SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–85781; File No. SR–FINRA–2019–004]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Order Approving a Proposed Rule Change To Expand Time for Non-Parties To Respond to Arbitration Subpoenas and Orders of Appearance of Witnesses or Production of Documents

May 6, 2019.

I. Introduction

On January 29, 2019, Financial Industry Regulatory Authority, Inc. (''FINRA'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Exchange Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend FINRA Rule 12512(d) through (e) and FINRA Rule 12513(d) through (e) of the Code of Arbitration Procedure for Customer Disputes (''Customer Code'') and FINRA Rule 13512(d) through (e) and FINRA Rule 13513(d) through (e) of the Code of Arbitration Procedure for Industry Disputes (''Industry Code'' and together, ''Codes''), to expand the time for non-parties to respond to arbitration subpoenas and orders of appearance of witnesses or production of documents, and to make related changes to enhance the discovery process for forum users.

The proposed rule change was published for comment in the **Federal Register** on February 12, 2019.[3] The public comment period closed on March 5, 2019. The Commission received four comment letters in response to the Notice, all supporting the proposed rule change.[4] On April 22, 2019, FINRA responded to the comment letters received in response to the Notice.[5] On March 19, 2019, FINRA extended the time period in which the Commission must approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to approve or disapprove the proposed rule change to May 13, 2019.[6] This order approves the proposed rule change.

II. Description of the Proposed Rule Change [7]

Parties exchange documents and information to prepare for an arbitration through the discovery process. The Codes currently provide that parties in FINRA arbitration who seek discovery from a non-party may request the panel to issue: (1) An order of appearance of witnesses or production of documents if the non-party is subject to FINRA's jurisdiction as an associated person or member firm or (2) a subpoena if the non-party is not subject to FINRA's jurisdiction.[8] If the panel decides to issue the order or subpoena, FINRA will transmit the signed order or subpoena to the moving party to serve on the non-party.[9] If a non-party receiving an order or a subpoena objects to the scope or propriety of the order or subpoena, the non-party may, within 10 calendar days of service of the order or subpoena, file written objections through the Director of the Office of Dispute Resolution (Director).[10]

FINRA is proposing three amendments to the Codes to enhance the discovery process for forum users, particularly non-parties. Specifically, FINRA is proposing to amend the Codes to:

(1) Extend the response time for non-parties to object to an order or subpoena from 10 calendar days of service to 15 calendar days of receipt of the order or subpoena; [11]

(2) exclude first-class mail as an option to serve documents on a non-party and as an option for the non-party to file the objection to the scope or propriety of the order or subpoena; [12] and

(3) codify the current practice that the Director sends, at the same time, objections and responses to the panel after the reply date has elapsed, unless otherwise directed by the panel.[13]

III. Comment Summary

Supportive Comments

As noted above, the Commission received four comment letters on the proposed rule change.[14] Overall, all four commenters support the proposal and believe that it represents a fair and reasonable approach to helping expedite the arbitration process.[15] More specifically, all four commenters explained that the extension of time to respond to an order or subpoena would help ensure that non-parties have sufficient time to respond to an order or subpoena during arbitration and enhance the discovery process for forum users.[16] The commenters also believe that FINRA's proposed change to the acceptable methods of service would help enable forum users to ''better facilitate and confirm service of subpoenas and orders.'' [17] One

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

[2] 17 CFR 240.19b–4.

[3] *See* Exchange Act Release No. 85063 (Feb. 6, 2019), 84 FR 3518 (Feb. 12, 2019) (File No. SR–FINRA–2019–004) (''Notice'').

[4] *See* Letter from Steven B. Caruso, Maddox Hargett Caruso, P.C., dated February 11, 2019 (''Caruso Letter''); letter from Christine Lazaro, Public Investors Arbitration Bar Association (''PIABA''), dated February 22, 2019 (''PIABA Letter''); letter from William Jacobson, Cornell Securities Law Clinic, dated March 1, 2019 (''Cornell Letter''); and letter from Nicole Iannarone, Georgia State University College of Law, dated March 5, 2019 (''Georgia State Letter''). Comment letters are available on the Commission's website at *https://www.sec.gov.*

[5] *See* Letter from Kristine A. Vo, Principal Counsel, FINRA, to Ms. Vanessa Countryman, Acting Secretary, U.S. Securities and Exchange Commission, dated April 22, 2019 (''FINRA Letter''). The FINRA Letter is available on FINRA's website at *http://www.finra.org,* at the principal office of FINRA, on the Commission's website at *https://www.sec.gov/comments/sr-finra-2019-004/srfinra2019004.htm,* and at the Commission's Public Reference Room.

