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Mission Statement

We publish *The Neutral Corner* to provide arbitrators and mediators with current updates on important rules and procedures within securities dispute resolution. FINRA's dedicated neutrals better serve parties and other participants in the FINRA forum by taking advantage of this valuable learning tool.

Discovery in FINRA Arbitration

By Steven Caruso and Ellen Slipp



The discovery phase of a customer-initiated arbitration conducted under the auspices of the FINRA Code of Arbitration Procedure for Customer Disputes (Code) is intended to allow the parties to obtain facts and information to support their cases and prepare for the evidentiary hearing. [Rule 12505](#) of the Code not only requires parties to cooperate with each other “to the fullest extent practicable in the exchange of documents and information to expedite the arbitration process,” but it also contains the rules that govern the discovery process, including making discovery requests, responding to such requests, objecting to discovery requests and providing arbitrator authority to issue sanctions against parties for discovery abuses.

Discovery Guide

In customer cases, the starting point in the discovery process is the [FINRA Discovery Guide](#). The Discovery Guide includes the Document Production Lists. Parties and arbitrators should consider the documents described in the Document Production Lists as presumptively discoverable in all customer cases. In most circumstances, parties should exchange the specified documents—without the need for objection or arbitrator intervention—unless the party in control of the document demonstrates a compelling reason not to produce it.

Unless the parties agree otherwise, within 60 days of the original date the answer to the statement of claim is due, or, for parties added by amendment or third party claim, within 60 days of the date that their answer is due, parties must:

- produce to all other parties all documents in their possession or control that are described in Document Production Lists 1 and 2;
- identify and explain the reason that specific documents described in Document Production Lists 1 and 2 cannot be produced within the required time and state when the documents will be produced; or
- assert a specific objection as provided in [Rule 12508](#) of the Code.

Comments, Feedback and Suggestions

Please send your suggestions and comments to:

Jisook Lee, Editor
The Neutral Corner
FINRA Dispute Resolution
One Liberty Plaza
165 Broadway, 27th Floor
New York, New York 10006

You may also email Jisook at
Jisook.Lee@finra.org.

Under [Rules 12506](#) and [12507](#), all parties must act in “good faith” in connection with their obligations under the Discovery Guide, which “means that a party must use its best efforts to produce all documents required or agreed to be produced.” In the event that a document cannot be produced within the required timeframe, the party “must establish a reasonable timeframe to produce the document.”

Objections

This “good faith” obligation is especially important when a party decides to assert an objection to producing any document described in the Document Production Lists. While parties may assert timely objections to any document in the Document Production Lists, the party asserting such an objection “must specifically identify which document . . . it is objecting to and why” under [Rule 12508\(a\)](#).

The fact that a party may object to the production of a specific document, however, does not relieve it of the burden to produce documents not covered by the objection in accordance with the stated time requirements. It is also not sufficient for a party to fail to respond to an item on the Document Production Lists on the grounds that no responsive documents exist. If no responsive documents exist, the party (or a person qualified to speak on behalf of the party regarding the existence of such documents), may be requested to:

- state in writing that he/she conducted a good faith search for the requested documents;
- describe the extent of the search; and
- state that based on the search, none of the requested documents are in the party’s possession, custody or control.

To be timely, an objection to any document in the Document Production Lists must be asserted before the deadline for producing the document expires. Any objection not made within the required time is waived unless the panel determines that the party had substantial justification for failing to make the objection within the required time. Moreover, an objection to any document in the Document Production Lists must identify which document or part of a document it pertains to and the party must explain the reasons for the objection.

Motions to Compel

Arbitrators may be asked to rule on the propriety of an asserted objection to a document in the Document Production Lists if a party files a motion to compel the production of that document. When deciding whether to compel discovery of a disputed document, arbitrators must first determine the nature of the party's objection that has been asserted. Among the most frequently asserted objections that arbitrators may see, with respect to documents described in the Document Production Lists, are the following:

Relevancy

In customer cases, arbitrators should assume that documents listed on the Document Production Lists of the Discovery Guide are relevant and should be produced. Accordingly, any party objecting to the production of such documents must show a compelling reason not to produce them. The Document Production Lists are only intended to provide guidance about what is generally relevant in such cases. Each case is different, and some things that are central to one customer case may be peripheral or irrelevant to another. If there is any question as to the relevancy of a specific document listed on the Document Production Lists, arbitrators should inquire whether the disputed document or information response is relevant or might lead to the discovery of relevant evidence.

