Separate Accounts after the 6% Contract Enhancement is applied. Accordingly, the asset-based charges applicable to the Separate Accounts will be assessed against the entire amounts held in the Separate Accounts, including any 6% Contract Enhancement amounts. As a result, the aggregate asset-based charges assessed will be higher than those that would be charged if the Contract owner's contract value did not include any Contract Enhancement.

6. Applicants submit that the provisions for recapture of any Contract Enhancement under the Contracts do not violate Sections 2(a)(32) and 27(i)(2)(A) of the Act. Sections 26(e) and 27(i) were added to the Act to implement the purposes of the National Securities Markets Improvement Act of 1996 and Congressional intent. The application of a 6% Contract Enhancement to premium payments made under the Contracts should not raise any questions as to compliance by the Insurance Companies with the provisions of Section 27(i). However, to avoid any uncertainty as to full compliance with the Act, Applicants request an order granting an exemption from Sections 2(a)(32) and 27(i)(2)(A), to the extent deemed necessary, to permit the recapture of the 6% Contract Enhancement under the circumstances described in the Application, without the loss of relief from Section 27 provided by Section 27(i).

7. Applicants state that Section 22(c) of the Act authorizes the Commission to make rules and regulations applicable to registered investment companies and to principal underwriters of, and dealers in, the redeemable securities of any registered investment company to accomplish the same purposes as contemplated by Section 22(a). Rule 22c–1 under the Act prohibits a registered investment company issuing any redeemable security, a person designated in such issuer's prospectus as authorized to consummate transactions in any such security, and a principal underwriter of, or dealer in, such security, from selling, redeeming, or repurchasing any such security except at a price based on the current net asset value of such security which is next computed after receipt of a tender of such security for redemption or of an order to purchase or sell such security.

8. Applicants state that it is possible that someone might view the Insurance Companies' recapture of the 6% Contract Enhancement as resulting in the redemption of redeemable securities for a price other than one based on the current net asset value of the Separate Accounts. Applicants contend, however, that the recapture of the 6% Contract Enhancement does not violate Rule 22c–1. The recapture of some or all of the 6% Contract Enhancement does not involve either of the evils that Section 22(c) and Rule 22c–1 were intended to eliminate or reduce as far as reasonably practicable, namely: (i) The dilution of the value of outstanding redeemable securities of registered investment companies through their sale at a price below net asset value or repurchase at a price above it, and (ii) other unfair results, including speculative trading practices. To effect a recapture of a 6% Contract Enhancement, the Insurance Companies will redeem interests in a Contract owner's contract value at a price determined on the basis of the current net asset value of the Separate Accounts. The amount recaptured will be less than or equal to the amount of the Contract Enhancement that the Insurance Companies paid out of their general account assets. Although Contract owners will be entitled to retain any investment gains attributable to the 6% Contract Enhancement and to bear any investment losses attributable to the 6% Contract Enhancement, the amount of such gains or losses will be determined on the basis of the current net asset values of the Separate Accounts. Thus, no dilution will occur upon the recapture of the Contract Enhancement. Applicants also submit that the second harm that Rule 22c–1 was designed to address, namely, speculative trading practices calculated to take advantage of backward pricing, will not occur as a result of the recapture of the 6% Contract Enhancement. Because neither of the harms that Rule 22c–1 was meant to address is found in the recapture of the Contract Enhancement, Applicants assert that Rule 22c–1 should not apply to the 6% Contract Enhancement. However, to avoid any uncertainty as to full compliance with Rule 22c–1, Applicants request an order granting an exemption from the provisions of Rule 22c–1 to the extent deemed necessary to permit them to recapture the Contract Enhancement under the Contracts.

9. Applicants also submit that extending the requested relief to encompass Future Contracts and Other Accounts is appropriate in the public interest because it promotes competitiveness in the variable annuity market by eliminating the need to file redundant exemptive applications prior to introducing new variable annuity contracts. Applicants assert that investors would receive no benefit or additional protection by requiring Applicants to repeatedly seek exemptive relief that would present no issues under the Act not already addressed in the Application.

10. Applicants submit, for the reasons stated herein, that their exemptive request meets the standards set out in Section 6(c) of the Act, namely, that the exemptions requested are appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act and that, therefore, the Commission should grant the requested order.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Cathy H. Ahn,

Deputy Secretary.

[FR Doc. 2011–8081 Filed 4–5–11; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–64166; File No. SR–FINRA–2010–035]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of Amendment No. 1 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 1, Relating to Amendments to the Discovery Guide and Rules 12506 and 12508 of the Code of Arbitration Procedure for Customer Disputes

April 1, 2011.

