

**HAVE FINTECH, REGTECH AND
TECHNOLOGICAL ADVANCES
RENDERED LIST 1 OF THE FINRA
DISCOVERY GUIDE OBSOLETE?**

**PUBLIC INVESTORS ARBITRATION BAR ASSOCIATION
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HAVE FINTECH, REGTECH AND TECHNOLOGICAL ADVANCES RENDERED LIST 1 OF THE FINRA DISCOVERY GUIDE OBSOLETE?

Technological Advances in the Financial Services Arena

Advances in electronic communications, social media, pattern recognition software, trading programs, artificial intelligence and even outsourcing have advanced in the past six years since FINRA Regulatory Notice 11-17 to the point where Claimant's counsel may end up doing double duty as an information technology expert, when drilling down and accessing the newly emerging categories of relevant "documents" in customer cases.¹ The intervening time frame since the issuance of Regulatory Notice 11-17 has seen the emergence of artificial intelligence programs designed to monitor trading activity including IBM's Watson, SparkCognition, Digital Reasoning, Neurensic and other software programs designed to monitor electronic communications in the financial services market arena. Notably, NASDAQ is already utilizing Digital Reasoning, a cognitive computing firm which has pioneered technology design to detect and monitor electronic communications.² Likewise, innovations in blockchain and encryption technology are technologies which both the financial services industry and FINRA have been assessing.³

¹ "A Day in the Quiet Life of an NYSE Floor Trader" D.M. Levine, *Fortune*, May 29, 2013. Suggesting that automated trading systems comprising 75% of all trades on the NASDAQ and New York Stock Exchange as of 2014.

² NASDAQ also utilizes SMARTS, a sophisticated natural language processing and machine intelligence-based technology to monitor and surveil communications with an eye monitoring electronic communications to detect potential market manipulation and risky conduct. See "NASDAQ and Digital Reasoning Establish Exclusive Alliance to Deliver Holistic Next Generation Surveillance and Monitoring Technology". NASDAQ Press Release, February 23, 2016. (Business.nasdaq.com/market-text/market-participants/SMARTS-trade-surveillance-sell-side).

³ NASDAQ. *Are You Ready for 2017? Seven Technologies That Will Transform Your Business*. 21 February 2017. <http://www.nasdaq.com/article/are-you-ready-for-2017-seven-technologies-that-will-transform-your-business-com-750533> and www3.weforum.org/docs/WEF-The-future-offinancial-infrastructure.pdf. "The Future of Financial Infrastructure: An ambitious Look at How Blockchain Can Reshape Financial Services." *World Economic Forum*, Aug. 2016.

FinTech, RegTech and Artificial Intelligence – New Terminology Defined By FINRA

In a posting on finra.org dated March 16, 2017, FINRA defined FinTech to include as encompassing “...financial technology-related (FinTech) developments in the securities industry”, noting that “[b]roker – dealers are also exploring and leveraging new technologies such as cloud storage, machine learning and blockchain to enhance their overall operational infrastructure and compliance functions”.⁴ This same web-based piece defining FinTech also included a second definition, RegTech, which it defined as “...a subset of FinTech, covering new and emerging technologies that assist the Financial Services Industry in meeting its regulatory compliance obligations, in a faster and more cost effective manner including applications such as compliance monitoring and fraud prevention, data management and identification and interpretation of regulation”.⁵

Additionally, this same web-based piece went on to note that Artificial Intelligence (AI) “...is rapidly being incorporated into various aspects of the Financial Services Industry, ranging from personalized automated advice and chatbot customer service, to trading based on social media sentiment, to highly sophisticated fraud surveillance.”⁶ The piece goes on to define a fourth term, Social Media Sentiment Investing and different business models in the financial services ecosystem, including social media data analytics companies, social media sentiment

⁴ <http://www.finra.org/industry/fintech>. Additionally, a word search on finra.org of the term “FinTech” as a supervisory, compliance and/or regulatory tool and concept indicates no meaningful utilization of it until May 17, 2017 in “FINRA 2017 Regulatory and Examination Priorities Letter, Cover Letter from FINRA President and CEO, Robert Cook. (<http://www.finra.org/industry/2017-regulatory-and-examination-priorities-letter>).