There is no simple bright-line test for determining whether a document is relevant or whether production of a disputed document should be ordered; the arbitrator must decide the issue based on the facts and circumstances of a particular case. Arbitrators may also ask the party seeking a particular document why it is needed, how it will be used and whether the information sought is available in any other form.

The fact that a document is relevant for discovery purposes to help a party prepare its case does not necessarily mean that it is admissible at the hearing. Production of documents in discovery does not create a presumption that the documents are admissible at the hearing. A party may object to the introduction of any document as evidence at the hearing to the same extent that a party can raise any other objection at an arbitration hearing. Under [Rule 12604](#), arbitrators decide what evidence to admit; they are not required to follow state or federal rules of evidence.

Cost or Burden of Production

When a party asserts an objection predicated on the cost or burden of production for a document listed on the Document Production Lists, arbitrators should require the party to demonstrate, with a reliable degree of specificity and detail, that the cost or burden of production is disproportionate to the need for the document. This inquiry may also require the arbitrators to determine if the document is relevant or likely to lead to relevant evidence. If the arbitrators determine that the document should be produced, they should consider whether there are alternatives that can lessen the impact of production, such as narrowing the timeframe or scope of an item or determining whether another document can provide the same information.

Vagueness

Arbitrators may encounter an objection to the production of a document listed on the Document Production Lists because the description of the document the party is seeking is vague or otherwise imprecise. When asked to rule on such an objection, arbitrators should be aware that the precise language for each of the documents listed on the Document Production Lists was developed through a joint coalition of representatives from the investors' bar and the securities industry.

Discovery Orders

When arbitrators rule on motions to compel, their discovery orders should address all open issues, specify the disposition of each contested request and set a deadline for production.

Conclusion

The timely exchange of relevant documents and information is vital to the fair and cost-efficient resolution of disputes that are administered under the Code. When parties comply with their obligations during discovery, the role of arbitrators in the discovery process is limited to resolving objections to the production of specific documents and/or information responses or clarifying what documents and/or information are relevant to the case. However, when parties fail to adhere to the Code by ignoring discovery deadlines, making frivolous objections or failing to comply with arbitrators' discovery orders, arbitrators must be familiar with the discovery rules and procedures and, if necessary, be prepared to use possible sanctions that are at their disposal, including dismissal of a claim, defense or proceeding.

**Steven B. Caruso, the resident partner in the New York City office of Maddox Hargett & Caruso, P.C., concentrates his practice on the representation of individual, high net worth and institutional investors in securities arbitration and litigation proceedings. Mr. Caruso is chairman of FINRA's Discovery Task Force Committee (DTFC) and is the immediate past chair of FINRA's National Arbitration & Mediation Committee (NAMC).*

**Ellen Slipp is managing director and head of Litigation for The Citi Private Bank. In that role, she manages litigation, including securities litigation, internal investigations and ethics inquiries. Ms. Slipp is a member of FINRA's Discovery Task Force Committee (DTFC) and FINRA's National Arbitration & Mediation Committee (NAMC).*

DR Portal Update

Neutral Portal

As a reminder, we strongly encourage arbitrators and mediators to register with the DR Portal. Portal benefits include:

- viewing and updating your profile information;
- viewing and printing your disclosure report;
- accessing information about your cases, including upcoming hearings and payment information;
- scheduling hearings;
- viewing case documents; and
- filing case documents.

Registration with the DR Portal is particularly important for cases that FINRA administers through the portal. FINRA is actively reaching out to arbitrators serving on portal cases to encourage them to register. Portal registration will be noted on the arbitrator disclosure report that parties review when selecting arbitrators.

If you have not registered with the DR Portal, please send an email to Dispute Resolution Neutral Management to request an invitation. Please include “request portal invitation” in the subject line.

Dispute Resolution and FINRA News

Case Filings and Trends



[Arbitration case filings](#) from January through May 2015 reflect a 27 percent decrease compared to cases filed during the same five-month period in 2014 (from 1,691 cases in 2014 to 1,241 cases in 2015). Customer initiated claims decreased by 29 percent through May 2015, as compared to the same time period in 2014.

