

## MEMORANDUM

TO: U.S. Securities & Exchange Commission

FROM: John W. Shaw<sup>1</sup>

DATE: August 23, 2010

RE: Proposed FINRA Discovery Guide Changes

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I am submitting this comment regarding FINRA's proposed changes to the Discovery Guide (Release No. 34-62584; File No. SR-FINRA-2010-035). After review and reflection, I have concluded that I cannot support the proposed changes to the current Guide.

While I do not hold the current Guide to be perfect, after dealing with the 99-90 Discovery Guide since its introduction, I find it to be preferable to the proposed changes for several reasons. I believe that several of the proposed changes, additions and deletions of list items, as well as the proposed two-list format, are flawed.

The proposed change to two lists of documents to be produced in "All Customer Cases" creates a situation of over-inclusiveness, needless and costly increased burdens, and a lack of clarity or utility in the production of documents. While not meant to be fully comprehensive, this comment discusses some of my concerns with the proposed list items below.

**List 1, Item 3.** This new item encompasses potentially proprietary, confidential, and trade secret information, and prompts a burdensome production in all cases, with no time limitation, and no necessary tie to any allegations. Such information may have little or no relevance to the claims brought in any given statement of claim, and the strategies, by the terms of the list item, may not have even been used in any customer accounts. For example, as drafted, this item would require production of any document related to a fixed income strategy recommended but not accepted by the customer in an IRA account not at issue in the statement of claim.

Requiring production of documents evidencing any strategy, whether actually implemented or simply recommended, over the life of the customer's accounts will result in irrelevant and unnecessary, second-guessing (with the benefit of full hindsight) of strategies utilized, avoided, recommended or not recommended, whether such strategies have any relation to the claims at hand or to the time period of the events leading to the statement of claim. The lack of focus on any particular time period, transaction, or stated claims will create an unchecked burden and expense on Firms in "All Customer Cases" whether the documents are relevant or not.

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<sup>1</sup>I am a partner in the firm of Berkowitz, Oliver, Williams, Shaw and Eisenbrandt in Kansas City, Missouri. I have been an active practitioner in the arbitration forum provided by FINRA and its predecessor entities, the NASD and the NYSE, for over 25 years.

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**List 1, Item 5.** This proposed item needlessly expands on 99-90 items which are presently limited to particular types of claims and now would require production of certain types of documents in all cases, whether applicable or relevant to the statement of claim. Beyond the expansion to claims to which the documents simply cannot be relevant, the proposed list item removes the alternate two-step list production method which is contemplated under the current rules. The existing method allows for a more focused and efficient production of documents, both for the firms who can limit their production to those documents which the claimants actually seek, and for claimants, who are able to focus their requests to documents which they believe may be relevant to the matter. Removing the list alternative and expanding the item to all cases will result in needless production of irrelevant documents which will be both unrelated to the type of claim raised and also undesired by the claimant. Any delays avoided with the elimination of the two-step method will be overridden by the over-inclusive and irrelevant production required by the item.

**List 1, Item 11.** This proposal exacerbates, rather than cures, a problem already present in the current discovery guide with respect to manuals, by expanding the item to include all firm manuals. Firm manuals contain confidential and proprietary trade secret information, the great bulk of which will have no relationship to any particular claim brought against a firm or an associated person. Further, in the age of electronic updates to manuals, the items' coverage of "All updates thereto" creates an enormous burden on a producing firm. For example, now that updates can be made on-line or to a firm's intra-net, any minor update to any section of any manual can result in new manual "update." The nature of these minor updates is such that multiple versions or updates of any manual may be created per year or even per month. The broad nature of the proposed list item potentially seeks multiple iterations of proprietary and otherwise sensitive documents. This list needs to be narrowly tailored to require only specific, pertinent sections of manuals (and applicable updates) be required. Given the sensitive nature of this information sought, this item should also specifically allow the confidentiality of the contents of any manuals to be preserved.

**List 1, Item 13.** This proposed item would require production of confidential information regarding customers who are not parties to the action. Production of these documents invades the privacy of third parties. It would require a burdensome search for and production of irrelevant documents concerning the accounts of non-parties. This item could foster discovery abuse and "fishing expeditions", because a party would need only to plead generalized allegations against an associated person to gain access to reports, reviews and other documents unrelated to claimant. This proposed item would misdirect the arbitration to a consideration of other customers and other accounts, creating needless delay, confusion, and potential bias.

**List 1, Item 16.** While perhaps not intended, the introductory clause of this new item appears to encompass, without limitation, all investigations, charges, or findings relating to a firm or

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associated person. To avoid unnecessary argument over the intent and meaning of this clause, it is suggested that the entire item be revised or, even better, eliminated. This item provokes burdensome discovery because it contains no time limitation. Moreover, by its ambiguity regarding the “behavior” at issue, it may provoke disputes regarding completely unrelated investigations, charges or findings. This item begs to be clarified. The danger of this ambiguous proposed item is magnified because it will apply to all cases.

**List 1, Items 19-21.** The expansion of the commission and compensation information to apply to all cases rather than only to claims wherein commission and compensation are relevant creates a burden with no corresponding discovery benefit. In many, if not most cases, the compensation or compensation structure for an associated person has absolutely no bearing on the claims or events at issue. Compliance with proposed Item 20 would be astonishingly burdensome and would require an immense production and time consuming redaction in order to protect the privacy of completely unrelated parties.

### **Form**

The problems created by the proposed changes are not offset by any purported simplification that comes as a result of the elimination of specific lists depending upon the type of claim at issue. Rather than maintaining lists applicable to certain types of claims, the proposed Guide simply includes list items which may only apply to certain types of claims.<sup>2</sup> This method does not adequately address the issue that claimants need not plead particular causes of action under the code. Instead these qualified items actually add to the confusion of what is required production by being included on lists that state they are “Documents [the Firm/Associated Persons or Customers] Shall Produce in All Customer Cases.” While I agree that certain classes of documents should only be required to be produced in certain cases, I do not believe that the language of the proposed rules will adequately promote that policy. Under the proposed rules, rather than having skirmishes over which lists apply to a statement of claim, the skirmishes will be over which list items apply to a statement of claim.

### **Conclusion**

I understand the attempt to revise the Discovery Guide was well intentioned. I also understand considerable time and effort went into the proposed revisions. However, I honestly believe the revisions should not be adopted.

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<sup>2</sup> See, Proposed List 1, Item 4 (“For claims alleging unauthorized trading...”); Proposed List 1, Item 13(b) (“For claims alleging failure to supervise...”); Proposed List 1, Item 20(a) (“For claims related to solicited trading activity...”); Proposed List 1, Item 22 (“allegations regarding an insurance produce that includes a death benefit”); Proposed List 2, Item 14 (“For claims alleging unauthorized trading...”); Proposed List 2 Item 19 (“to the extent that an insurance produce that provides a death benefit is included...”).

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I appreciate the opportunity to provide comments to this pending proposal.

Respectfully,



John W. Shaw