to delete any previous entries to this section. The only edits you may make to a previous conflict/disclosure is to designate that it is no longer active. You may also provide a written explanation to describe any changes that you submit.

You must check the box affirming that the answers you provided in this section are accurate each time you submit an update form.

The screenshot displays the 'Conflicts/Disclosures Detail' form within the FINRA Dispute Resolution Portal. The form is titled 'Conflicts/Disclosures Detail' and includes a close button (X) in the top right corner. The form fields are as follows:

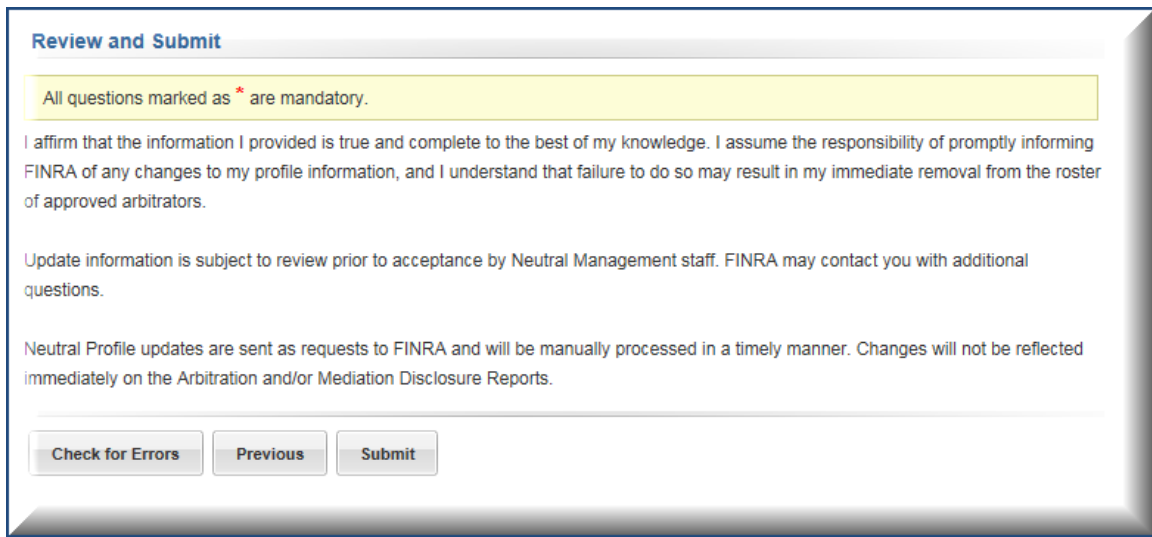
- Disclosure/Conflict Type:** A dropdown menu with 'Had an account with' selected.
- Firm Name:** A text input field containing 'XYZ Corp.'
- Firm CRD Number:** A text input field containing '1234', with a 'Find' link to its right.
- Details:** A text input field containing 'ABC'.
- Make Inactive:** A checkbox that is checked, with a red arrow pointing to it and the text 'You can check the "Make Inactive" box'.
- Explanation:** A large text area for providing details.

Below the 'Explanation' field, it states 'You have 3000 character(s) left.' At the bottom of the form, there are two buttons: 'Update Row' and 'Close'.

At the bottom of the page, there is a checkbox with the text: 'By selecting this checkbox, I affirm that the answers provided in this section are accurate.'

## Review and Submit

Once you have entered your updates and provided the necessary explanations, you can submit your form by selecting the “Review and Submit” section of the form for the left hand menu. You must read the affirmation before hitting the submit button.



**Review and Submit**

All questions marked as \* are mandatory.

I affirm that the information I provided is true and complete to the best of my knowledge. I assume the responsibility of promptly informing FINRA of any changes to my profile information, and I understand that failure to do so may result in my immediate removal from the roster of approved arbitrators.

Update information is subject to review prior to acceptance by Neutral Management staff. FINRA may contact you with additional questions.

Neutral Profile updates are sent as requests to FINRA and will be manually processed in a timely manner. Changes will not be reflected immediately on the Arbitration and/or Mediation Disclosure Reports.

[Check for Errors](#) [Previous](#) [Submit](#)

### ***Check for Errors Button***

Before you submit your update form, click on the “Check for Errors” button to see if you have any unresolved entries in your form.

### ***Error Message***

If you have any errors in your submission, the system will show you a message with the sections in which you have errors. The sections with errors will appear immediately before the colon; they will correlate with the sections that appear in the left hand navigation menu of the form. When you go back to these sections, you will see the fields to be corrected in red. You must correct the errors before the system accepts your update form.

To better help you navigate back to the form to fix your errors, you can select the “Print” button to print out the error message.

The screenshot shows the 'Review and Submit' page of the FINRA Dispute Resolution Portal. At the top, a yellow banner states: 'All questions marked as \* are mandatory.' Below this is a paragraph of text: 'I affirm that the information I provided is true and complete to the best of my knowledge. I assume the responsibility of promptly informing FINRA of any changes to my profile information, and I understand that failure to do so may result in my immediate removal from the roster of approved arbitrators.' Another paragraph follows: 'Update information is subject to review prior to acceptance by FINRA management staff. FINRA may contact you with additional questions.' Below that, it says: 'Neutral Profile updates are sent as requests to FINRA and will be reflected immediately on the Arbitration and/or Mediation Disclosure.' At the bottom of the page are three buttons: 'Check for Errors', 'Previous', and 'Submit'. The 'Check for Errors' button is circled in red. A 'Validation Errors' dialog box is open over the 'Check for Errors' button, containing a 'Print' button (also circled in red) and two error messages: '-Arbitrator Classifications: You need to click the checkbox to agree that the answers provided in this section are accurate.' and '-Conflicts/Disclosures: You need to click the checkbox to agree that the answers provided in this section are accurate.'

### ***Submit***

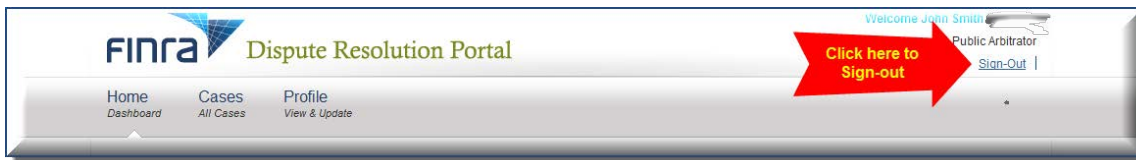
When you submit the form successfully, you will receive a confirmation email with a tracking number to reference in case you have questions about your submission. You should also print out a copy of the form you submitted.