⁵ On November 3, 2016 the SEC announced its own agenda and panelists for a forum to address FinTech Innovation in the Financial Services Industry (“SEC Announces Agenda, Panelists for Nov. 14 FinTech Forum) ([SEC.gov/newsreleases/pressrelease/2016-234.html](http://www.sec.gov/newsreleases/pressrelease/2016-234.html)). The entire transcript of the FinTech Forum – The Evolving Financial Market Place held on Monday, November 14, 2016 is available on <https://www.sec.gov/spotlight/fintech/transcript-111416.pdf>.

⁶ <http://www.finra.org/industry/fintech>. See also “The Role of Big Data, Machine Learning and AI in Assessing Risks: A Regulatory Prospective”, Scott W. Bauguess, Acting Director and Acting Chief Economist, DERA, June 21, 2017. www.SEC.gov/news/speech/bauguess-big-data-ai.

based product issuers, crowdsourced research networks and social networking platforms.⁷ Given these new processes, how will the FINRA Office of Dispute Resolution and arbitration panels address discovery related requirements in the context of arbitration proceedings?

As of this writing, it is still unknown as to the extent to which emergent Fintech technology and supporting FinTech vendor firms will fully interface with, be embraced by and otherwise come under the supervisory and compliance provision of FINRA rules. Additionally, developments involving social media titans Facebook and Google; technology titan Apple and even marketing giant Amazon, also suggest that these firms will become increasingly involved with transactions involving securities marketed to the investing public.

The FINRA Discovery Guide

The original FINRA Discovery Guide for respondents and claimants involved in FINRA venued arbitration proceedings was incorporated as a part of FINRA Notice to Members 99-90. The Discovery Guide was updated in April of 2011, with the issuance of Regulatory Notice 11-17, with List 1 containing 22 items deemed presumptively discoverable from firms and/or associated persons. Contemporaneous with FINRA Regulatory Notice 11-17, FINRA updated its Rules 12506 (document production lists) and 12508 (objecting to discovery requests; waiver of objection).

Significantly, Regulatory Notice 11-17 placed an emphasis on “flexibility” noting that arbitrators involved in the discovery process of FINRA arbitration proceedings can “...order the production of documents not provided for by the lists”, also noting that as relates “Electronic Discovery” that: “Electronic files are “documents” within the meaning of the Guide”.⁸

⁷ www.finra.org/industry/fintech.

⁸ www.finra.org/sites/default/files/NoticeDocument/p123505.pdf, pages 2 and 3.

A Sampling of Some Items From List 1 of the Discovery Guide Which Have Been Greatly Impacted By Technology Advances Since the Issuance of Regulatory Notice 11-17

Items 3, 5, 6, 7, 12, 13, 14 and 17 include various categories of documents presumptively discoverable from List 1 of the Discovery Guide that firms/associated persons are required to produce in customer cases which have been greatly impacted by technological advances since the issuance of the Discovery Guide.

Item 3
Trading Strategy Documentation

Documents evidencing any investment or trading strategies used or recommended in the customer parties' accounts.

Comment: The lion's share of investment and trading strategies utilized by brokerage firms are now automated, computerized and/or involved algorithms.⁹

Item 5
Worksheets/Notes Provided to the Claimant/Proof of Broker Review

Materials the firm and/or associated persons prepared or used and/or provided to the customer parties relating to the transactions or products at issue, and worksheets or notes indicating that the associated persons reviewed or read such documents.

Comment: Hard copy, three-ring binder formatted, written notes of client conversations, cross-reference holding pages and old-school trading strategies have been almost completely replaced with customer relationship management software and other computer based programs. Further, other technology based programs now domicile the lion's share of responsive documents under this Item.

Item 6
Customer Relationship Management Notes

Notes the firm/associated persons made relating to the customer parties and/or the customer parties' claims, accounts, transactions or products or types of products at issue.