SEC Rule Approval

Proposed Rule Change to Amend the Codes of Arbitration Procedure Relating to Cancelling or Postponing a Hearing

On May 22, 2015, the Securities and Exchange Commission (SEC) approved a proposed amendment to Rules [12214](#) and [12601](#) of the Customer Code and Rules [13214](#) and [13601](#) of the Industry Code to require that if one or more parties request a postponement or cancellation within 10 days before a scheduled hearing session and the arbitrators grant the request, the party or parties making the request would pay a late cancellation fee of \$600 per-arbitrator.

Prior to the amendments, if a party or parties cancelled or postponed a hearing more than three business days before the start of a scheduled hearing, arbitrators did not receive an honorarium. Further, if the hearing was postponed or cancelled within three business days of the hearing, the arbitrators received a per-arbitrator honorarium of \$100. Many arbitrators complained that the three-day cancellation period did not provide enough time to schedule other opportunities, and the \$100 per-arbitrator fee did not adequately compensate them for their preparation time or anticipated income, now lost due to cancellation of the hearings. In light of the inconvenience and lost income to arbitrators that cancellations cause, FINRA amended the Codes to increase the cancellation period and late cancellation fee to encourage parties to begin case preparation earlier and, when appropriate, to begin settlement discussions as soon as reasonably possible.

The amendments are effective for arbitration cases filed on or after July 6, 2015. The extended cancellation period and the increased late cancellation fee would not apply to parties whose cases were filed prior to the effective date.

Party Portal

Seventeen firms have volunteered to use the DR Portal for all of their cases: Wells Fargo, Morgan Stanley, UBS, Merrill Lynch, Raymond James, Ameriprise, TD Ameritrade, Citigroup, E*Trade, LPL Financial, Fidelity, Royal Alliance Associates, Inc., SagePoint Financial, Inc., Woodbury Financial Services, FSC Securities Corporation, Scottrade and Charles Schwab & Co.

Expiration Dates for DR Portal Accounts and Passwords

Portal Accounts

Arbitrators and mediators should be aware that DR Portal accounts expire after 17 months of inactivity. To avoid having to re-register in the portal, be sure to log in within 17 months. You can check on the status of cases and update your profile.

Passwords

On June 27, 2015, password expirations will be extended to one year, on a rolling basis. Therefore, if your password expires after June 27, your new password will be good for one year.

Please review [Regulatory Notice 15-21](#) for more information about late cancellation fees.

Update: FINRA Dispute Resolution Task Force

The [Dispute Resolution Task Force](#) held its third in-person meeting May 14 - 15, 2015. During the meetings, the task force reviewed the reports and recommendations made to date by the 10 subcommittees. The chairperson of the task force will draft a report to be presented to the National Arbitration and Mediation Committee (NAMC) by the end of the year. Please review the Dispute Resolution Task Force webpage for more information about the task force and its work.

Securities Arbitration and Mediation Hot Topics 2015

On May 19, 2015, FINRA participated on the panel at the Securities Arbitration and Mediation Hot Topics program at the New York City Bar Association. The panel of experienced practitioners and two senior representatives from FINRA examined rule changes and future developments. This program delivered practical suggestions on prosecuting and defending securities arbitrations and mediations.

Practising Law Institute: Securities Arbitration 2015

On July 30, 2015, FINRA will participate in the Practising Law Institute's (PLI) [Securities Arbitration 2015 program](#). The program will feature FINRA staff, FINRA arbitrators, noted academics and experienced attorneys who represent customers and industry parties. Among other topics, faculty will discuss proposed rule changes, recent case law trends and post-hearing practices. The faculty will also provide practical tips on direct and cross examination of witnesses in product cases, explore sensitive and ethical issues in drafting settlement agreements and discovery requests, review ethical issues in dealing with an aging population, employment arbitrations and expungement hearings and explore developing technology in the forum.

Please visit PLI's website for more information about the Securities Arbitration 2015 program.