I. Introduction

On July 12, 2010, the Financial Industry Regulatory Authority, Inc. ("FINRA") filed with the Securities and Exchange Commission ("SEC" or "Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Exchange Act" or "Act") [1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend the Discovery Guide, which includes Document Production Lists, and to make conforming changes to Rules 12506 and 12508 of the Code of Arbitration Procedure for Customer Disputes ("Customer Code"). The proposed rule change was published for comment in the **Federal Register** on August 3, 2010.[3] The Commission received 55 comment letters on the

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Exchange Act Release No. 62584 (July 28, 2010), 75 FR 45685 (August 3, 2010).

proposed rule change.[4] On February 8, 2011, the Commission received from FINRA a Response to Comments and Partial Amendment No. 1 to the proposed rule change.[5] The Commission is publishing this notice and order to solicit comment on Amendment No. 1 and to approve the proposed rule change, as modified by Amendment No. 1, on an accelerated basis.

II. Description of Proposed Rule Change and Summary of Comments

As described in Exchange Act Release No. 62584,[6] FINRA is proposing to amend the Discovery Guide, which includes Document Production Lists, and to make conforming changes to Rules 12506 and 12508 of the Customer Code. Of the 55 comments received on the initial proposal, 15 supported it with modifications,[7] 36 opposed it,[8] and 4 addressed particular aspects of the proposal without expressing a position on whether the Commission should approve the proposed rule change.[9]

In its Response Letter, FINRA stated that the initial proposed rule change reflected several years of close consultation with FINRA's constituents, including investor and industry representatives, arbitrators, and attorneys that handle investor claims at securities arbitration clinics. FINRA also stated that, because the Discovery Guide, as amended by the initial proposed rule change, was comprised of language that was discussed at length with these constituents and crafted to balance the parties' discovery needs with the goal of keeping FINRA arbitration efficient and cost effective, FINRA was, for the most part, making only limited further revisions to the proposed rule change to provide additional clarification and guidance.[10]

In addition, FINRA stated that, if the Commission approves the proposed rule change as amended, it would establish a Discovery Task Force under the auspices of FINRA's National Arbitration and Mediation Committee to review substantive issues relating to the Discovery Guide on an ongoing basis, for the purpose of keeping the Discovery Guide current as products change and new discovery issues arise.[11] FINRA stated that it would convene the Discovery Task Force approximately six months after implementing the revised Discovery Guide to allow practitioners time to gauge the efficacy of the new Discovery Guide.[12]

FINRA's responses to comments and changes to the proposed rule change made by Amendment No. 1 are described below.

A. Guide Introduction

1. Arbitrator Discretion

Commenters expressed concerns that arbitrators may adhere strictly to the Discovery Guide's two lists of documents (the first itemizing categories of documents to be produced by firms and their associated persons, and the second itemizing categories of documents to be produced by customers—together, "Lists") when making discovery decisions and may not use the flexibility the Discovery Guide provides to them.[13] FINRA responded that it wants arbitrators to be aware of the flexibility they have when