Comment: As indicated above in comments to item 5, hard copy three-ring binder formatted, written notes of client conversations, cross-reference holding pages and old-school trading strategies have been almost completely

⁹ Complete discovery of these trading mechanics and specifics is essential for fair discovery in claimant's case.

replaced with customer relationship management software and other computer based programs. CRM software has become the gold standard for the prevention of client account and account related notations.

Item 7

Supervisory, Compliance or Managerial Review of Accounts, Transactions and Brokers, Including Correspondence

Notes or memoranda evidencing supervisory, compliance or managerial review of the customer parties' accounts or transactions, or of the associated persons assigned to the customer parties' accounts; and correspondence between the customer parties and firm/associated persons relating to the customer parties' claims, accounts, transactions or products or types of products at issue bearing indications of managerial, compliance or supervisory review.

Comment: Supervisory, compliance and managerial reviews are nowadays initiated, more often than not, by reports generated by automated, computerized and/or software driven technologies. To the extent that these reviews involve notes or memoranda, these are largely computer entered and stored. Likewise, hard copy correspondence is scanned and stored and e-mails are subject to computer based storage protocols and procedures. The likelihood of any responsive documents to Item 7 being on paper as opposed digitized format has become a remote disability.

Item 12

Analyses and Reconciliations of Client Accounts and Reviews of Account Transactions and Products

Analyses and reconciliations of the customer parties' accounts, including those relating to reviews of the customer parties' claims, accounts, transactions or the product or types of products at issue.

Comment: Periodic analyses and reconciliations are now routinely prepared by automated and computerized programs created by various software parameters. The actual review of these analyses and reconciliations by the appropriate supervisory, compliance and/or managerial personnel in line of command and is far more likely to be formatted in automated or computerized program. The production of these analyses, reviews and reconciliations in their newly confirmed technology based format is essential for fair discovery.

Item 13
Exception Reports/Activity Reviews/Concentration Reports
and Reviews

Exception reports, supervisory activity reviews, concentration reports, active account runs and similar documents produced to review for activity in the customer parties' accounts related to the allegations. For claims alleging failure to supervise, the firm/associated persons must produce the documents listed in this item that were produced to review for activity in customer accounts handled by associated persons and related to the allegations.

Comment: The same comments pertain with respect to Item 14 as indicated in Item 13 above. Further, has the term "exception report" in the first sentence of this item become obsolete or has it acquired a more expansive definition with all of the new surveillance technologies? Historically, many firms have developed their own proprietary internal mechanisms for surveilling and assessing possible client account abuses. Discovery demands not fashioned to encompass these new technologies could well resort in negative response to a simple demand for a firm's own, so nominated, exception reports when in fact a firm has seen and observed far more expansive categories and metrics of possible customer victimization and wrongdoing that might not have been detected on an old-school earlier generation exception report.

Item 14
Internal Audit Reports for Branch, Accounts and Transactions
at Issue

Portions of internal audit reports for the branch in which the customer parties maintained accounts that concern associated persons or the accounts or transactions at issue and discussed alleged improper behavior in the branch against other individuals similar to the improper conduct alleged.

Comment: Internal audit reports have become much more reliant upon technological advances which include the automated generation of reports based upon various flag parameters involving associated persons, client accounts and securities transactions suggesting the intervention of the human element.

The same comments pertain with respect to Item 14 as indicated in Item 13 above. Further, the term "internal audit reports" in the first sentence of this item. Is the term internal audit reports obsolete or has it acquired a more expansive definition with all of the new surveillance technologies? Historically, many firms have developed their own proprietary internal mechanisms for surveilling and assessing possible client account abuses. Discovery demands not fashioned to encompass these new technologies

could well resort in negative response to a simple demand for a firm's own, so nominated, internal audit reports when in fact a firm has seen and observed far more expansive categories and metrics of possible customer victimization and wrongdoing that might not have been detected on an old-school earlier generation exception report.