Updating Email Addresses in the Portal

Neutrals who need to update their email addresses and are already registered in the portal, must make this change on their own through the portal. FINRA staff cannot any change neutrals' email addresses after they have registered for the [portal](#). You can update your email address by first logging into the portal. From the homepage, select the "manage my account" link from the left-hand panel. After you update your email address, press the "save" button and confirm that your data has been saved. Before logging out, you must navigate back to the Dispute Resolution Portal to effect this change in your profile. Please contact the Neutral Management department by [email](#) or by telephone (855-209-1620) if you have any questions. You may also review the [User Guide](#) for any help with the portal.

Revisions to FINRA Arbitrator Definitions

By Stefanie Herrera, Neutral Coordinator, FINRA Neutral Management



In February 2015, the Securities and Exchange Commission approved amendments to the definitions of non-public arbitrator and public arbitrator in [Rules 12100](#) and [13100](#) of the Customer and Industry Codes of Arbitration Procedure. The amended definitions provide, among other matters, that persons who worked in the financial industry for any duration during their careers will always be classified as non-public arbitrators, and persons who represent investors or the financial industry as a significant part of their business will also be classified as non-public, but may become public arbitrators after a cooling-off period. The amendments also reorganize the definitions to make them easier for arbitrator applicants and parties, among others, to determine the correct arbitrator classification. Below are key changes to the arbitrator definitions.

Arbitrators Who Have Worked in the Financial Industry

The previous classification rules defined non-public arbitrators generally as those who are or were within the past five years employed within the securities industry or were associated with securities industry entities for 20 years or more.

The new rules widen the non-public net to include any arbitrator who has been associated with the financial industry at any point throughout his or her career, regardless of position held, or the duration of employment and/or registration. For example, an arbitrator who worked for a registered broker-dealer for a brief time more than 30 years ago will be classified as non-public alongside a registered representative with several decades of financial work experience. This rule intentionally draws a clear line between those who have had any affiliation with the financial industry and those who have not.

The non-public definition also adds two new categories of financial industry employees who may qualify to serve as non-public arbitrators: persons associated with a mutual fund or hedge fund, and persons associated with an investment adviser.

Arbitrators Who Represent Investors

Under the old rules, only attorneys and professionals who provided services to parties on the industry side were classified as non-public. This left those professionals who represented investors in the public arbitrator pool, despite the fact that the perceived potential for bias is arguably the same among investor representatives as their adversaries. The revised arbitrator definitions address this perception of bias by expanding the non-public definition to include arbitrators who provide services or representation to investors. These non-public arbitrators may eventually be re-classified as public after they have separated from their financial industry affiliations for at least five calendar years, as long as their affiliations do not total 15 years or more. Those who were directly employed within the financial industry will always be non-public.

The New “Non-Public”

Under the revised definitions, it would be difficult to equate all non-public arbitrators with “industry arbitrators.” While the non-public roster will continue to have arbitrators with direct experience in the financial industry, it will also include those who have had minimal interaction with the financial industry as well as attorneys and other professionals who have devoted a significant portion of their professional time to representing investors. Parties, therefore, need to look past the “non-public” and “public” labels and examine closely the experience, background and affiliations of each potential arbitrator when selecting panels.

Thank You for Taking Our Survey

In March, FINRA’s Neutral Management Department sent a classification survey to each public arbitrator to determine who would be affected by the revised rules. We would like to thank all of the public arbitrators who have completed the survey. Your participation helped to ensure that arbitrators are classified correctly when the revised rules become effective, making the transition as smooth as possible. If you are currently a public arbitrator and have not yet taken the survey, please complete it as soon as possible. Arbitrators who do not submit the survey will remain inactive on the roster until their surveys are completed.

Arbitrators may contact the Neutral Management Department by [email](#) or by telephone at (855) 209-1620 with any questions about the new public and non-public arbitrator definitions.

Refer an Arbitrator

Based on the revised arbitrator definitions, a significant number of public arbitrators will either be reclassified as non-public or become temporarily ineligible to serve on the roster. To ensure our public roster continues to meet the needs of the parties, we ask arbitrators to help us reach out to potential public arbitrators to serve on the roster. If you know anyone who may be interested in serving as an arbitrator for FINRA, please refer them to the [Become an Arbitrator](#) page of our website or send us an email.