### ***When Will the Updates Appear in Your Profile?***

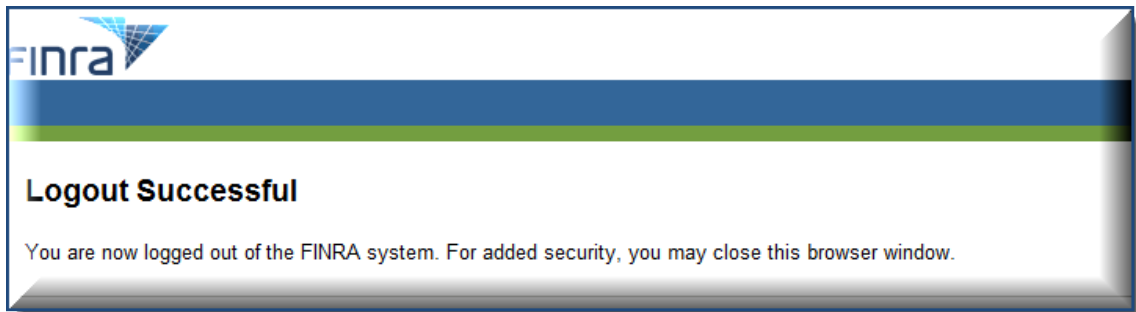
If you are currently serving on a case, FINRA will endeavor to make the update to your profile within one business day. If you are not currently serving on a case, FINRA will try to make the update within three to five business days. Therefore, you will not immediately see the updates in the DR portal.

## Log Out of Portal

You can log out of the DR portal by clicking on the **“Sign-Out”** link in the top right corner.



Once you click the **“Sign-Out”** link you will receive confirmation that your Logout was successful.



## Additional Help

If you have any questions about the DR portal, please contact Neutral Management Staff toll free at **(855) 209-1620** or in New York at **(212) 858-3999**.

## OMB APPROVAL

OMB Number: 3235-0045  
 Estimated average burden  
 hours per response.....38

Required fields are shown with yellow backgrounds and asterisks.

Page 1 of \* 36

SECURITIES AND EXCHANGE COMMISSION  
 WASHINGTON, D.C. 20549  
 Form 19b-4

File No.\* SR - 2013 - \* 024

Amendment No. (req. for Amendments \*)

Filing by Financial Industry Regulatory Authority

Pursuant to Rule 19b-4 under the Securities Exchange Act of 1934

|  |   |  |  |  |   |
|--|---|--|--|--|---|
| Initial *<br><input checked="" type="checkbox"/> | Amendment *<br><input type="checkbox"/>   | Withdrawal<br><input type="checkbox"/> | Section 19(b)(2) *<br><input checked="" type="checkbox"/>  | Section 19(b)(3)(A) *<br><input type="checkbox"/>  | Section 19(b)(3)(B) *<br><input type="checkbox"/> |
|  |   |  | Rule   |  |   |
| Pilot<br><input type="checkbox"/>                | Extension of Time Period<br>for Commission Action *<br><input type="checkbox"/> | Date Expires *<br><input type="text"/> | <input type="checkbox"/> 19b-4(f)(1)<br><input type="checkbox"/> 19b-4(f)(2)<br><input type="checkbox"/> 19b-4(f)(3) | <input type="checkbox"/> 19b-4(f)(4)<br><input type="checkbox"/> 19b-4(f)(5)<br><input type="checkbox"/> 19b-4(f)(6) |   |

Notice of proposed change pursuant to the Payment, Clearing, and Settlement Act of 2010

Section 806(e)(1)



Section 806(e)(2)



Security-Based Swap Submission pursuant  
 to the Securities Exchange Act of 1934

Section 3C(b)(2)



Exhibit 2 Sent As Paper Document



Exhibit 3 Sent As Paper Document



### Description

Provide a brief description of the action (limit 250 characters, required when Initial is checked \*).

Proposed rule change to amend the Discovery Guide used in customer arbitration proceedings.

### Contact Information

Provide the name, telephone number, and e-mail address of the person on the staff of the self-regulatory organization prepared to respond to questions and comments on the action.

First Name \* Margo Last Name \* Hassan  
 Title \* Assistant Chief Counsel, FINRA Dispute Resolution  
 E-mail \* margo.hassan@finra.org  
 Telephone \* (212) 858-4481 Fax (301) 527-4761

### Signature

Pursuant to the requirements of the Securities Exchange Act of 1934,

has duly caused this filing to be signed on its behalf by the undersigned thereunto duly authorized.

(Title \*)

Date 06/03/2013

By Kenneth Andrichik

(Name \*)

Senior Vice President and Chief Counsel, FINRA  
 Dispute Resolution

Kenneth Andrichik,

NOTE: Clicking the button at right will digitally sign and lock  
 this form. A digital signature is as legally binding as a physical  
 signature, and once signed, this form cannot be changed.

SECURITIES AND EXCHANGE COMMISSION  
WASHINGTON, D.C. 20549

For complete Form 19b-4 instructions please refer to the EFFT website.

**Form 19b-4 Information \***

Add Remove View

The self-regulatory organization must provide all required information, presented in a clear and comprehensible manner, to enable the public to provide meaningful comment on the proposal and for the Commission to determine whether the proposal is consistent with the Act and applicable rules and regulations under the Act.

**Exhibit 1 - Notice of Proposed Rule Change \***

Add Remove View

The Notice section of this Form 19b-4 must comply with the guidelines for publication in the Federal Register as well as any requirements for electronic filing as published by the Commission (if applicable). The Office of the Federal Register (OFR) offers guidance on Federal Register publication requirements in the Federal Register Document Drafting Handbook, October 1998 Revision. For example, all references to the federal securities laws must include the corresponding cite to the United States Code in a footnote. All references to SEC rules must include the corresponding cite to the Code of Federal Regulations in a footnote. All references to Securities Exchange Act Releases must include the release number, release date, Federal Register cite, Federal Register date, and corresponding file number (e.g., SR-[SRO]-xx-xx). A material failure to comply with these guidelines will result in the proposed rule change being deemed not properly filed. See also Rule 0-3 under the Act (17 CFR 240.0-3)

**Exhibit 1A- Notice of Proposed Rule Change, Security-Based Swap Submission, or Advance Notice by Clearing Agencies**

Add Remove View

The Notice section of this Form 19b-4 must comply with the guidelines for publication in the Federal Register as well as any requirements for electronic filing as published by the Commission (if applicable). The Office of the Federal Register (OFR) offers guidance on Federal Register publication requirements in the Federal Register Document Drafting Handbook, October 1998 Revision. For example, all references to the federal securities laws must include the corresponding cite to the United States Code in a footnote. All references to SEC rules must include the corresponding cite to the Code of Federal Regulations in a footnote. All references to Securities Exchange Act Releases must include the release number, release date, Federal Register cite, Federal Register date, and corresponding file number (e.g., SR-[SRO]-xx-xx). A material failure to comply with these guidelines will result in the proposed rule change, security-based swap submission, or advance notice being deemed not properly filed. See also Rule 0-3 under the Act (17 CFR 240.0-3)

**Exhibit 2 - Notices, Written Comments, Transcripts, Other Communications**

Add Remove View

Exhibit Sent As Paper Document

☐

Copies of notices, written comments, transcripts, other communications. If such documents cannot be filed electronically in accordance with Instruction F, they shall be filed in accordance with Instruction G.