Item 17
Reports Following Regulatory Review and Inspection

Portions of examination reports or similar reports following an examination or inspection conducted by any regulator that focused on the associated persons or customer parties' claims, accounts or transactions, or the product or types of products, or that discussed alleged improper behavior in the branch against other individuals similar to the conduct alleged.

Comment: As relates to the active time frame of the implementation and review of any program in a customer's account, there will surely also be periodic reports and cautionary critiques issued requiring human input, monitoring and correction during the lifetime of the account and such events will also require a production of documents as defined the electronic discovery definitions of FINRA Regulatory Notice 11-17. If a third-party trader, money manager, asset manager or some other financial professional, separate and apart from the claimant's broker has been actively involved with the selection of the asset mix and balance, separate and apart from the broker of record, their identity will also have to be made known. Discovery of these examination reports in their new technology based formats is essential.

The Hybrid BD-RIA Model

A number of firms have been moving towards the hybrid platform which tout the efficiencies of program training, while maintaining a human interface, including Personal Capital, Rebalance, Blackrock, Vanguard Personal Advisors, Charles Schwab and Betterment. Platforms such as Tradingfront and Nestegg automate routine tasks for RIA's (Betterment Institutional, Motif Institutional and Fidelity Institutional Web Services, AlgoTrades and Cloud Technology).¹⁰ This trend has become more pronounced with the migration of wirehouse

¹⁰ FINRA NTM 94-44 (Board Approves Clarification on Applicability of Article 3, Section 40 of Rules of Fair Practice to Investment Advisory Activities of Registered Representatives) and 96-33 (NASD Clarifies Rules Governing RR/IA's).

brokers to the RIA business platform. These predominantly paperless, technology-based modalities clearly meet the definition of “documents” under FINRA Regulatory Notice 11-17.

The Trend Towards Involving Non-FINRA Licensed Registered Investment Advisers

The past decade has seen an incredible transfer lesser to investment advisory platform working out of small, unsupervised offices without any compliance reviews.¹¹ FINRA member firms who platform business models, however, must assure that they do not advance wrongful ends and discovery of these paperless, technology-based documents is also essential in claims involving the activities of non-FINRA licensed advisers which interface with FINRA member firms.¹²

Cloud Technology

Accessing cloud technology based data imposes its own challenges to adapting to the FINRA Discovery Guide to customer claims as relates to affording claimants and their counsel fair access to discoverable documents in arbitration proceedings.¹³ This has been accompanied by incredible shift towards cloud technology as opposed to in-house, on-site, proprietary, dedicated server storage being balanced with the intellectual technology to requirements of brokerage firms as set forth in the Sarbanes-Oxley Act of 2002.¹⁴ Respondents cannot be

¹¹ See also Trends in Supervisory and Clearing Firm Liability, Timothy J. O’Connor and Paul C. Carroll, Securities Arbitration and Mediation 2017: The Courage to Simply, David E. Robbins, Esq. and James D. Yellen, Esq., Co-Chairs, New York State Bar Association Continuing Legal Education Series, New York City April 6, 2017.

¹² Top independent broker-dealer firms include LPL Financial, AIG Advisor Group, ING Advisors Network, NFP Securities, Inc., AXA Advisors, LLC, National Planning Holdings, Inc., Securities America Inc., Commonwealth Financial Network, Northwestern Mutual Investment Services and MML Investor Services, with LPL Financial and PrimeVest Financial Services, Inc., a subsidiary of ING Advisors Network, Inc.

¹³ Yeoh, John, and Frank Guanco. “How Cloud is Being used in the Financial Sector: Survey Report.” Cloud Security Alliance (2015): n. pag. Web 22 Feb. 2017.1.

¹⁴ “The Benefits of Cloud Computing for the Banking & Financial Industry.: *Global Banking And Finance Review Magazine - Financial & Business Insights*. Global Banking & Finance Review, GBAF Publications, Ltd. August 23, 2013.

permitted to avoid Discovery Guide production obligations by pointing to the clouds, claiming inaccessibility.