[4] *See* comment letters submitted by Richard A. Stephens, Esq., dated August 6, 2010 ("Stephens comment"); Seth E. Lipner, Esq., Baruch College, Member, Deutsch & Lipner, dated August 15, 2010 ("Lipner comment"); Leonard Steiner, Esq., dated August 16, 2010 ("Steiner comment"); Robert C. Port, Esq., Cohen Goldstein Port Gottlieb, LLP, dated August 19, 2010 ("Port comment"); Steven M. McCauley, Esq., dated August 19, 2010 ("McCauley comment"); Steven B. Caruso, Esq., Maddox Hargett & Caruso, P.C., dated August 20, 2010 ("Caruso comment"); Diane Nygaard, Esq., dated August 20, 2010 ("Nygaard comment"); Ryan K. Bakhtiari, Esq., Aidikoff, Uhl and Bakhtiari, dated August 20, 2010 ("Bakhtiari comment"); Thomas R. Cox, Esq., Miller, Canfield, Paddock and Stone, P.L.C., dated August 20, 2010 ("Cox comment"); Steven J. Gard, Esq., dated August 22, 2010 ("Gard comment"); John W. Shaw, Esq., Berkowitz, Oliver, Williams, Shaw and Eisenbrandt, dated August 23, 2010 ("Shaw comment"); Stephen Krosschell, Esq., Goodman & Nekvasil, P.A., dated August 23, 2010 ("Krosschell comment"); David P. Neuman, Esq., Stoltmann Law Offices, P.C., dated August 23, 2010 ("Neuman comment"); Theodore A. Krebsbach, Esq., Krebsbach and Snyder, P.C., dated August 23, 2010 ("Krebsbach comment"); Eric G. Wallis, Esq., Reed Smith LLP, dated August 23, 2010 ("Wallis comment"); Herb Pounds, Jr., Esq., dated August 23, 2010 ("Pounds comment"); Alan S. Brodherson, Esq., dated August 24, 2010 ("Brodherson comment"); Joseph Terry, dated August 24, 2010 ("Terry comment"); Mark James, dated August 24, 2010 ("James comment"); Jonathan W. Evans, Esq., and Michael S. Edmiston, Esq., Law Offices of Jonathan W. Evans & Associates, dated August 24, 2010 ("Evans and Edmiston comment"); G. Kirk Ellis, Esq., dated August 24, 2010 ("Ellis comment"); Jason R. Doss, Esq., The Doss Firm, LLC, dated August 24, 2010 ("Doss comment"); Jenice L. Malecki, Esq., Malecki Law, dated August 24, 2010 ("Malecki comment"); Frances Ruby, dated August 24, 2010 ("Ruby comment"); Carrie L. Chelko, Esq., Deputy General Counsel, Janney Montgomery Scott LLC, dated August 24, 2010 ("Janney comment"); Raymond W. Henney, Esq., Honigman Miller Schwartz and Cohn LLP, dated August 24, 2010 ("Henney comment"); Jonathan Kord Lagemann, Esq., dated August 24, 2010 ("Lagemann comment"); Brian N. Smiley, Esq., Smiley Bishop & Porter, LLP, dated August 24, 2010 ("Smiley comment"); Stanley Yorsz, Esq., Buchanan Ingersoll & Rooney PC, dated August 24, 2010 ("Yorsz comment"); Dominick F. Evangelista, Esq., Bressler, Amery & Ross, P.C., dated August 24, 2010 ("Evangelista comment"); Michael N. Ungar, Esq., Kenneth A. Bravo, Esq., Joseph S. Simms, Esq., and Jill Y. Coen, Esq., Ulmer & Berne LLP, dated August 24, 2010 ("Ulmer & Berne comment"); Barry D. Estell, Esq., dated August 24, 2010 ("Estell comment"); Richard A. Lewins, Esq., dated August 24, 2010 ("Lewins comment"); Robert M. Rudnicki, Esq., Vice President and Director of Litigation, Raymond James & Associates, Inc., on behalf of Raymond James Financial, Inc. and Raymond James & Associates, Inc., dated August 24, 2010 ("Raymond James comment"); Lee H. Schillinger, dated August 24, 2010 ("Schillinger comment"); Paula D. Shaffner, Esq., Stradley Ronon Stevens & Young, LLP, dated August 24, 2010 ("Shaffner comment"); Kelly J. Moynihan, Esq., Keesal, Young & Logan, dated August 24, 2010 ("Moynihan comment"); Richard L. Martens, Esq., Jason S. Haselkorn, Esq., Patricia M. Christiansen, Esq., Charles L. Pickett, Esq., Casey Ciklin Lubitz Martens & O'Connell, dated August 24, 2010 ("Casey Ciklin comment"); Peter J. Mougey, Esq., Levin Papantonio Thomas Mitchell Rafferty & Proctor, P.A., dated August 24, 2010 ("Mougey comment"); Rob Bleecher, Esq., dated August 24, 2010 ("Bleecher comment"); Scott R. Shewan, Esq., President, Public Investors Arbitration Bar Association, dated August 24, 2010 ("PIABA comment"); Bradford D. Kaufman, Esq., Greenberg Traurig, P.A., dated August 24, 2010 ("Kaufman comment"); William A. Jacobson, Esq., Associate Clinical Professor, Cornell Law School, and Director, Cornell Securities Law Clinic, dated August 24, 2010 ("Cornell Securities Law Clinic comment"); S. Lawrence Polk, Esq., Sutherland Asbill & Brennan LLP, dated August 24, 2010 ("Polk comment"); John R. Cronin, Vermont Securities Director and Chair, NASAA Arbitration Project Group, dated August 25, 2010 ("NASAA comment"); Theodore M. Davis, Esq., dated August 25, 2010 ("Davis comment"); Eliot Goldstein, Esq., Law Offices of Eliot Goldstein, LLP, dated August 25, 2010 ("Goldstein comment"); Richard M. Layne, Esq., dated August 26, 2010 ("Layne comment"); Royal B. Lea, Esq., dated August 27, 2010 ("Lea comment"); Keith L. Griffin, Esq., Griffin Law Firm, LLC, dated August 27, 2010 ("Griffin comment"); Patricia Cowart, Esq., Chair, SIFMA Arbitration Committee, dated September 10, 2010 ("SIFMA comment"); Gail E. Boliver, Esq., Boliver & Bidwell, dated September 16, 2010 ("Boliver comment"); Scott C. Ilgenfritz, Esq., Johnson, Pope, Bokor, Ruppel & Burns, LLP, dated September 24, 2010 ("Ilgenfritz comment"); Matthew Farley, Esq., Drinker Biddle & Reath LLP, dated September 24, 2010 ("Drinker Biddle comment"); and Kathy A. Besmer, dated November 6, 2010 ("Besmer comment").