**Exhibit 3 - Form, Report, or Questionnaire**

Add Remove View

Exhibit Sent As Paper Document

☐

Copies of any form, report, or questionnaire that the self-regulatory organization proposes to use to help implement or operate the proposed rule change, or that is referred to by the proposed rule change.

**Exhibit 4 - Marked Copies**

Add Remove View

The full text shall be marked, in any convenient manner, to indicate additions to and deletions from the immediately preceding filing. The purpose of Exhibit 4 is to permit the staff to identify immediately the changes made from the text of the rule with which it has been working.

**Exhibit 5 - Proposed Rule Text**

Add Remove View

The self-regulatory organization may choose to attach as Exhibit 5 proposed changes to rule text in place of providing it in Item I and which may otherwise be more easily readable if provided separately from Form 19b-4. Exhibit 5 shall be considered part of the proposed rule change.

**Partial Amendment**

Add Remove View

If the self-regulatory organization is amending only part of the text of a lengthy proposed rule change, it may, with the Commission's permission, file only those portions of the text of the proposed rule change in which changes are being made if the filing (i.e. partial amendment) is clearly understandable on its face. Such partial amendment shall be clearly identified and marked to show deletions and additions.

**1. Text of the Proposed Rule Change**

(a) Pursuant to the provisions of Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),<sup>1</sup> Financial Industry Regulatory Authority, Inc. (“FINRA”) is filing with the Securities and Exchange Commission (“SEC” or “Commission”) a proposed rule change to amend the Discovery Guide (“Guide”) 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. The proposed rule change fulfills FINRA’s commitment to review the topics of e-discovery and product cases with the Discovery Task Force (“Task Force”) that FINRA established in 2011.<sup>2</sup> FINRA believes that the proposed revisions to the Guide will reduce the number and limit the scope of disputes involving document production in customer cases, thereby improving the arbitration process for the benefit of public investors, broker-dealer firms, and associated persons.

Below is the text of the proposed rule change. Proposed new language is underlined; proposed deletions are in brackets.

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> In 2011, FINRA received SEC approval to update the Guide (See Securities Exchange Act Rel. No. 64166 (April 1, 2011), 76 Federal Register 19155 (April 6, 2011), File No. SR-FINRA-2010-035). As part of the rule making process, FINRA agreed to establish the Task Force under the auspices of the National Arbitration and Mediation Committee (NAMC). FINRA charged the Task Force with reviewing substantive issues relating to the Guide on a periodic basis to keep the Guide current as products change and new discovery issues arise. FINRA pledged to ask the Task Force to review e-discovery issues and product cases.

\* \* \* \* \*

## **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 during a proceeding.

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.

\* \* \* \* \*

(b) Not applicable.

(c) Not applicable.

## **2. Procedures of the Self-Regulatory Organization**

At its meeting on April 17, 2013, the FINRA Board of Governors authorized the filing of the proposed rule change with the SEC. No other action by FINRA is necessary for the filing of the proposed rule change.

FINRA will announce the effective date of the proposed rule change in a Regulatory Notice to be published no later than 60 days following Commission approval. The effective date will be no later than 30 days following publication of the Regulatory Notice announcing Commission approval.

Questions regarding this rule filing may be directed to Margo Hassan, Assistant Chief Counsel, FINRA Dispute Resolution, at (212) 858-4481.

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

(a) Purpose

### **Background**

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 (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.

As stated above, in 2011 FINRA updated the Guide and established the Task Force. To fulfill the commitment FINRA made to the SEC during the rulemaking process, the first topics that the Task Force discussed were e-discovery and product cases. The Task Force also reviewed concerns raised by forum users about the affirmation language in the Guide's introduction.

### **E-Discovery**

FINRA considers electronic files to be documents within the meaning of the Guide. As part of the 2011 revisions, FINRA updated the Guide to expressly state 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. Commenters on the proposed rule change asked FINRA for additional guidance on e-discovery. The Task Force discussed e-discovery over numerous meetings and recommended that FINRA amend the Guide to include general guidelines for arbitrators to consider when deciding disputes relating to the form of production for electronic documents.

FINRA is proposing to amend the Guide's introduction to state 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 during a proceeding.

The proposed guidance would also state that when arbitrators are resolving contested motions about the form of production, they should 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.

The third factor advises arbitrators to consider, among other things, whether a party’s ability to use a converted document is diminished by a change in the documents’ appearance, searchability, metadata, or maneuverability. If the SEC approves the proposed rule change, FINRA intends to provide arbitrators with guidance on the terms

“appearance,” “searchability,” “metadata,” and “maneuverability” in training materials to be posted on FINRA’s website. FINRA would include the substance of the following descriptions of each term in the training materials:

- **Appearance** – In many instances, converting a document from its “native format” (the form in which the electronic file was created) to a hard copy or static format will not affect the appearance of the document. However, that is not always the case. If, for example, a party prints a Microsoft Word® document (“Word document”) and produces it in hard copy, it will look the same. However, a party might configure some native files to print only certain portions of the document. For example, a party could set the print area on a Microsoft Excel® spreadsheet (“Excel spreadsheet”) to print only certain rows or columns. A hard copy print-out of such an Excel spreadsheet would contain less information than the native file. Similarly, a hard copy print-out of a Microsoft PowerPoint® presentation may not contain speaker’s notes that appear in the electronic file.
- **Searchability** – Converting a native file may affect the searchability of the document. If a party prints a Word document and produces it in hard copy form, the document is not electronically searchable. In its native form, the contents of a Word document can be searched electronically for key words or information. Static electronic formats may or may not be searchable, depending on how they are converted.
- **Metadata** – Converting a native file may also affect the availability of metadata. Metadata describes how, when, and by whom electronically stored information (“ESI”) was collected, created, accessed, or modified, and how it is formatted.

For example, an e-mail contains many pieces of metadata, such as the date and time it was sent, and information about who sent it, and who received it. It is possible to convert a native file to a static format and keep all the metadata attached. It is also possible to produce some, but not all, metadata associated with a native file.

- **Maneuverability** – Converting a native file into another format may affect the maneuverability of a document – the party’s ability to manipulate data using the native application. For example, an Excel spreadsheet in its native format can be sorted and filtered for data and the user can examine embedded formulas and references. If the Excel spreadsheet is printed or converted to certain formats, that ability is lost.