[6] *See* Letter from Kristine A. Vo, Principal Counsel, FINRA, to Lourdes Gonzalez, Assistant Chief Counsel—Sales Practices, Division of Trading and Markets, Securities and Exchange Commission, dated March 19, 2019.

[7] The subsequent description of the proposed rule change is substantially excerpted from FINRA's description in the Notice. *See* Notice, 84 FR at 3518–3519.

[8] *See* Rules 12512 and 12513. *See also* Rules 13512 and 13513.

[9] *See* Notice, 84 FR at 3518.

[10] *See* Rules 12512 and 12513. *See also* Rules 13512 and 13513.

[11] Receipt of overnight mail service, overnight delivery service, hand delivery, email or facsimile is accomplished on the date of delivery. *See* Notice, 84 FR at 3519, n. 8.

[12] Filing and service by first-class mail is accomplished on the date of mailing, but it can take several days to confirm receipt. For purposes of this rule proposal, service by overnight mail, overnight delivery, hand delivery, facsimile or email is accomplished on the date of delivery.

[13] FINRA states that the Director sends the complete set of motion papers to the panel to ensure that the panel receives the advocacy positions of all parties at the same time.

[14] *See supra* note 4.

[15] *See* Caruso Letter (stating that ''proposed changes would be a fair, equitable and reasonable approach that would expedite and facilitate the efficiency of the arbitration process . . . ''; PIABA Letter (supporting the proposed rule changes ''insofar as they strike a good balance between promoting fast and efficient discovery and allowing for the normal internal operations of third parties to work to respond to subpoenas and orders.''); Georgia State Letter (stating that the proposal would ''promote speed and efficiency in arbitration''); and Cornell Letter (stating that the proposal is an important step towards ''enhancing the discovery process for forum users.'').

[16] *See* Cornell Letter. *See also* Caruso Letter (stating that ''the proposed amendments would address forum users concerns and would help ensure that non-parties wanting to object to an order or subpoena have sufficient time to do so.''); PIABA Letter (supporting ''the proposed rule changes, insofar as they strike a good balance between promoting fast and efficient discovery and allowing for the normal internal operations of third parties to work to respond to subpoenas and orders.''); Georgia State Letter (stating that patterning its rule on those of other fora would create familiarity with the process, resulting in ''more timely answers from non-parties and FINRA spending less time enforcing orders and subpoenas that were not answered.'').

[17] PIABA Letter. *See also* Georgia State Letter (stating that the proposal would ''enhance the speed

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commenter states that the new acceptable service methods would further its efforts to ''provide no-cost advocacy to retail investors who cannot obtain legal representation because [they] do not cost anything.'' [18] This commenter also supports the proposed fifteen-day response deadline because ''it would promote speed and efficiency in arbitration.'' [19]

Additional Guidance

One commenter suggests that FINRA amend the proposal to use service (instead of receipt) as the trigger for determining response deadlines.[20] Specifically, the commenter believes that the use of ''receipt'' instead of ''service'' as a trigger for responses ''introduces uncertainty into the process [because w]hile service can be verified, a serving party may not be aware of when a request is received by a third party.'' [21] The commenter also points out that ''other similar forums currently use service and not receipt as the trigger for calculating a response deadline.'' [22]

In response, FINRA explains that the receipt of overnight mail service, overnight delivery service, hand delivery, email, or facsimile is accomplished on the date of delivery.[23] Accordingly, FINRA believes that parties will be able to determine the date of delivery because, other than for overnight mail service and overnight delivery service, typically delivery will be the same date as service.[24] FINRA also states that the rule change excludes first class mail as an option to serve documents on a non-party, in part, because it may be difficult to determine the date of delivery and, thereby, receipt.[25] For these reasons, FINRA did not take commenter's recommended change.

Similarly, another commenter recommends that FINRA adopt a certified mail option to ''verify when the order or subpoena was received.'' [26] In response, FINRA states that service by overnight mail, overnight delivery, hand delivery, email, or facsimile allow the parties to verify both the date of delivery and receipt and, therefore, certified mail is unnecessary.[27] Accordingly, FINRA did not take the commenters recommended change.