Effective Date

The amended arbitrator definitions will become effective June 26, 2015. The new definitions will apply to all lists of arbitrators that FINRA sends to the parties on or after June 26, 2015. For cases in which FINRA sent lists prior to June 26, 2015, FINRA will not change the classification of arbitrators based on the new definition, and will not grant challenges based solely on an arbitrator's reclassification under the new rules. For more information about the revised rules, please review [Regulatory Notice 15-18](#).

Mediation Update

Mediation Statistics



From January to May 2015, parties initiated 199 [mediation cases](#). FINRA closed 196 cases during this time. Approximately 82 percent of these cases concluded with successful settlements, and the average case turnaround time was 79 days.

Mediation Program for Small Arbitration Claims

The [Mediation Program for Small Arbitration Claims](#) continues to offer parties in active arbitration cases the opportunity to mediate telephonically, and work with a FINRA mediator at no or low cost. Initial arbitration claims up to and including \$25,000 can mediate at no cost, and initial arbitration claims over \$25,000 through \$50,000 can mediate at \$50 per hour (divided by the parties). Approximately two-thirds of the cases in the program are investor disputes and one-third are employment disputes (primarily promissory note cases).

The program provides parties who may find it difficult to obtain legal representation due to their claim size, an informal process to resolve their dispute with a qualified FINRA mediator. It also offers seniors or those who have difficulty traveling, the option to participate in a mediation without traveling. FINRA mediators also benefit from participating in the program. Mediators with fewer occasions to mediate cases due to their geographic location, or who are new to the roster, increase their visibility with party representatives that mediate in our forum. If you are a FINRA mediator and want more information about this program, please email SmallClaims@finra.org.

Mediator Tip: Keep It Current

Keeping your mediator disclosure report up-to-date (including the number of times you have mediated cases, your success rate, and types of cases mediated) matters to parties selecting a mediator. Mediators frequently update their mediator rate, current employment, disclosure/conflict information, but sometimes forget to describe their success as a mediator. You can update your mediator profile anytime through the [DR Portal](#).

Annual Mediator Fee Due September 1, 2015

FINRA mediators must submit their \$200 annual mediator renewal fee by September 1, 2015, to remain active on the roster. All active FINRA mediators will receive email notices around mid-August with instructions on how to pay the annual fee. Please contact [Marilyn Molena](#) if you have questions regarding your mediator availability status.



Question and Answers

Legal Authority to Award Attorneys' Fees and/or Punitive Damages

Question When completing the [Award Information Sheet](#), what should a panel do if it wants to grant a party's request for punitive damages and/or attorneys' fees but the party did not provide the required legal authority for the panel to do so? Can arbitrators look up this information on the Internet?

Answer Arbitrators are not permitted to engage in any outside legal research, nor should they ask FINRA staff to conduct legal research for them. The panel must rely on the parties to provide the research in support of their requests. To that end, the panel may ask parties to submit briefs on the applicable issue. Unless the panel requests that parties submit their briefs simultaneously, the opposing party or parties should be allowed to submit a reply brief.

If a party cites cases in its motion or brief and the arbitrators wish to read the full court opinions, the arbitrators may not obtain this information on their own, despite how easily accessible it may be. The arbitrators must ask the parties to supply copies of the decisions.

Related Conflicts on Arbitrator Disclosure Reports

Question My arbitrator disclosure report reflects that I have a current "Related Conflict With" a brokerage firm and includes a description of this conflict as "Conflict due to a Merger/Acquisition." I do not have an account with that firm and did not make that disclosure. Why does it appear on my arbitrator disclosure report?

Answer Under [Rule 12405](#) of the Customer Code, arbitrators have an ongoing obligation to disclose any direct or **indirect** financial or personal interests in the outcome of the arbitration. However, many arbitrators may be unaware of the need to identify and disclose the names of the firms that are affiliated with firms they do business with.

Keep Disclosures Current

As a reminder, arbitrators should review their disclosure reports regularly to make sure that all information is accurate and current. Even if arbitrators are not currently assigned to cases, their disclosure reports are continually sent to parties in their hearing locations during arbitrator selection. Parties deserve to have the most current and complete information to make an informed decision when they select arbitrators.

To address this situation, FINRA added a conflict type in 2010—“Related Conflict With”—to the Disclosures/Conflict Information section of the disclosure report to increase transparency and alert the parties to the indirect interest that an arbitrator may have with a firm. Using the information provided by the arbitrators, FINRA’s computer system is programmed to automatically print related conflicts on the disclosure reports. This information cannot be modified by staff.