FINRA recognizes that parties have legitimate reasons for converting documents into different formats, and for requesting particular document formats. For example, a firm may need to convert a document into a particular format to comply with legal requirements to redact personal confidential information, such as customer Social Security numbers. A customer may need a document to contain metadata in order to establish when a broker learned specific information. FINRA believes that requiring production in a reasonably usable format and providing general guidance on e-discovery would provide arbitrators with the flexibility to tailor document production to the needs of each case.

In conjunction with the proposed guidance on e-discovery, FINRA is proposing to amend 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, such as narrowing the time frame or scope of an item on the Lists, or determining whether another document can provide the same information. FINRA is mindful of the costs associated with e-discovery and is proposing to amend 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. FINRA believes the additional guidance would raise arbitrator awareness of alternative ways to help parties to resolve an e-discovery dispute in a cost effective manner.

### **Product Cases**

In its 2011 order approving revisions to the Guide, the SEC noted that several commenters raised concerns that the revised Guide does not sufficiently address product cases.<sup>3</sup> In response to these concerns, FINRA agreed to ask the Task Force to consider the topic. The Task Force recognized that product cases are unique customer cases that differ from other customer cases in several ways and recommended that FINRA add general guidelines to the Guide which describe how product cases are different from other customer cases and which outline the types of documents that parties typically request in such cases.

FINRA is proposing to amend the Guide's introduction to add guidance on product cases. The Guide would state 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. The Guide

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<sup>3</sup> Supra Note 2.

would enumerate 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>4</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 would explain that the two existing 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 would emphasize that, in a product case, parties are not limited to the documents enumerated in the Lists. It would also emphasize that the Customer Code provides a mechanism for parties to seek additional documents. Finally, the guidelines would 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.

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<sup>4</sup> A mandatory hold is an act by an entity to preserve documents and electronic information relevant to a lawsuit or government investigation.

FINRA staff considered adding an item to the firm/associated person List that would enumerate specific documents that firms/associated persons would be required to produce when a customer alleged that a claim was a product case. Staff was mindful of the economic impact on firms that is associated with the larger volume of documents in product cases and rejected that approach. Instead, FINRA is proposing general guidelines on the types of documents that customers typically request in products cases because general guidelines would encourage parties to discuss their discovery needs and would encourage arbitrators to be flexible when making a determination on whether to order additional production.

### **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. Forum users raised concerns that the language creates a "loop hole" in which parties might assert that they are only required to provide an affirmation relating to production when *no* documents are produced, as opposed to situations where there is partial production. Some users were also concerned that parties might affirm that they did not find documents where they looked as opposed to looking for documents in all appropriate places. The Task Force discussed the forum users' concerns and recommended that FINRA amend the affirmation language to add clarity to the provision.

To respond to these concerns, FINRA is proposing to amend the affirmation language to make it clear that a party may request an affirmation when an opposing party makes only a partial production. The revised language would provide 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 proposing to require a party to state the sources searched in the affirmation. FINRA believes the proposed revision would add clarity to the affirmation text and reduce disputes over requests for affirmations.

#### **Clarifying Amendments**

FINRA is proposing to add additional sub-headings to the Guide's introduction to break the introduction into distinct sections that address specific concerns. The new headings would be: Flexibility in Discovery; Cost or Burden of Production; Requests for Additional Documents; Form of Production; and Product Cases. We believe the new headings will add clarity to the Guide.

FINRA is proposing to move the sentence that reads: "[w]here 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" to the section that would be titled Requests for Additional Documents. We also propose to add the phrase "may be" before relevant to reflect that relevancy is not always established at the time that a party requests additional documents. Finally, we propose to amend the sentence in that paragraph that states that "[a]rbitrators must use their judgment in considering requests for additional documents and may not deny document requests on the grounds that the documents are

not expressly listed in the Discovery Guide” to add the term “solely” before the phrase “on the grounds.” FINRA believes that adding “solely” adds clarity to the Guide by ensuring that arbitrators understand that they should not automatically sustain an objection to production because a document is not expressly listed in the Guide.

As noted in Item 2 of this filing, FINRA will announce the effective date of the proposed rule change in a Regulatory Notice to be published no later than 60 days following Commission approval. The effective date will be no later than 30 days following publication of the Regulatory Notice announcing Commission approval.

(b) Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,<sup>5</sup> 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 the proposed rule change will reduce the number and limit the scope of disputes involving document production in customer cases, thereby improving the arbitration process for the benefit of public investors, broker-dealer firms, and associated persons.

**4. 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. FINRA considered the potential impact of the proposed rule change on efficiency, competition, and capital formation. FINRA is concerned that production relating to e-

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<sup>5</sup> 15 U.S.C. 78o-3(b)(6).



discovery and product cases can be time-consuming and costly for parties. The proposed revisions to the Guide provide parties and arbitrators with guidance on how to handle e-discovery matters and document production relating to product cases in a flexible, efficient, and cost effective manner. The proposal also clarifies the provisions relating to affirmations and should reduce the inefficiency associated with disputes concerning affirmations.

5. **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.

6. **Extension of Time Period for Commission Action**

FINRA does not consent at this time to an extension of the time period for Commission action specified in Section 19(b)(2) of the Act.<sup>6</sup>

7. **Basis for Summary Effectiveness Pursuant to Section 19(b)(3) or for Accelerated Effectiveness Pursuant to Section 19(b)(2) or Section 19(b)(7)(D)**

Not applicable.

8. **Proposed Rule Change Based on Rules of Another Self-Regulatory Organization or of the Commission**

Not applicable.

9. **Security-Based Swap Submissions Filed Pursuant to Section 3C of the Act**

Not applicable.

10. **Advance Notices Filed Pursuant to Section 806(e) of the Payment, Clearing and Settlement Supervision Act**

Not applicable.

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<sup>6</sup> 15 U.S.C. 78s(b)(2).

**11. Exhibits**

Exhibit 1. Completed notice of proposed rule change for publication in the Federal Register.

EXHIBIT 1

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34- ; File No. SR-FINRA-2013-024)

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of Proposed Rule Change Relating to Amendments to the Discovery Guide Used in Customer Arbitration Proceedings

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on June 3, 2013, 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 (“Guide”) 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. The proposed rule change fulfills FINRA’s commitment to review the topics of e-discovery and product cases with the Discovery Task Force (“Task Force”) that FINRA established

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

in 2011.<sup>3</sup> FINRA believes that the proposed revisions to the Guide will reduce the number and limit the scope of disputes involving document production in customer cases, thereby improving the arbitration process for the benefit of public investors, broker-dealer firms, and associated persons.

