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**Delivered via e-mail**
Elizabeth M. Murphy
Secretary, Securities and Exchange Commission
100 F Street N.E.
Washington, D.C. 20549-1090

*RE: Amendments to Discovery Guide in FINRA Arbitrations*
*File No. SR-FINRA-2013-024*

Dear Ms. Murphy:

I am an attorney in Seattle, and have represented investors, broker dealers, and registered representatives in FINRA arbitrations for more than 20 years. I have also been a FINRA arbitrator for more than a decade.

The purpose of this letter is to provide the Securities and Exchange Commission with comments on the above referenced proposed rule change filed by FINRA on June 3, 2013. My comments are focused on the proposed amendments dealing with the production of electronic files. The proposed rule provides:

> 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 proposed rule further provides that when deciding contested motions related to the form of production, arbitrators are to consider "whether the chosen form of production is different from the form in which a document is ordinarily maintained," and if so,

> 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.

The proposed amendment has a fundamental flaw that will undermine its usefulness: it does not require the producing party to disclose whether or not the form or format of electronic files *has* been changed from their original form or format. How broker dealers and their vendors (such as companies that store their e-mails) maintain files, particularly electronic files, is complex. A recipient

has no way of knowing whether or not a document or electronic file's format has been changed. As a practical matter, producing parties will be free to change the form or format of electronic and other files to omit material, or make the material more difficult for the recipient to use, without ever being discovered.

This is not a minor defect. In my experience respondent broker dealers commonly have a much narrower idea than I do of (1) what a request is asking for, particularly when requests are not phrased using the firm's own terminology or descriptions, and (2) what is "relevant" to an issue. It is reasonably foreseeable that when broker dealers provide electronic files they will consider parts of those files to be not covered by the request, or to be irrelevant (e.g., metadata), and hence will consider it proper to reformat the data to delete such information. It is likewise reasonably foreseeable that they will have a different idea of whether or not certain reformatting "makes it more difficult or burdensome" on the recipient—who may not have access to the same tools for working with such material as do respondents.

In short, it is predictable that electronic files will often be reformatted prior to production. As the proposed rule is written, as long as those files meet the minimal threshold of "reasonably usable," and there is no indication on their face that the format has been altered to delete metadata, obscure information, or make the files more burdensome to use, no one will ever know. Respondents and their counsel, can—and human nature being what it is, will—employ those tools to obtain strategic advantage, because there will be an immediate and certain benefit in doing so, at little or no cost.

This proposed amendment to the Discovery Guide should include language along the lines of:

> The producing party must state whether or not the documents being produced are in the same form or format as that in which they are ordinarily maintained, or in the case of documents obtained from a third party the same as that in which the third party provided them, and if not explain the differences in detail sufficient for the recipient to understand their significance, including specifically whether any information in the original format is omitted from the produced documents.

Thank you for considering these comments.

Very truly yours,

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