IV. Discussion and Commission Findings

After careful review of the proposed rule change and the comment letters, the Commission finds that the proposal is consistent with the requirements of the Exchange Act and the rules and regulations thereunder that are applicable to a national securities association.[28] Specifically, the Commission finds that the proposed rule change is consistent with Section 15A(b)(6) of the Exchange Act,[29] 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 agrees with FINRA and the commenters that the proposed rule changes would protect investors and the public interest by improving the FINRA arbitration forum for the parties that use it.[30]

As stated in the proposal, forum users have expressed concerns about the amount of time that non-parties have to respond to orders and subpoenas [31] since the individual at a non-party firm who is responsible for responding to an order or subpoena may not actually receive a copy of the order or subpoena until after the tenth day from service has passed.[32] Once the objection to an order or subpoena is waived, the non-party must respond to the order or subpoena or risk incurring sanctions or disciplinary action.[33] Consequently, the Commission believes the extension from 10 calendar days of service to 15 calendar days of receipt of the order or subpoena would address forum users' concerns because the proposal would help to provide sufficient time to non-parties wanting to object to an order or subpoena. Consequently, we also believe that the proposal would also help prevent accidental waivers that could cause sanctions or disciplinary action, protest, and thus further delays in resolving arbitration claims between parties.

The Commission acknowledges one commenter's concern that adopting a trigger for response to a subpoena or order date based on the date of ''receipt'' rather than the date of ''service'' may cause confusion since ''a serving party may not be aware of when a request is received by a third party.'' [34] However, we are also concerned that a non-party to the arbitration may not be able to anticipate the arrival of an order or subpoena, which could lead to inadvertently waiving its right to object. In addition, we note FINRA's statement that parties will be able to determine the date of delivery because, other than for overnight mail service and overnight delivery service, typically delivery will be the same date as service.[35] In sum, the Commission believes that the risks related to the inability to anticipate receipt of a subpoena or order support adopting a trigger date based on the date of receipt rather than the date of service.

The Commission also acknowledges another commenter's request to adopt a certified mail delivery option.[36] However, the Commission also notes that service by overnight mail, overnight delivery, hand delivery, email, or facsimile will allow the parties to verify both the date of delivery and receipt.[37] Therefore, on balance, the Commission believes that the proposed available delivery options will accommodate the commenter's concern.[38]

The Commission also agrees with FINRA's proposal to exclude first-class mail as an option to serve documents on the non-party and as an option for the non-party to file the objection to the scope or propriety of the order or subpoena. As stated in the proposal, forum users have previously raised concerns that the use of first-class mail

of and lower costs in arbitration by amending the methods of service.''); Caruso Letter (stating that the proposal ''enable forum users to be better able to confirm and facilitate the timing of discovery obligations.''); Cornell Letter (predicting that the new proposed service methods would ''speed[] up the time it takes to serve documents to non-parties.'').

[18] Georgia State Letter.

[19] *Id.*

[20] *See id.*

[21] Georgia State Letter.

[22] *Id.* (stating that service is the trigger for responses in federal court, in the JAMS arbitration forum, and to SEC and FTC requests).

[23] *See supra* note 5; *see also* Notice.

[24] *See* FINRA Letter.

[25] *Id.*

[26] *See* Cornell Letter.

[27] *Id.*

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

[29] 15 U.S.C. 78*o*–3(b)(6).

[30] *See supra* note 15; *see also* FINRA Letter.

[31] *See* Notice, 84 FR at 3818–3519, n. 4 (citing a letter from Kevin M. Carroll, Managing Director and Associate General Counsel, Securities Industry and Financial Markets Association, to Jennifer Piorko Mitchell, Vice President and Deputy Corporate Secretary, FINRA, dated June 2, 2017 (responding to FINRA's March 2017 Special Notice on FINRA's engagement programs), *www.finra.org/sites/default/files/notice_comment_file_ref/SN-32117_SIFMA-KevinCarroll_comment.pdf*).

[32] *See* FINRA Notice at 3519 (Non-parties do not have access to the Dispute Resolution Party Portal (Party Portal). As a result, they are currently served using other means, such as first-class mail, overnight mail service, overnight delivery service, hand delivery, email, or facsimile. Consequently, a firm that is a non-party to an arbitration is not able to anticipate the arrival of an order or subpoena and instruct front-line employees to route these high priority documents to the appropriate individual responsible for responding to the discovery request).

[33] *See* FINRA Notice at 3519 (citing Rules 12212 and 12511). *See also* Rules 13212 and 13511).

[34] Georgia State Letter.

[35] *See* FINRA Letter.

[36] *See* Cornell Letter.

[37] *See* FINRA Letter.

[38] *Id.*

is too slow and thus slows down the discovery process.[39] The Commission agrees that by requiring forum users to serve or transmit discovery-related documents through overnight mail service, overnight delivery, hand delivery, email, or facsimile, the proposal would help forum users confirm and expedite discovery, and therefore expedite the arbitration process.