[5] *See* letter from Margo A. Hassan, Assistant Chief Counsel, FINRA Dispute Resolution, to Elizabeth Murphy, Secretary, Commission, dated February 8, 2011 ("Response Letter"). The text of the proposed rule change and FINRA's Response Letter are available on FINRA's Web site at *http://www.finra.org,* at the principal office of FINRA, on the Commission's Web site at *http://www.sec.gov,* and at the Commission's Public Reference Room.

[6] *See* note 3 *supra*.

[7] *See* Caruso, Bakhtiari, Cox, Pounds, Doss, Malecki, Smiley, Lewins, Raymond James, Mougey, PIABA, Cornell Securities Law Clinic, SIFMA, Boliver, and Ilgenfritz comments.

[8] *See* Lipner, Steiner, Port, McCauley, Nygaard, Gard, Shaw, Neuman, Krebsbach, Krosschell, Brodherson, Terry, James, Evans and Edmiston, Ellis, Ruby, Janney, Lagemann, Yorsz, Evangelista, Ulmer & Berne, Estell, Schillinger, Shaffner, Moynihan, Casey Ciklin, Bleecher, Kaufman, NASAA, Davis, Goldstein, Layne, Lea, Griffin, Drinker Biddle, and Besmer comments.

[9] *See* Stephens, Wallis, Henney, and Polk comments.

[10] Response Letter.

[11] *Id.*

[12] *Id.*

[13] *See* Lipner, Krebsbach, Evans and Edmiston, Shaffner, Bleecher, Griffin, Henney, NASAA, Yorsz, Goldstein, SIFMA, and Drinker Biddle comments.

asked to decide discovery disputes, and therefore the initial proposal included revisions to the introduction of the Discovery Guide stating that arbitrators may order production of documents not appearing on the Lists, and that arbitrators can order that parties do *not* have to produce all items on the Lists in a particular case.[14] Further, these revisions added guidance on how arbitrators should handle objections based on cost or burden of production.[15]

In addition to these changes, and in response to commenters' concerns, FINRA has proposed changes to the introduction to explain that arbitrators must use their judgment in considering requests for documents beyond those contained in the Lists and may not deny document requests on the grounds that the documents are not expressly listed in the Discovery Guide.[16] FINRA stated that, in addition to expanding the language in the Discovery Guide, if the SEC approves the proposed rule change, FINRA would revise the Arbitrator's Reference Guide, which is posted on the FINRA Web site, to include a discussion on how arbitrators should use the new Discovery Guide.[17] FINRA also stated that it would update its arbitrator training materials to ensure that FINRA makes arbitrators aware of the revisions.[18] In addition, FINRA stated that it would offer training on the revised Discovery Guide in a workshop that FINRA would post as an audio file on its Web site if the proposed rule change, as amended, is approved.[19]

2. Business Models and Types of Customer Claims

FINRA initially proposed adding language to the introduction of the Discovery Guide stating that parties and arbitrators should recognize that not all firms have the same business models and that certain items on the Lists may not be relevant in a particular case when the firm's business model (*e.g.,* full service firm, discount broker, or online broker) is taken into consideration.[20] Commenters requested that FINRA add "clearing firm" to the parenthetical listing examples of business models.[21] FINRA agrees that adding "clearing firm" to the parenthetical would be helpful to parties and arbitrators and has amended the proposed language of the parenthetical accordingly.[22] FINRA is also proposing in that same paragraph to replace the phrase "be relevant in" with the phrase "apply to" because "apply to" would more precisely convey the intended meaning of the sentence.[23] In addition, commenters asked for new language indicating that items on the Customer List may not apply in a particular case depending on the claims asserted.[24] FINRA agrees that adding such guidance regarding customer claims would be helpful, and has amended the proposed rule change accordingly.[25]

In the initial proposed rule change, FINRA included language stating that electronic files are "documents" within the meaning of the Discovery Guide.[26] Commenters suggested that FINRA should include additional guidance concerning electronic files.[27] FINRA responded that it understands that issues relating to electronic discovery are becoming more prevalent and intends to recommend that the Discovery Task Force include the topic on its agenda.[28] However, FINRA is not proposing any additional revisions concerning electronic discovery at this time.