FINRA Regulatory Notice 07-59 – Electronic Communications

FINRA Regulatory Notice 07-59 (Supervision of Electronic Communications) requires firms to have, implement and utilize appropriate systems to monitor customer emails within its supervisory and compliance network.¹⁵ Nasdaq’s use of the SMARTS and Digital Reasoning technologies enable the monitoring of additional applications such Customer Relationship Management software (CRM software) and other included emergent technologies referenced in that article which have stretched the definition of “documents” under the Discovery Guide applicable to items 3, 5, 6, 7, 12, 13 and 14 from List 1.¹⁶

The supervision obligations regarding electronic correspondence under FINRA Regulatory Notice 07-59 include the following six categories:

1. Written policies and procedures
2. Types of electronic communication review
3. The identity of the persons responsible for reviewing electronic telecommunications
4. The method of review
5. Frequency of review
6. Documentation of the actual review process

It is submitted that all six of these categories include “documents” produced by the emerging FinTech, RegTech and AI technologies referenced in this article.

¹⁵ <https://www.finra.org/file/regulatory-notice-07-59>.

¹⁶ See footnotes 1 and 8.

FINRA Rule 2214 – Requirements for the Use of Investment Analysis Tools

FINRA Rule 2214 (Requirements for the Use of Investment Analysis Tools) defines the definition of investment analysis tools to include

“...an interactive technological tool that produces simulations and statistical analysis that present the likelihood of various investment outcomes if certain investments are made or certain investment strategies or styles are undertaken, thereby serving as an additional resource to investors in the evaluation of the potential risks and returns of investment choices.”

Thusly, it is also submitted that these investment analysis tools are likewise “documents” pursuant to the definition of elective discovery as defined by Regulatory Notice 11-17. See also Regulatory Notice 16-41, (Communications with the Public, October 2016).

FINRA Rules 2165 and 4512 – Protecting the Elderly and Customer Account Information

In February of 2018 FINRA will be ruling out Rule 2165 (Financial Exploitation of Specified Adults), as well as amendments to FINRA Rule 4512 (Customer Account Information) which will require broker dealers to “make reasonable efforts” to acquire pertinent contact information for a trusted contact for elderly customers and also allows firms to place temporary holds on the release of funds and securities from customer accounts “when there is a reasonable belief of financial exploitation”.¹⁷ These requirements will surely see the implementation of policies, procedures technology formatted reports and processes while not expressly contemplated expressly by the Discovery Guide, will surely meet the definition of “documents” as defined by Regulatory Notice 11-17.

Compensation Programs

Likewise, compensation models of financial professionals have been altered and being implemented with new technologies innovating broker financial incentives including indirect

¹⁷ See FINRA Regulatory Notice 15-37 (Financial Exploitation of Seniors and Other Vulnerable Adults. www.finra.org/sites/default/files/notice_doc_file_ref/Regulatory_Notice_15_37.pdf).

incentives such as client referrals, client retention, broker bonuses, account opening incentives, and assets under management based compensation (CallidusCloud, Synogy, Xactly, IBM's Varicent and Orical's Siebel). This move away from traditional commission based brokers may not afford the transparency in the discovery process, unless properly pursued whether by List 1, Items 19 and 20 or separate discovery requests. Expressly incorporating these new innovations into an updated Discovery Guide makes better sense and avoid unclarity and discovery disputes.

Algorithmic and Automated Trading Programs

In FINRA Regulatory Notices 15-09 and 16-21, FINRA addressed the emergence of automated and algorithmic trading systems, which in turn can be monitored and surveilled by automated and algorithmic monitoring and review. In the final analysis, it will be human beings in the chain of command who will be responsible for creating, implementing, reviewing, supervising, approving and/or correcting and engaging in problematic programs.¹⁸ Properly formatted and articulated discovery demands will be required to afford claimants the discovery to which they are entitled under Regulatory Notice 11-17. Likewise, an updated Discovery Guide will assure transparency and a fair discovery process.