Finally, the Commission supports the proposal's codification of the current practice that the Director sends, at the same time, objections and responses to the panel after the reply date has elapsed, unless otherwise directed by the panel. This ensures that all members on the panel receive all the parties' advocacy positions at the same time. The Commission agrees that the proposed rule change will enhance forum users' understanding of existing case administration procedures and will improve transparency concerning forum operations.[40]

V. Conclusion

It is therefore ordered pursuant to Section 19(b)(2) of the Exchange Act [41] that the proposal (SR–FINRA–2019–004), be and hereby is approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[42]

Eduardo A. Aleman,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–85782; File No. SR–ICEEU–2019–009]

Self-Regulatory Organizations; ICE Clear Europe Limited; Notice of Filing of Proposed Rule Change Relating to the ICE Clear Europe Operational Risk Management Policy ("ORM Policy")

May 6, 2019.

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 May 1, 2019, ICE Clear Europe Limited ("ICE Clear Europe" or the "Clearing House") filed with the Securities and Exchange Commission ("Commission") the proposed rule changes described in Items I, II, and III below, which Items have been prepared primarily by ICE Clear Europe. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Clearing Agency's Statement of the Terms of Substance of the Proposed Rule Change

ICE Clear Europe proposes to formalize its Operational Risk Management Policy ("ORM Policy"), which consolidates its practices with respect to management of operational risk. The revisions do not involve any changes to the ICE Clear Europe Clearing Rules or Procedures.[3]

II. Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, ICE Clear Europe 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. ICE Clear Europe has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of such statements.

(A) Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

(a) Purpose

ICE Clear Europe is proposing to formalize its ORM Policy which sets out the Clearing House's processes for managing operational risks, the stakeholders responsible for executing those processes, the frequency of review of the policy and the governance and reporting lines for the policy.

The ORM Policy addresses operational risk, which it defines as the risk of an event occurring which negatively impacts the achievement of business objectives resulting from inadequate or failed internal operational controls, people, systems or external events.[4] The ORM Policy establishes an overall process that identifies, assesses, responds to, monitors and reports operational risk.

Risk Identification: Risk identification is performed by the business areas and lines exposed to the risk (referred to as "risk owners") at least once each year, and is overseen by the Risk Oversight Department. Risk owners must map their existing processes, linking them to business objectives and identify operational risks where an event might negatively impact the achievement of a business objective. Risk sources must also be identified.

Risk Assessment: Risk assessment is conducted by the risk owners at least once per year in conjunction with risk identification. The potential impact of the risk, including its potential severity and likelihood, are to be evaluated. More frequent ad hoc assessments may be necessary if risks emerge or disappear between annual reviews. For most operational risks, control mechanisms may already exist, in which case uncontrolled and controlled impacts are measured. Risk owners must also assess the sufficiency of existing control mechanisms on a quarterly or, if necessary, a more frequent ad hoc basis.

Risk Response: Risk owners are responsible for proposing and implementing remedial actions, which must be approved by the ICE Clear Europe Executive Risk Committee (the "ERC"). Depending upon the potential expected impact of the operational risk and the Clearing House risk appetite, the four possible responses to a risk are to treat or mitigate the risk, tolerate or accept the risk, transfer the risk to another party (such as through insurance) or terminate the activity carrying the risk.

Risk Monitoring: Risk owners must monitor the identified operational risk daily through the use of key performance indicators, key risk indicators and other risk indicators such as their own management limits. The Risk Oversight Department itself monitors risks daily through risk appetite metrics and management thresholds as well as operational incidents raised by the risk owners. Risk owners and the Risk Oversight Department also must monitor the performance of control mechanisms on a regular and frequent basis.

Risk Reporting and Oversight: Overall oversight of the policy rests with the Audit Committee and Risk Oversight Department. Specifically, the results of risk assessments must be reported to the Audit Committee and the Board Risk Committee (the "BRC") when material changes are observed. Control

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[39] *See* FINRA Notice at 3519.

[40] *See* FINRA Notice at 3519 (FINRA notes that the proposed rule change would impact all members, including members that are funding portals or have elected to be treated as capital acquisition brokers ("CABs"), given that the funding portal and CAB rule sets incorporate the impacted FINRA rules by reference).

[41] 15 U.S.C. 78s(b)(2).

[42] 17 CFR 200.30–3(a)(12).

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

[2] 17 CFR 240.19b–4.

[3] Capitalized terms used but not defined herein have the meanings specified in the ICE Clear Europe Clearing Rules (the "Rules").

[4] The ORM Policy notes several non-exhaustive examples of operational risk, including risks from internal and external fraud, employment practices and workplace safety, clients, products and business practices, damage to physical assets and business disruption and system failures.