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

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

**Background**

The Guide supplements the discovery rules contained in the FINRA Code of Arbitration Procedure for Customer Disputes ("Customer Code"). It includes an

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<sup>3</sup> In 2011, FINRA received SEC approval to update the Guide (See Securities Exchange Act Rel. No. 64166 (April 1, 2011), 76 Federal Register 19155 (April 6, 2011), File No. SR-FINRA-2010-035). As part of the rule making process, FINRA agreed to establish the Task Force under the auspices of the National Arbitration and Mediation Committee (NAMC). FINRA charged the Task Force with reviewing substantive issues relating to the Guide on a periodic basis to keep the Guide current as products change and new discovery issues arise. FINRA pledged to ask the Task Force to review e-discovery issues and product cases.

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 (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.

As stated above, in 2011 FINRA updated the Guide and established the Task Force. To fulfill the commitment FINRA made to the SEC during the rulemaking process, the first topics that the Task Force discussed were e-discovery and product cases. The Task Force also reviewed concerns raised by forum users about the affirmation language in the Guide's introduction.

### **E-Discovery**

FINRA considers electronic files to be documents within the meaning of the Guide. As part of the 2011 revisions, FINRA updated the Guide to expressly state 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. Commenters on the proposed rule change asked FINRA for additional guidance on e-discovery. The Task Force discussed e-discovery over numerous meetings and recommended that FINRA amend the Guide to include general guidelines for arbitrators to consider when deciding disputes relating to the form of production for electronic documents.

FINRA is proposing to amend the Guide's introduction to state 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 during a proceeding.

The proposed guidance would also state that when arbitrators are resolving contested motions about the form of production, they should 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.

The third factor advises arbitrators to consider, among other things, whether a party’s ability to use a converted document is diminished by a change in the documents’ appearance, searchability, metadata, or maneuverability. If the SEC approves the proposed rule change, FINRA intends to provide arbitrators with guidance on the terms

“appearance,” “searchability,” “metadata,” and “maneuverability” in training materials to be posted on FINRA’s website. FINRA would include the substance of the following descriptions of each term in the training materials:

- **Appearance** – In many instances, converting a document from its “native format” (the form in which the electronic file was created) to a hard copy or static format will not affect the appearance of the document. However, that is not always the case. If, for example, a party prints a Microsoft Word® document (“Word document”) and produces it in hard copy, it will look the same. However, a party might configure some native files to print only certain portions of the document. For example, a party could set the print area on a Microsoft Excel® spreadsheet (“Excel spreadsheet”) to print only certain rows or columns. A hard copy print-out of such an Excel spreadsheet would contain less information than the native file. Similarly, a hard copy print-out of a Microsoft PowerPoint® presentation may not contain speaker’s notes that appear in the electronic file.
- **Searchability** – Converting a native file may affect the searchability of the document. If a party prints a Word document and produces it in hard copy form, the document is not electronically searchable. In its native form, the contents of a Word document can be searched electronically for key words or information. Static electronic formats may or may not be searchable, depending on how they are converted.
- **Metadata** – Converting a native file may also affect the availability of metadata. Metadata describes how, when, and by whom electronically stored information (“ESI”) was collected, created, accessed, or modified, and how it is formatted.

For example, an e-mail contains many pieces of metadata, such as the date and time it was sent, and information about who sent it, and who received it. It is possible to convert a native file to a static format and keep all the metadata attached. It is also possible to produce some, but not all, metadata associated with a native file.

- **Maneuverability** – Converting a native file into another format may affect the maneuverability of a document – the party’s ability to manipulate data using the native application. For example, an Excel spreadsheet in its native format can be sorted and filtered for data and the user can examine embedded formulas and references. If the Excel spreadsheet is printed or converted to certain formats, that ability is lost.

FINRA recognizes that parties have legitimate reasons for converting documents into different formats, and for requesting particular document formats. For example, a firm may need to convert a document into a particular format to comply with legal requirements to redact personal confidential information, such as customer Social Security numbers. A customer may need a document to contain metadata in order to establish when a broker learned specific information. FINRA believes that requiring production in a reasonably usable format and providing general guidance on e-discovery would provide arbitrators with the flexibility to tailor document production to the needs of each case.

In conjunction with the proposed guidance on e-discovery, FINRA is proposing to amend 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, such as narrowing the time frame or scope of an item on the Lists, or determining whether another document can provide the same information. FINRA is mindful of the costs associated with e-discovery and is proposing to amend 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. FINRA believes the additional guidance would raise arbitrator awareness of alternative ways to help parties to resolve an e-discovery dispute in a cost effective manner.

### **Product Cases**

In its 2011 order approving revisions to the Guide, the SEC noted that several commenters raised concerns that the revised Guide does not sufficiently address product cases.<sup>4</sup> In response to these concerns, FINRA agreed to ask the Task Force to consider the topic. The Task Force recognized that product cases are unique customer cases that differ from other customer cases in several ways and recommended that FINRA add general guidelines to the Guide which describe how product cases are different from other customer cases and which outline the types of documents that parties typically request in such cases.

FINRA is proposing to amend the Guide's introduction to add guidance on product cases. The Guide would state 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. The Guide

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<sup>4</sup> Supra Note 2.

would enumerate 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>5</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 would explain that the two existing 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 would emphasize that, in a product case, parties are not limited to the documents enumerated in the Lists. It would also emphasize that the Customer Code provides a mechanism for parties to seek additional documents. Finally, the guidelines would 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.

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<sup>5</sup> A mandatory hold is an act by an entity to preserve documents and electronic information relevant to a lawsuit or government investigation.

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### **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. Forum users raised concerns that the language creates a "loop hole" in which parties might assert that they are only required to provide an affirmation relating to production when *no* documents are produced, as opposed to situations where there is partial production. Some users were also concerned that parties might affirm that they did not find documents where they looked as opposed to looking for documents in all appropriate places. The Task Force discussed the forum users' concerns and recommended that FINRA amend the affirmation language to add clarity to the provision.

To respond to these concerns, FINRA is proposing to amend the affirmation language to make it clear that a party may request an affirmation when an opposing party makes only a partial production. The revised language would provide 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 proposing to require a party to state the sources searched in the affirmation. FINRA believes the proposed revision would add clarity to the affirmation text and reduce disputes over requests for affirmations.

#### **Clarifying Amendments**

FINRA is proposing to add additional sub-headings to the Guide's introduction to break the introduction into distinct sections that address specific concerns. The new headings would be: Flexibility in Discovery; Cost or Burden of Production; Requests for Additional Documents; Form of Production; and Product Cases. We believe the new headings will add clarity to the Guide.