The corresponding description of a related conflict will appear as “Conflict Due to a Merger/Acquisition.” For example, if an arbitrator has an account with ABC Securities and ABC Securities is affiliated with XYZ Brokerage, parties should be aware that XYZ Brokerage will appear on the disclosure report as a firm with a “conflict due to a merger/acquisition” with ABC Securities. If the underlying conflict (*i.e.*, ABC Securities) becomes outdated, the arbitrator should notify FINRA of this change. FINRA will update its records, and any related conflicts associated with the underlying conflict will no longer appear on the disclosure report.

Education and Training



Basic Arbitrator Training and Arbitrator’s Guide: Updated to Include Information on Mid-Case Referrals

FINRA updated the online Basic Arbitrator Training and Arbitrator’s Guide to include guidance about revised [Rule 12104](#), which now permits arbitrators to make a disciplinary referral during a pending case in limited circumstances. You may access the training on FINRA’s [Learning Management System](#) or download the PDF version from the [Written Materials page](#). The [Arbitrator’s Guide](#) was also updated to incorporate guidance related to Rule 12104.

Arbitrator Tip: Remain Focused During the Hearing



Hearings can be exhausting. Your mind may wander, and you may be tempted to review emails or voicemails on your phone. However, we remind arbitrators to be mindful of their responsibilities to the parties and the arbitration process. In fairness to everyone, arbitrators must refrain from distracting behavior including checking their phones during a hearing.

Parties and their counsel work hard to prepare their cases, and they expect dedicated and focused arbitrators to hear their presentations. Even though you might think that a quick glance on your phone will be harmless, it does not go unnoticed. Parties are aware of all aspects of the hearing and are particularly tuned in to an arbitrator's attentiveness during the hearing. Therefore, any distraction that shifts your focus away from the hearing is not acceptable. If a personal matter cannot wait, a better alternative would be to call a recess to address it. An exception would be if you are looking at your laptop, iPad or phone to review case documents, the hearing script or other FINRA rules and procedures. In those instances, please advise the parties, so they do not think that you are reviewing personal matters.

FINRA's commitment to the parties is to provide a forum in which they feel they will receive a fair hearing. Arbitrators who cannot meet this commitment will be counseled and may ultimately be made unavailable to serve on future cases.

Directory

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Dispute Resolution

Kenneth L. Andrighik
Senior Vice President – Chief Counsel
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Northeast Region

Carolann Gemski
Regional Director
Midwest Region

Laura D. McNamire
Regional Director
West Region

Manly Ray
Regional Director
Southeast Region

Jisook Lee
Associate Director of Neutral
Management and Editor of
The Neutral Corner

FINRA Dispute Resolution Offices

Northeast Region

FINRA Dispute Resolution
One Liberty Plaza, 27th Floor
165 Broadway
New York, NY 10006
Phone: (212) 858-4200
Fax: (301) 527-4873
neprocessingcenter@finra.org

West Region

FINRA Dispute Resolution
300 S. Grand Avenue, Suite 900
Los Angeles, CA 90071
Phone: (213) 613-2680
Fax: (301) 527-4766
westernprocessingcenter@finra.org

Southeast Region

FINRA Dispute Resolution
Boca Center Tower 1
5200 Town Center Circle, Suite 200
Boca Raton, FL 33486
Phone: (561) 416-0277
Fax: (301) 527-4868
fl-main@finra.org

Midwest Region

FINRA Dispute Resolution
55 West Monroe Street, Suite 2600
Chicago, IL 60603-1002
Phone: (312) 899-4440
Fax: (312) 236-9239
midwestprocessingcenter@finra.org

Editorial Board

Arthur Baumgartner Northeast Region

David Carey Case
Administration

William Cassidy Southeast Region

Christina Gates West Region

Mignon McLemore Office of Chief
Counsel

Marilyn Molena Mediation

Patrick Walsh Midwest Region

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Send all correspondence to Jisook
Lee, Associate Director of Neutral
Management and Editor of *The Neutral
Corner*:

FINRA Dispute Resolution
One Liberty Plaza
165 Broadway, 27th Floor
New York, NY 10006

Or call (212) 858-4400.

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