3. Privilege

Several commenters raised concerns that List items might require production of privileged documents.[29] One commenter suggested that parties raise objections based on unspecified or unrecognized privileges.[30] Based on these comments, FINRA believes that additional guidance on acceptable grounds for assertions of privilege would be helpful to parties and arbitrators, and is proposing to add language to the introduction stating that parties are not required to produce documents that are otherwise subject to an established privilege, including the attorney-client privilege and attorney work product doctrine.[31]

4. Enforcing Document Production

Commenters raised concerns about arbitrators not adequately enforcing the discovery rules, including through reluctance to impose sanctions for party failure to comply with discovery rules.[32] FINRA believes that the appropriate places to address the arbitrators' duty to enforce discovery requirements are the Code of Arbitration Procedure and FINRA's training materials.[33] FINRA stated that it trains arbitrators concerning the discovery rules and available sanctions.[34] FINRA also stated that, to reinforce the training, it had included a discussion in the revised Arbitrator's Reference Guide (which FINRA indicated would be posted to FINRA's Web site in the near future) that addresses discovery obligations and discusses sanctions.[35]

B. Document Production Lists

1. Eliminating the Discovery Guide

Several commenters asserted that FINRA should eliminate the Discovery Guide.[36] FINRA disagreed with the commenters and stated that experience with the current Discovery Guide since its inauguration in 1999 indicates that the Discovery Guide and its Lists help parties obtain the documents they need to develop a case.[37] FINRA believes that the proposed rule change, which incorporated user feedback after years of experience with the Discovery Guide, will improve the discovery process for customers, and for firms and their associated persons.[38]

2. Production Burden

Several commenters expressed the view that document production under the Guide is burdensome to investors.[39] Others raised concerns about the burdens imposed on firms and their associated persons.[40] FINRA stated that it created the Discovery Guide to facilitate the exchange of the kinds of documents that parties routinely sought during discovery and that arbitrators regularly ordered produced. FINRA also stated that the proposed revisions reflect experience gained over the years since FINRA implemented the Discovery Guide.[41] In addition, FINRA stated that

[14] Response Letter.

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *See* note 3 *supra.*

[21] *See* SIFMA and Drinker Biddle comments. The Drinker Biddle comment also asked FINRA to add "prime-brokerage firm" to the parenthetical. FINRA believes that adding "clearing firm" to the parenthetical will add sufficient clarity for the Guide's users and is not proposing to add "prime-brokerage firm" at this time.

[22] Response Letter.

[23] *Id.*

[24] *See* PIABA and Caruso comments.

[25] Response Letter.

[26] *See* note 3 *supra.*

[27] *See* Yorsz and Martens comments.

[28] Response Letter.

[29] *See* Krosschell, Pounds, Evans and Edmiston, Schillinger, PIABA, Polk, Layne, SIFMA, Drinker Biddle, and Janney comments.

[30] *See* Estell comments.

[31] *Id.*

[32] *See* Krebsbach, Lewins, PIABA, and Boliver comments.

[33] Response Letter.

[34] *Id.*

[35] *Id.*

[36] *See* Lipner, McCauley, Gard, Terry, Evans and Edmiston, and Bleecher comments.

[37] Response Letter.

[38] *Id.*

[39] *See* Lipner, McCauley, Neuman, Krebsbach, James, Evans and Edmiston, Doss, Ruby, Smiley, Estell, Mougey, Bleecher, NASAA, Davis, Layne, and Ilgenfritz comments.

[40] *See* Cox, Krebsbach, Janney, Evangelista, Ulmer & Berne, SIFMA, and Drinker Biddle comments.

