SECURITIES AND EXCHANGE COMMISSION


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. 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.15 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.”16 One

---

4 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. 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.
5 See Rules 12512 and 12513. See also Rules 13512 and 13513.
6 See Notice, 84 FR at 3518.
7 See Rules 12512 and 12513. See also Rules 13512 and 13513.
8 See Notice, 84 FR at 3518.
9 See Notice, 84 FR at 3518.
10 See Notice, 84 FR at 3518.
11 Receipt of overnight mail service, overnight delivery service, hand delivery service, hand delivery, facsimile or email is accomplished on the date of delivery. See Notice, 84 FR at 3519, n. 8.
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 is accomplished on the date of delivery because, other than for overnight mail service and overnight delivery service, typically delivery will be the same date as service. 27 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 is difficult to determine the date of delivery and, thereby, receipt. 28 For these reasons, FINRA did not take commenter’s recommended change.

delivery, email, or facsimile allow the parties to verify both the date of delivery and receipt and, therefore, certified mail is unnecessary. 29 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. 30 Specifically, the Commission finds that the proposed rule change is consistent with Section 15A(b)(6) of the Exchange Act, 31 which requires, among other things, that FINRA rules be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable practices, to prevent unfair, deceptive, and manipulative acts and practices, to promote just and equitable competition, and capital formation. The Commission approves 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. 32

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 33 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. 34 Once the objection to an order or subpoena is waived, the non-party must respond to the order or subpoena on, or before, the date stated in the order or subpoena. 35

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 See FINRA Notice at 3519 (citing Rules 12212 and 12511).
29 Id.
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/3N-32117_SIFMA-KevinCarroll_comment.pdf).
is too slow and thus slows down the discovery process. 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.

V. Conclusion

It is therefore ordered pursuant to Section 19(b)(2) of the Exchange Act that the proposal be hereby approved.

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

Eduardo A. Aleman, Deputy Secretary.

SECURITIES AND EXCHANGE COMMISSION


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"), and Rule 19b–4 thereunder, notice is hereby given that on May 1, 2019, ICE Clear Europe Limited ("ICE Clear Europe") 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. 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.

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) 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. 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