FINRA is proposing to move the sentence that reads: "[w]here 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" to the section that would be titled Requests for Additional Documents. We also propose to add the phrase "may be" before relevant to reflect that relevancy is not always established at the time that a party requests additional documents. Finally, we propose to amend the sentence in that paragraph that states that "[a]rbitrators must use their judgment in considering requests for additional documents and may not deny document requests on the grounds that the documents are

not expressly listed in the Discovery Guide” to add the term “solely” before the phrase “on the grounds.” FINRA believes that adding “solely” adds clarity to the Guide by ensuring that arbitrators understand that they should not automatically sustain an objection to production because a document is not expressly listed in the Guide.

## 2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,<sup>6</sup> 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 the proposed rule change will reduce the number and limit the scope of disputes involving document production in customer cases, thereby improving the arbitration process for the benefit of public investors, broker-dealer firms, and associated persons.

### 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. FINRA considered the potential impact of the proposed rule change on efficiency, competition, and capital formation. FINRA is concerned that production relating to e-discovery and product cases can be time-consuming and costly for parties. The proposed revisions to the Guide provide parties and arbitrators with guidance on how to handle e-discovery matters and document production relating to product cases in a flexible, efficient, and cost effective manner. The proposal also clarifies the provisions relating to

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<sup>6</sup> 15 U.S.C. 78o-3(b)(6).

affirmations and should reduce the inefficiency associated with disputes concerning affirmations.

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 45 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 or disapprove 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](mailto:rule-comments@sec.gov). Please include File Number SR-FINRA-2013-024 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-2013-024. 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 website (<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 website 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-2013-024 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.<sup>7</sup>

Elizabeth M. Murphy

Secretary

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<sup>7</sup> 17 CFR 200.30-3(a)(12).



## Subpoenas and Orders to Appear or Produce Documents

### SEC Approves Amendments to Arbitration Codes Relating to Subpoenas and Orders to Direct the Appearance of Witnesses and Production of Documents Without Subpoenas

**Effective Date: February 18, 2013**

#### Executive Summary

The Customer and Industry Codes of Arbitration Procedure (Codes) provide arbitrators with the authority to issue subpoenas for the appearance of witnesses and the production of documents. The Codes also authorize arbitrators to order FINRA member firms and their employees and associated persons to produce documents and/or to appear as witnesses without using the subpoena process. The SEC approved amendments to the Codes which direct arbitrators, in most instances, to issue orders (arbitrator orders), instead of issuing subpoenas, when industry parties seek the appearance of witnesses or the production of documents from non-party firms or their employees or associated persons.

The amendments add procedures for non-parties to object to subpoenas and for parties and non-parties to object to arbitrator orders of production. They also standardize procedures under the Codes relating to service of motions for subpoenas and arbitrator orders; service of issued subpoenas and arbitrator orders; and time frames for responding to subpoenas and arbitrator orders, making them operationally consistent.<sup>1</sup>

The amendments are effective on February 18, 2013, for all motions filed on or after the effective date that request a subpoena under Rule 12512 or 13512, or an arbitrator order under Rule 12513 or 13513.

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

**January 2013**

#### Notice Type

- ▶ Rule Amendment

#### Suggested Routing

- ▶ Compliance
- ▶ Legal
- ▶ Registered Representatives

#### Key Topics

- ▶ Arbitration
- ▶ Code of Arbitration Procedure
- ▶ Discovery
- ▶ Orders to Appear or Produce Documents
- ▶ Subpoenas

#### Referenced Rules & Notices

- ▶ Rule 12512
- ▶ Rule 12513
- ▶ Rule 13512
- ▶ Rule 13513



Questions concerning this *Notice* should be directed to:

- ▶ Richard W. Berry, Senior Vice President and Director of Case Administration, Operations, and Regional Office Services, Dispute Resolution, at (212) 858-4307 or [richard.berry@finra.org](mailto:richard.berry@finra.org); or
- ▶ Margo A. Hassan, Assistant Chief Counsel, Dispute Resolution, at (212) 858-4481 or [margo.hassan@finra.org](mailto:margo.hassan@finra.org).

## Background & Discussion

### Subpoenas

The Codes give arbitrators the authority to issue subpoenas to parties and non-parties. Subpoena Rules 12512 and 13512 set forth procedures for a party to make a motion for a subpoena. The subpoena rules also detail how a party may object to a subpoena and reply to an objection. Finally, the subpoena rules describe how parties must share documents produced under a subpoena.

The subpoena rules do not address who bears the production costs under a subpoena. In practice, arbitrators resolve disputes between parties, and between parties and non-parties, relating to costs associated with subpoenas. The subpoena rules do not provide a procedure for non-parties to object to subpoenas served upon them. As a matter of practice, FINRA permits non-parties to file objections to subpoenas. The objections may include a request for the arbitrators to determine who pays the costs of production.

### Arbitrator Orders

The Codes authorize arbitrators to order firms, their employees or their associated persons to produce documents and/or to appear as witnesses without using the subpoena process. Unlike the subpoena rules, Rules 12513 and 13513 (order rules) expressly address the costs relating to production by non-party firms and their employees/associated persons. The order rules provide that, unless the panel directs otherwise, the party requesting the appearance of witnesses or the production of documents from non-parties pays the reasonable costs of the appearance and/or production.

### Amendments to the Subpoena Rules

FINRA believes that a party firm's responsibility to reimburse a non-party firm (or its employees or associated persons) for production costs should be the same regardless of whether the party firm requests a subpoena or an arbitrator order. FINRA also believes that firms and associated persons are better served by requesting an arbitrator order. Arbitrator orders offer an efficient mechanism for obtaining the appearance of witnesses and production of documents from firms and their employees. While the Codes provide an enforcement mechanism for subpoenas and arbitrator orders,<sup>2</sup> typically, once an arbitrator issues a subpoena, non-compliance is handled away from the arbitration forum through the courts. However, non-compliance relating to an arbitrator order is handled by the arbitrators who are familiar with the case. Another advantage to using an arbitrator order is that arbitrator orders are not subject to the geographical limitations contained in subpoena statutes. Arbitrator orders are cost effective because forum users avoid the costs and risks associated with court proceedings.

Since the Codes provide a mechanism through the order rules for seeking production of documents and witnesses without resorting to the subpoena process, FINRA amended the subpoena rules to provide that unless circumstances dictate the need for a subpoena, arbitrators may not issue subpoenas to non-party firms and/or employees or associated persons of non-party firms at the request of party firms and/or employees or associated persons of party firms. The amendments state that if the arbitrators determine that the request for the appearance of witnesses or the production of documents should be granted, then the arbitrators should order the appearance of such persons or the production of documents from such persons or non-party firms under the order rules. An arbitrator might order a subpoena if, for example, a firm failed to produce documents pursuant to an arbitrator order, or if a former associated person of a firm has left the industry and the arbitrator believes that an order would not be effective.