[41] Response Letter.

balancing the desire to provide parties with the documents they need to prepare their cases with a desire to minimize production burdens is challenging, but, based on years of experience with the Discovery Guide and constituent feedback, FINRA believed that the proposed rule change, as amended, would strike an appropriate balance.[42]

3. Two List Format

Several commenters objected to FINRA's proposal to consolidate the Lists from 14 claim-specific lists to two general Lists (one for firms and their associated persons, and one for customers) citing, among other objections, additional production burdens and the potential for producing documents that are not needed in every case.[43] FINRA stated that it proposed the consolidation in response to suggestions from advocates for customers that FINRA eliminate the Lists for specific types of claims because customers are not required to plead causes of action under the Customer Code.[44] FINRA also stated that, along with consolidating the Lists, FINRA proposed expanding the guidance it gives to arbitrators in the Discovery Guide's introduction on how to handle discovery issues so that arbitrators understand that they may tailor the Discovery Guide to unique circumstances that arise in arbitration cases.[45] FINRA stated that the consolidation would better serve forum users and ultimately reduce the number and limit the scope of disputes involving document production.[46]

4. Time Periods and Scope of Production

Several commenters objected to the time periods specified in the proposed consolidated List items.[47] FINRA responded by stating that investor and industry representatives that collaborated with FINRA on the proposed rule change considered each List item on its own merits and discussed, over several meetings, the time periods for each item.[48] FINRA explained that, given the effort that went into determining appropriate time periods for production, FINRA was not proposing to change any of the time periods in the proposed rule change.[49] FINRA also stated that the Discovery Task Force may choose to revisit the time periods for production of certain documents after forum users have gained experience with the revised Discovery Guide.[50]

5. Product Cases

Several commenters raised concerns that the Guide does not sufficiently address claims alleging the defective structuring or widespread mismarketing of a specific security, or "product cases."[51] One commenter expressed the belief that the Guide should not address specific products.[52] FINRA responded by stating that it believes product cases are an appropriate subject for the Discovery Task Force, and that it intends to suggest that the Task Force consider the topic further.[53]

6. Distinguishing Customer Parties From Other Customers

Commenters asked FINRA to revise the proposed List items to distinguish between customers that are parties to a case and other, non-party customers.[54] FINRA agreed that making such a distinction in the proposed List items would add clarity to the Discovery Guide.[55] FINRA has accordingly amended the proposed preamble to the Lists to state that, throughout the Lists, FINRA will refer to customers that are parties to an arbitration case as "customer parties" and other, non-party customers as "customers."[56]

7. Accounts or Transactions at Issue

Several proposed List items called for a firm or associated person to produce documents relating to the accounts or transactions at issue.[57] Upon further consideration, FINRA has amended the proposed rule change by specifying that, in addition to documents relating to the accounts or transactions at issue, these items cover documents relating to the claims, and products or types of products, at issue.[58]

C. Individual List Items

In addition to the amendments described above, FINRA has made a number of revisions to the proposed rule change that are specific to individual items on the Lists.

1. List 1, Item 2

As initially proposed, this item would have called for production of all correspondence sent to customers or received by firms and their associated persons specifically relating to the accounts or transactions at issue including, but not limited to, documents relating to asset allocation, diversification, trading strategies, and market conditions; and all advertising materials sent to customers of the firm that refer to the securities or account types at issue.[59] Unless separately requested, the documents would not have included confirmation slips and monthly statements.

FINRA has made several changes to this proposed item that FINRA believes would clarify the item's application and provide additional guidance to parties and arbitrators.[60] As amended, the item would require production of all correspondence sent to the customer parties or received by the firm or its associated persons that relate to the claims, accounts, transactions, or products or types of products at issue including, but not limited to, documents relating to asset allocation, diversification, trading strategies, and market conditions; and all advertising materials sent to customers of the firm that refer to the products or account types that are at issue or that were used by the firm or its associated persons to solicit or provide services to the customer parties. In addition, if requested, the documents would include confirmation slips and monthly statements. Even if not requested, the documents would include confirmation slips and monthly statements that have handwritten notations or that are not identical to those the firm sent to the customer parties.

2. List 1, Item 4

Currently, for claims alleging unauthorized trading, the Discovery Guide presumes that firms will produce order tickets for the customers' transactions at issue. FINRA initially proposed to delete this requirement on

[42] *Id.*

[43] *See* Port, Cox, Shaw, Krebsbach, Brodherson, Janney, Yorsz, Shaffner, Martens, Ulmer & Berne, and SIFMA comments.

[44] FINRA stated that it proposed to update the Discovery Guide in 2008, and, although the 2008 proposal was withdrawn, FINRA incorporated many suggestions made in comments on that proposal, including the suggestion that FINRA consolidate the lists, in the current proposal. *See* Response Letter.

[45] Response Letter.

[46] *Id.*

[47] *See* Stephens, Caruso, Krosschell, Pounds, Evans and Edmiston, Smiley, Ulmer & Berne, Estell, Raymond James, Shillinger, Shafner, Mougey, PIABA, Cornell Securities Law Clinic, Davis, Goldstein, Layne, SIFMA, Boliver, and Drinker Biddle comments. Commenters asserted, among other objections, that time periods were too short, or too long, or were not consistent between customers and firms/associated persons.