Programs for Implementation of the Fiduciary Rule

Likewise, the implementation of the Fiduciary Rule will continue to see an explosion of this technology in compliance with the Fiduciary Rule including firms such as Broadridge Financial Solutions and its DOL Fiduciary Solution product, DOL Customer Communications tool and Red Flag Software and the Adviser Perspectives, Inc./IRA fiduciary optimizer which

¹⁸ See also FINRA Regulatory Notice 16-21 "Qualification and Registration of Associated Persons Relating to Algorithmic Trading" and 15-09 "Guidance on Effective Supervision and Control Practices for Firms Engaging in Algorithmic Trading Strategies".

allows compliance officers access to various categories of information relating to a specific individual broker or brokerage firm.¹⁹

Will These Innovations Give Rise to New Supervisory and Compliance Titles and Responsibilities?

Will the implementation of algorithms and FinTech innovations also see the emergence of a new FINRA Qualification Examination separate and apart from existing titles?²⁰ FINRA Notice to Members 16-21 suggests that individuals involved with the creation and implementation of algorithmic trading programs should be licensed with FINRA.²¹ While these programs are in their infancy, as with other technological developments, discovery of their reports, processes, procedures and reviews are essential to any claimant's case.

Additionally, the outsourcing of supervision and surveillance functions by brokerage firms to these new networks would clearly require that any such FINRA member firms have written supervisory procedures to assure compliance with FINRA rules and applicable securities law and regulations (See Notice to Members 05-48 and the FINRA Report on Distributed Ledger Technology, *supra* at page 18).²²

¹⁹ Advicent Solution, L.P. a portfolio company of Vista Equity Partners has already teamed up with 20 broker-dealers according to its website including Allstate Financial Services, Ameritas Investment Corp., Schwab Openview Gateway of Charles Schwab & Co., Inc., Commonwealth Financial Network, Nationwide, J.W. Cole Financial, Inc., Summit Brokerage Services. (www.advicent.solutions.com). These procedures would likewise be subject to discovery as "documents" as defined by Regulatory Notice 11-17 and The Discovery Guide.

²⁰ For example, Series 14 (Compliance Officer), Series 16/86/87 (research & supervisory), Series 23/24/25/39 (Principal Examinations), Series 27/28 (FinOp Principal), Series 4/9/10 (Sales Supervisor/Options Principal), Series 57 (Securities Trader) and Series 99 (Operations Professional)?

²¹ FINRA Regulatory Notice 16-21, "Qualification and Registration of Associated Persons Relating to Algorithmic Trading" addresses the SEC approval of an amendment to NASD Rule 1032(f) expanding the scope of persons required to register as a Securities Trader to include individuals who are "responsible for the day-to-day supervision or direction" of "algorithmic trading strategy relating to an equity, preferred or convertible debt securities".

²² Distributed Ledger Technology: Implications of Blockchain for the Securities Industry FINRA, January 2017. (www.finra.org/sites/default/files/FINRA_Blockchain_Report.pdf), p. 18.

Discovery Required of Clearing Firms Should Also Include FinTech, RegTech and Artificial Intelligence Related Documents and Information

Given detection, surveillance and red flag-type software utilized by clearing brokerage firms, the discovery of the procedures, processes, implementation and utilization of them as relates to customer accounts in arbitration proceedings is essential.²³ Clearing firms also have access to technology based and algorithmic trading capabilities and are required to address qualifications associated with the human beings who monitor and assess them.²⁴ Anti-money laundering software and related programs also make it very difficult for clearing firms to ignore possible customer victimization.²⁵

How Will Respondents Comply in the Discovery Process With These New Technologies?

(i) How will respondents produce computer code, software, algorithms and artificial intelligence?

How will a claimant get proper discovery in a case involving algorithms, a robo-trading program, and artificial intelligence software? Particularly when these technologies continue to morph during the time frame of the maintenance of a client's account? Will the response be merely a code program, a computer chip of some sort or would there be attendant written memoranda, instructions, commentary and upgrades involved with the independent thought and hands-on involvement of the human being? Assuming a firm can, in fact, produce an algorithm,

²³ The SEC noted the need for continued focus regarding the review of the compliance reviews of clearing firms with the Dodd-Frank Act in SEC Office of Compliance Inspections and Examinations, Examination Priorities for 2016", 2 (January 11, 2016).