The amendments add new Rules 12512(g) and 13512(g) to address costs when a party firm and/or employee or associated person requests a subpoena directed to a non-party firm and/or employee or associated person. Under the new rules, if an arbitrator issues a subpoena, the party firm requesting the subpoena shall pay the reasonable costs of the non-party's appearance and/or production, unless the panel directs otherwise.

Finally, the amendments add new Rules 12512(e) and 13512(e) to provide a mechanism for non-parties to object to a subpoena they receive. Under the new provisions, if a non-party receiving a subpoena objects to the scope or propriety of the subpoena, the non-party may, within 10 calendar days of service of the subpoena, file written objections with the director of Arbitration. The party that requested the subpoena may respond to the objections within 10 calendar days of receipt of the objections. These new provisions codify FINRA's current practice concerning non-party objections to subpoenas.

### Amendments to the Order Rules

As described above, the order rules authorize arbitrators to order firms, their employees, or their associated persons to produce documents and/or to appear as witnesses without using the subpoena process. The rules also provide that unless the panel directs otherwise, the party requesting the appearance of witnesses or the production of documents from non-parties pays the reasonable costs of the appearance and/or production.

FINRA amended the order rules to incorporate the procedures outlined in the subpoena rules for making, objecting to and serving motions. In addition, FINRA amended the order rules to provide for non-party objections to an arbitrator's order.

### Effective Date

The amendments are effective on February 18, 2013, for all motions filed on or after the effective date that request a subpoena under Rule 12512 or 13512, or an arbitrator order under Rule 12513 or 13513.

### Endnotes

1. See Securities Exchange Act Rel. No. 68404 (December 11, 2012), 77 Federal Register 74712 (December 17, 2012) (File No. SR-FINRA-2012-041).
2. IM-12000 states that it may be deemed conduct inconsistent with just and equitable principles of trade and a violation of Rule 2010 for a member or a person associated with a member to fail to appear or to produce any document in his possession or control as directed pursuant to provisions of the Code (see Customer Code of Arbitration Procedure Part I – Interpretative Material, Definitions, Organization and Authority).

## ATTACHMENT A

New language is underlined; deletions are in brackets

### Customer Code

#### 12512. Subpoenas

(a) To the fullest extent possible, parties should produce documents and make witnesses available to each other without the use of subpoenas.

(1) Arbitrators shall have the authority to issue subpoenas for the production of documents or the appearance of witnesses.

(2) Unless circumstances dictate the need for a subpoena, arbitrators shall not issue subpoenas to non-party FINRA members and/or employees or associated persons of non-party FINRA members at the request of FINRA members and/or employees or associated persons of FINRA members. If the arbitrators determine that the request for the appearance of witnesses or the production of documents should be granted, the arbitrators should order the appearance of such persons or the production of documents from such persons or non-party FINRA members under Rule 12513.

(b) A party may make a written motion requesting that an arbitrator issue a subpoena to a party or a non-party. The motion must include a draft subpoena and must be filed with the Director, with an additional copy for the arbitrator. The requesting party must serve the motion and draft subpoena on each other party, at the same time and in the same manner as on the Director. The requesting party may not serve the motion or draft subpoena on a non-party.

(c) If a party receiving a motion and draft subpoena objects to the scope or propriety of the subpoena, that party shall, within 10 calendar days of service of the motion, file written objections with the Director, with an additional copy for the arbitrator, and shall serve copies on all other parties at the same time and in the same manner as on the Director. The party that requested the subpoena may respond to the objections within 10 calendar days of receipt of the objections. After considering all objections, the arbitrator responsible for deciding discovery-related motions shall rule promptly on the issuance and scope of the subpoena.

(d) If the arbitrator issues a subpoena, the party that requested the subpoena must serve the subpoena at the same time and in the same manner on all parties and, if applicable, on any non-party receiving the subpoena.

(e) If a non-party receiving a subpoena objects to the scope or propriety of the subpoena, the non-party may, within 10 calendar days of service of the subpoena, file written objections with the Director. The Director shall forward a copy of the written objections to the arbitrator and all other parties. The party that requested the subpoena may respond to the objections within 10 calendar days of receipt of the objections. After considering all objections, the arbitrator responsible for issuing the subpoena shall rule promptly on the objections.

~~[(e)]~~ (f) Any party that receives documents in response to a subpoena served on a non-party shall provide notice to all other parties within five days of receipt of the documents. Thereafter, any party may request copies of such documents and, if such a request is made, the documents must be provided within 10 calendar days following receipt of the request.

(g) If the arbitrators issue a subpoena to a non-party FINRA member and/or any employee or associated person of a non-party FINRA member at the request of a FINRA member and/or employee or associated person of a FINRA member, the party requesting the subpoena shall pay the reasonable costs of the non-party's appearance and/or production, unless the panel directs otherwise.

#### **12513. Authority of Panel to Direct Appearances of Associated Person Witnesses and Production of Documents Without Subpoenas**

(a) Upon motion of a party, the panel may order the following without the use of subpoenas:

- The appearance of any employee or associated person of a member of FINRA; or
- The production of any documents in the possession or control of such persons or members.

(b) The motion must include a draft order and must be filed with the Director, with an additional copy for the arbitrator. The requesting party must serve the motion and draft order on each other party, at the same time and in the same manner as on the Director. The requesting party may not serve the motion or draft order on a non-party.

(c) If a party receiving a motion and draft order objects to the scope or propriety of the order, that party shall, within 10 calendar days of service of the motion, file written objections with the Director, with an additional copy for the arbitrator, and shall serve copies on all other parties at the same time and in the same manner as on the Director. The party that requested the order may respond to the objections within 10 calendar days

of receipt of the objections. After considering all objections, the arbitrator responsible for deciding discovery-related motions shall rule promptly on the issuance and scope of the order.

(d) If the arbitrator issues an order, the party that requested the order must serve the order at the same time and in the same manner on all parties and, if applicable, on any non-party receiving the order.

(e) If a non-party receiving an order objects to the scope or propriety of the order, the non-party may, within 10 calendar days of service of the order, file written objections with the Director. The Director shall forward a copy of the written objections to the arbitrator and all other parties. The party that requested the order may respond to the objections within 10 calendar days of receipt of the objections. After considering all objections, the arbitrator responsible for issuing the order shall rule promptly on the objections.

(f) Any party that receives documents in response to an order served on a non-party shall provide notice to all other parties within five days of receipt of the documents. Thereafter, any party may request copies of such documents and, if such a request is made, the documents must be provided within 10 calendar days following receipt of the request.

[(b)] (g) Unless the panel directs otherwise, the party requesting the appearance of witnesses by, or the production of documents from, non-parties under this rule shall pay the reasonable costs of the appearance and/or production.

## Industry Code

### 13512. Subpoenas

(a) To the fullest extent possible, parties should produce documents and make witnesses available to each other without the use of subpoenas.