[48] Response Letter.

[49] *Id.*

[50] *Id.*

[51] *See* Lipner, Bakhtiari, Malecki, Mougey, and Goldstein comments.

[52] *See* Krebsbach comments.

[53] Response Letter.

[54] *See* SIFMA and Raymond James comments.

[55] Response Letter.

[56] *Id.*

[57] *See* List 1, items 2, 7, 9, 11, 12, 13, and 17.

[58] Response Letter.

[59] *See* note 3 *supra.*

[60] Response Letter.

the grounds that production of order tickets is burdensome, and evidence relating to whether the claimants authorized a particular transaction would be produced under proposed List 1, Items 4, 6, and 8. Several commenters objected to the proposed deletion and stated, among other things, that order tickets provide evidence of whether a trade was solicited or unsolicited, evidence of whether a trade was reviewed and approved by supervisory personnel, and evidence of the time that an order was entered.[61] FINRA found the comments persuasive, and has amended the proposed item to restore the presumption that firms will produce order tickets for the customer parties' transactions at issue in cases alleging unauthorized trading.[62] FINRA believes that the arbitrators can effectively address issues of production burden on a case-by-case basis.[63]

3. List 1, Item 5(a)

As initially proposed, this item would have provided for production of all materials that the firm or its associated persons prepared, used or provided to customers relating to the transactions or products at issue, including research reports, sales materials, performance or risk data, prospectuses, and other offering documents, including documents intended or identified as being "for internal use only."[64] In response to comments, FINRA is proposing to amend the proposed item to clarify its intended scope by specifying that the documents include copies of news articles or outside research.[65]

4. List 1, Item 6

As initially proposed, this item would have required production of all notes the firm or its associated persons made, including, but not limited to, entries in any diary or calendar, relating to the customers or the customers' accounts or transactions at issue.[66] For clarity, FINRA has amended this proposed item to require production of all notes the firm or its associated persons made relating to the customer parties or the customer parties' claims, accounts, transactions, or products or types of products at issue, including, but not limited to, entries in any diary or calendar, relating to the claims or products at issue.[67]

5. List 1, Item 7(a)

As initially proposed, this item would have required production of all notes or memoranda evidencing supervisory, compliance, or managerial review of the customers' accounts or trades therein for the period at issue.[68] FINRA has amended this proposed item to expand the guidance provided to parties and arbitrators by requiring production of all notes or memoranda evidencing supervisory, compliance, or managerial review of the customer parties' accounts or transactions therein or of the associated persons assigned to the customer parties' accounts for the period at issue.[69]

6. List 1, Item 14

As initially proposed, this item would have required production of portions of internal audit reports for the branch in which the customers maintained accounts that "focused on" associated persons or the accounts or transactions at issue.[70] FINRA has amended this item to clarify its intended scope by replacing "focused on" with "concern."[71]

7. List 1, Item 15

As initially proposed, this item would have required production of records of disciplinary action taken against a firm's associated persons by any regulator or employer for all sales practice violations or conduct similar to the conduct alleged in the Statement of Claim.[72] FINRA has amended this proposed item to clarify its intended scope by including the same parenthetical reference to "state, federal or self-regulatory organization" that FINRA uses in other items in the Discovery Guide that refer to regulators.[73]

8. List 2, Item 1

As initially proposed, this item (relating to customer tax documents) would have stated that customers may redact information relating to medical and dental expenses and the names of charities on Schedule A of their tax return unless the information is related to the allegations in the Statement of Claim.[74] The proposed statement was followed by language indicating that income tax returns must be identical to those that were filed with the Internal Revenue Service.[75] To add clarity to the proposed item, FINRA has amended it by moving the sentence indicating that tax returns must be identical so that it appears immediately above the statement permitting redaction of the returns.[76]

9. List 2, Item 4

This item concerns the customers' accounts at firms that are not parties to the matter. For clarity, FINRA has amended the proposed item by distinguishing between non-party firms and party firms.[77]

10. List 2, Item 8

This item relates to telephone records. In the initial proposed rule change, FINRA stated that it was not proposing any substantive changes to the Discovery Guide's application to telephone records.[78] In response to comments regarding that statement, FINRA offered a clarification.[79] FINRA states that, under the current Discovery Guide, customers are required to produce certain documents relating to telephone records only if they are alleging unauthorized trading.[80] In contrast, proposed item 8 would require customers to produce the specified documents in every case, which is more than a ministerial change.[81]

11. List 2, Item 17

As initially proposed, this item would have required production of documents showing the customers' complete educational and employment background or, in the alternative, a description of the customers' educational and employment background if not set forth in resumes produced under item 16.[82] FINRA has amended this proposed item by revising it to require production of any existing description of the customer parties' educational and employment background if not set forth in resumes produced under item 16.