²⁴ See also Trends in Supervisory and Clearing Firm Liability, Timothy J. O'Connor and Paul C. Carroll, Securities Arbitration and Mediation 2017: The Courage to Simply, David E. Robbins, Esq. and James D. Yellen, Esq., Co-Chairs, New York State Bar Association Continuing Legal Education Series, New York City April 6, 2017.

²⁵ For example, see FINRA Rules 5210 and 6410 and 17 CFR § 242.200 – 204; 17 CFR § 240.15c3-5 and 17 CFR § 242.600 – 613. See SEC Rule 15c3-5, Exchange Act Rule 10b-5, FINRA 2020, U.S. Patriots Act & AML Regulations.

robo-trading program or artificial intelligence generated trading surveillance program, how would claimant's counsel overcome a claim of proprietary protection, intellectual property protection and confidentiality?²⁶ Such obstructionist tactics are inimical to the guidelines of The Discovery Guide, which should be updated, in any event, to expressly require the production of these items.

(ii) Overcoming the “No Obligation to Create Documents” Argument/Fallacy

Further, the guidance in FINRA Regulatory Notice 11-17, entitled “No Obligation to Create Documents”, which states that “parties are not required to create documents in response to items on the lists”, has been oft cited by obstructionist Respondent firms seeking to avoid discovery of presumptively discoverable documents. Will firms continue to be permitted to parrot this provision when faced with discovery demands encompassing these new categories of technology domiciled “documents” data and information, which they possess, but have not turned into specific, one-dimensional, paper documents? The definition of “documents” in FINRA Notices 07-59 and 11-17 clearly suggest otherwise.

(iii) Overcoming Claims of Confidentiality and Privilege

The “confidentiality” and “privilege” definitions set forth on page 3 of Regulatory Notice 11-17 must also be updated to fairly address, or debunk as the case may be, Respondent Firm claims of “proprietary confidential business plans and procedures or trade secrets” and “privilege”. How will claimant's counsel ascertain the identity of the individuals who generated and/or interfaced with these programs involved with your client's account? How could their testimony be compelled if they are not subject to FINRA jurisdiction?

²⁶ While FINRA Regulatory Notice 11-17 expressly addresses the issue of confidentiality, FINRA has not issued any meaningful follow-up express guidance on the discoverability of technology applications interfacing with the day-to-day customer/broker dealer relationship which have emerged in the intervening six years.

WILL SECURITIES ARBITRATION BECOME OBSOLETE?

Absolutely not, as this era of commoditization of information and big data has served to only heighten and enhance the opportunity for the human element to engage in meaningful and protective supervisory and compliance reviews in the financial services industry and customer accounts. There will surely be many instances of problematic failure to properly design, implement and supervise these new technological innovations. Given these emerging trends in involving technology, transactions and job titles in the securities industry, both introducing firms and clearing firms can no longer ignore wrongful conduct which they have facilitated. Some of these innovations will surely afford the securities industry and the customers they serve a more transparent and mutually beneficial and protective relationship.

The Time has come for a New, Updated FINRA Discovery Guide and Regulatory Notice to Address all of the Technological Changes Which Have Occurred Since FINRA Regulatory Notice 11-17

In closing, while it is submitted that these new technologies fall under FINRA's own definition of "documents", as contained in and defined by Regulatory Notice 11-17, given these recent technological advances an accompanying new paradigm in compliance and supervisory innovations over the past six years since its issuance, the time has now arrived for FINRA to issue more particularized guidance in a new Discovery Guide. Both claimant's and respondent's counsel will be better served with clear cut, expressly enumerated, presumptive discovery requirements. Likewise, arbitrators having to resolve discovery disputes will be better served with an updated Discovery Guide, adapted to emergent FinTech, RegTech software programs, artificial intelligence and technological modalities which has served to place clear *indicia* and detection of customer victimization on their radar screens.