(1) Arbitrators shall have the authority to issue subpoenas for the production of documents or the appearance of witnesses.

(2) Unless circumstances dictate the need for a subpoena, arbitrators shall not issue subpoenas to non-party FINRA members and/or employees or associated persons of non-party FINRA members at the request of FINRA members and/or employees or associated persons of FINRA members. If the arbitrators determine that the request for the appearance of witnesses or the production of documents should be granted, the arbitrators should order the appearance of such persons or the production of documents from such persons or non-party FINRA members under Rule 13513.

(b) A party may make a written motion requesting that an arbitrator issue a subpoena to a party or a non-party. The motion must include a draft subpoena and must be filed with the Director, with an additional copy for the arbitrator. The requesting party must serve the motion and draft subpoena on each other party, at the same time and in the same manner as on the Director. The requesting party may not serve the motion or draft subpoena on a non-party.

(c) If a party receiving a motion and draft subpoena objects to the scope or propriety of the subpoena, that party shall, within 10 calendar days of service of the motion, file written objections with the Director, with an additional copy for the arbitrator, and shall serve copies on all other parties at the same time and in the same manner as on the Director. The party that requested the subpoena may respond to the objections within 10 calendar days of receipt of the objections. After considering all objections, the arbitrator responsible for deciding discovery-related motions shall rule promptly on the issuance and scope of the subpoena.

(d) If the arbitrator issues a subpoena, the party that requested the subpoena must serve the subpoena at the same time and in the same manner on all parties and, if applicable, on any non-party receiving the subpoena.

(e) If a non-party receiving a subpoena objects to the scope or propriety of the subpoena, the non-party may, within 10 calendar days of service of the subpoena, file written objections with the Director. The Director shall forward a copy of the written objections to the arbitrator and all other parties. The party that requested the subpoena may respond to the objections within 10 calendar days of receipt of the objections. After considering all objections, the arbitrator responsible for issuing the subpoena shall rule promptly on the objections.

[(e)] (f) Any party that receives documents in response to a subpoena served on a non-party shall provide notice to all other parties within five days of receipt of the documents. Thereafter, any party may request copies of such documents and, if such a request is made, the documents must be provided within 10 calendar days following receipt of the request.

(g) If the arbitrators issue a subpoena to a non-party FINRA member and/or any employee or associated person of a non-party FINRA member at the request of a FINRA member and/or employee or associated person of a FINRA member, the party requesting the subpoena shall pay the reasonable costs of the non-party's appearance and/or production, unless the panel directs otherwise.



### 13513. Authority of Panel to Direct Appearances of Associated Person Witnesses and Production of Documents Without Subpoenas

(a) Upon motion of a party, the panel may order the following without the use of subpoenas:

- The appearance of any employee or associated person of a member of FINRA; or
- The production of any documents in the possession or control of such persons or members.

(b) The motion must include a draft order and must be filed with the Director, with an additional copy for the arbitrator. The requesting party must serve the motion and draft order on each other party, at the same time and in the same manner as on the Director. The requesting party may not serve the motion or draft order on a non-party.

(c) If a party receiving a motion and draft order objects to the scope or propriety of the order, that party shall, within 10 calendar days of service of the motion, file written objections with the Director, with an additional copy for the arbitrator, and shall serve copies on all other parties at the same time and in the same manner as on the Director. The party that requested the order may respond to the objections within 10 calendar days of receipt of the objections. After considering all objections, the arbitrator responsible for deciding discovery-related motions shall rule promptly on the issuance and scope of the order.

(d) If the arbitrator issues an order, the party that requested the order must serve the order at the same time and in the same manner on all parties and, if applicable, on any non-party receiving the order.

(e) If a non-party receiving an order objects to the scope or propriety of the order, the non-party may, within 10 calendar days of service of the order, file written objections with the Director. The Director shall forward a copy of the written objections to the arbitrator and all other parties. The party that requested the order may respond to the objections within 10 calendar days of receipt of the objections. After considering all objections, the arbitrator responsible for issuing the order shall rule promptly on the objections.

(f) Any party that receives documents in response to an order served on a non-party shall provide notice to all other parties within five days of receipt of the documents. Thereafter, any party may request copies of such documents and, if such a request is made, the documents must be provided within 10 calendar days following receipt of the request.

[(b)] (g) Unless the panel directs otherwise, the party requesting the appearance of witnesses by, or the production of documents from, non-parties under this rule shall pay the reasonable costs of the appearance and/or production.

## **About Matt Fischer**

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Matt Fischer's practice is concentrated in general commercial litigation with emphasis in real estate, business, contract, securities, intellectual property, and international litigation. He has experience in state and federal civil trial courts, handling agency, regulatory and administrative matters, and alternative dispute resolution forums, such as the Financial Industry Regulatory Authority (FINRA) and the American Arbitration Association (AAA).

Securities litigation experience includes representing financial institutions, broker-dealers, retail and investment banks, lending institutions and investment advisors in federal court, state court and SRO arbitrations. Matt has significant experience defending broker-dealers and registered representatives in customer disputes involving allegations of unsuitability, lack of diversification, unauthorized trading, churning, excessive commissions, failure to supervise, negligence, fraud, breach of fiduciary duty, and federal and state statutory violations. He has further experience in securities litigation includes broker-dealer and clearing house disputes, up-front bonus recovery, Rule 10b-5, Section 11 and Section 12 litigation, state statutory securities litigation and investment registration issues. Additionally, Matt has experience in regulatory work with the Arizona Corporation Commission, Securities Division and other administrative agencies including broker registration issues and responses to regulatory inquiries.

### **Representative Presentations and Publications**

- Escrow Litigation Update, Arizona State Escrow Association Annual Conference
- Making Litigation Manageable, Association of Corporate Counsel/Lex Mundi (2005)
- Preparing Witnesses and Defending Depositions, Snell & Wilmer
- Alliance of Automobile Manufacturers, et al. v. Hull, 137 F. Supp.2d 1165 (D. Ariz. 2001)
- In re Cases Filed by DIRECTV, Inc., 344 F. Supp.2d 636 (D. Ariz. 2004)
- In re Cases Filed by DIRECTV, Inc., 344 F. Supp.2d 647 (D. Ariz. 2004)

### **Professional Recognition and Awards**

- Southwest Super Lawyers® - Rising Stars Edition, Business Litigation (2013)
- Volunteer Lawyers Program, Collaboration for Children Award (Intel/Snell & Wilmer) (2008)
- Snell & Wilmer Top Pro Bono Attorney (2007)
- Volunteer Lawyers Program, Guardianship Attorney of the Year (2005)

### **Education**

- University of Arizona (J.D., summa cum laude, 1999) - Business Editor, Arizona Law Review; Order of the Coif
- University of Notre Dame (B.A., Economics/Computer Applications, cum laude, 1995)