12. List 2, Item 19

This item concerns insurance products that provide a death benefit. As initially proposed, it would have

[61] *See* Stephens, Caruso, Nygaard, Krosschell, Evans and Edmiston, Schillinger, Layne, and Pounds comments.

[62] Response Letter.

[63] *Id.*

[64] *See* note 3 *supra.*

[65] *See* Response Letter. *Cf.* Estell comments (relating to news articles or outside research).

[66] *See* note 3 *supra.*

[67] Response Letter.

[68] *See* note 3 *supra.*

[69] Response Letter.

[70] *See* note 3 *supra.*

[71] Response Letter. *Cf.* Estell comments (relating to the term "focused on").

[72] *See* note 3 *supra.*

[73] Response Letter.

[74] *See* note 3 *supra.*

[75] *Id.*

[76] Response Letter.

[77] *Id.*

[78] *See* note 3 *supra.*

[79] Response Letter. In its comment, PIABA questioned whether there was an error in the rule text of List 2, Item 8(b) because it did not limit production to claims alleging unauthorized trading.

[80] Response Letter.

[81] *Id.*

[82] *See* note 3 *supra.*

required customers to produce all insurance information received from an insurance sales agent or securities broker relating to such insurance.[83] FINRA has amended the proposed item to clarify its intended scope by deleting the reference to "insurance" before "information."[84]

III. Commission's Findings

After careful review of the proposed rule change, the comment letters and the FINRA Response Letter, the Commission finds that the proposed rule change, as modified by Amendment No. 1, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities association.[85] In particular, the Commission finds that the proposed rule change is consistent with Section 15A(b)(6) of the Act,[86] which requires, among other things, that FINRA rules 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.

The Commission believes that the revisions to the Discovery Guide will help reduce the number and limit the scope of disputes involving document production and other matters, thereby improving the arbitration process for the benefit of the public investors, broker-dealer firms, and associated persons who use the process. The revisions to the Discovery Guide are the result of over six years of consultation by FINRA with its constituents. The Commission also expects that further improvement of the process should be possible through the Discovery Task Force's consideration of discovery issues as they arise.[87]

IV. Accelerated Approval

The Commission finds goods cause, pursuant to Section 19(b)(2) of the Exchange Act,[88] for approving the proposed rule change, as modified by Amendment No. 1 thereto, prior to the 30th day after publication of notice of the filing of Amendment No. 1 in the **Federal Register**. The proposed rule change was informed by FINRA's consideration of, and the incorporation of many suggestions made in, extensive comments on a 2008 proposal to update the Discovery Guide, and Amendment No. 1's modifications to the proposed rule change add clarity to the Discovery Guide and provide additional guidance to parties and arbitrators.

Accordingly, the Commission finds that good cause exists to approve the proposal, as modified by Amendment No. 1, on an accelerated basis.

V. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change, as modified by Amendment No. 1, is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR–FINRA–2010–035 on the subject line.

Paper Comments

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

All submissions should refer to File Number SR–FINRA–2010–035. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of FINRA. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–FINRA–2010–035 and should be submitted on or before April 27, 2011.

VI. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[89] that the proposed rule change (SR–FINRA–2010–035), as modified by Amendment No. 1, be, and hereby is, approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[90]

Cathy H. Ahn,

Deputy Secretary.

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[83] *See* note 3 *supra.*

[84] Response Letter.

[85] In approving this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[86] 15 U.S.C. 78*o*–3(b)(6).

[87] *Cf.* Response Letter (describing plans for further consideration of issues by the Discovery Task Force).

[88] 15 U.S.C. 78s(b)(2).

[89] 15 U.S.C. 78s(b)(2).

[90] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–64163; File No. SR–NYSEAmex–2011–22]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by NYSE Amex LLC To Expand the $2.50 Strike Price Program

March 31, 2011.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b–4 thereunder,[2] notice is hereby given that, on March 29, 2011, NYSE Amex LLC ("NYSE Amex" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. 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

The Exchange proposes to amend Commentary .07 to NYSE Amex Rule 903 to expand the $2.50 Strike Price Program. The text of the proposed rule change is available at the principal office of Exchange, the Commission's Public Reference Room, on the Commission's Web site at *http://www.sec.gov,* and *http://www.nyse.com.*

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.