

**Barry D. Estell**  
**ATTORNEY AT LAW**  
**6140 Hodges Drive**  
**Telephone (913) 722-5416    Mission, Kansas 66205    E-mail: bestell@kc.rr.com**

---

August 24, 2010

File No. SR-FINRA-2010-035

I am a lawyer who has represented investors in NASD and FINRA arbitration since 1993. Prior to that, I spent 13 years in the securities industry as a registered representative and compliance officer. I was a registered principal in most areas including Series 4, Registered Options Principal; Series 24, General Securities Principal; Series 27, Financial & Operations Principal; and Series 53, Municipal Securities Principal. I have been a seldom used NASD/FINRA arbitrator since 1990.

### INTRODUCTION

As FINRA once again applies lipstick to the pig that is arbitration it really needs to be said that there is no way that FINRA will ever offer investors an unbiased forum. The financial interest and job security of the FINRA staff rests on customers seldom receiving a level playing field. It is not the American Association of Individual Investors; it's a trade association of people who make their living defrauding individuals and the fraud has spiraled upward since the advent of forced industry arbitration.

FINRA discovery is one-sided, biased, and intended to favor the member firms. The small crumbs thrown investor's way are routinely ignored. I attach a 2004 study of objections by Morgan Stanley to the current Discovery Guide lists in a sample of 25 arbitration proceedings. My favorite is that the Discovery Guide is "unintelligible." The Discovery Guide had been in existence for five years and Morgan Stanley had conceded nothing as "presumptively" discoverable. Everything was subject to objection on general, vague, and frivolous grounds. Nothing has changed. Regardless of the changes proposed, public customers will still have to spend a year with multiple discovery motions and hearings (at significant cost) to receive even the most basic Discovery Guide items deemed "presumptively discoverable." That is the optimistic view. It's just as likely they will never receive the basic documents.

I repeat the statistical information in the PIABA comment letter on the 2008 proposal. A defrauded customer has a less than 40% chance of recovering 30% of the damages he or she would be entitled to as a matter of law in a courtroom and has a less than 50% chance of collecting even that.<sup>1</sup> This is a seriously flawed forum. Discovery abuse is only one of the factors denying customers a fair hearing. Investors, lacking any chance of a fair hearing, usually accept low-ball settlement offers to recoup what small percentage of their losses that they can. There is no reason to believe that

---

<sup>1</sup> All the information needed to quantify damages, awards, settlement amounts and collectability are in the possession of FINRA which has steadfastly refused to make it available to academic researchers or the public in general. A secret forum is a corrupt forum.

member firms will not ignore the proposed lists just as they have the 1999 lists. They have absolutely no incentive to comply. Giving arbitrators the authority to levy sanctions is a bad joke on investors. Arbitrators know what happens to those that do so. They disappear from the arbitration panels.

### **OVERT BIAS OF DISCOVERY GUIDE LISTS**

**General Objections:** Almost every response to Discovery Guide document production contains “General Objections” under which a Respondent firm may withhold each and every document required by Lists.<sup>2</sup> This is a direct violation of Code Section 12508. Objecting to Discovery; Waiver of Objection

(a) If a party objects to producing any document described in Document Production Lists 1 or 2, any other applicable Document Production List, or any document or information requested under [Rule 12507](#), it must specifically identify which document or requested information it is objecting to and why.

Three years after the above section became effective, it is uniformly ignored. Why? Because arbitrators know that the rules are for show only and not to be enforced against a major Wall Street firm. Did Bernie Madoff have to worry about ignoring a few NASD/FINRA rules concerning discretionary accounts?

The net effect is that member firms feel comfortable entering general objections and relying upon them to withhold whatever documents do not bolster their defense. Claimant, not knowing what is being withheld can not request it. The Discovery Guide should unequivocally state that no general objection may be entered nor relied upon to withhold any documents required by the Discovery Guide. Automatic sanctions should apply, including the striking of any response which includes general objections. Otherwise, customers must file a motion demanding that the member abide by Code Section 12508 and be charged \$400 to \$1,000 for the arbitrators to decide if the firm will be ordered to comply. That’s a 4-6 month project and combined with the multiple other motions necessary to force (hopefully) compliance with the Code, becomes very expensive for a customer.

**“Know Your Arbitration Claimant” Rule:** Also known as the financial colonoscopy procedure or post-claim suitability determinations. The Guide requires customers to produce years of sensitive financial information that has no relevance to the case at issue. It is one-sided: Where’s the broker’s tax return? It is meant to harass and embarrass claimants so that they will not pursue claims. It has no relevance to the issues in the arbitration which limit most member discovery obligations, and can be financially dangerous when dealing with 3<sup>rd</sup> and 4<sup>th</sup> tier FINRA bucket shops.

It is a really bad idea for FINRA or anyone else to order solid citizens who have been victimized by a boiler room to give those firms even more personal documents concerning bank accounts, insurance policies, real estate transactions and loan documentation. Many of these are criminal enterprises and the principals sometimes

---

<sup>2</sup> See attached compilation of objections by Morgan Stanley in 2004 including 34 general objections.

(although not often enough) go to jail. To give them increasing amounts of personal financial information entirely unrelated to the original transactions is an invitation for identity theft and a second criminal career if FINRA finally gets around to barring them from the securities industry.

If this information were relevant, the brokerage firm could request it prior to opening the account or making the recommendation. Try that one out. Instead, FINRA seeks to reinforce arbitrator training that if a client is wealthy, or traded a speculative security at another firm years ago, anything the broker does to him is per se "suitable" because the customer is "sophisticated" or engaged in speculation in the past. Many arbitrators consider it a complete defense even if the customer transferred to the current Respondent broker to get away from speculative investments. It takes nine years (the six year rule plus three) before a customer who has speculated, knowingly or not, can regain the alleged protection of FINRA regulations. Arbitrators are trained to ignore state law entirely.

An especially pernicious recent example is a customer who received less than 10% of the shares of a closely held corporation from his employer for services rendered. The business prospered beyond his wildest dreams but upon losing a substantial amount of money to FINRA bucket shops he was ordered to produce all of the business records and tax returns of the corporation. It was a gross violation of the privacy of the entrepreneur who made him wealthy and who had no connection to the case. He had the choice of betraying his employer and benefactor or dropping his case. That is what the financial colonoscopy is all about; intimidation and coercion, not the issues in the Statement of Claim or Answer.

Another true war story from years past concerns fraudulent Prudential limited partnerships: A retired client was sold a real estate partnership that the SEC found to be fraudulently marketed. No matter. His tax returns showed that for several years he had a rental house. The broker testified that the client had bragged about his private rental real estate and had demanded that he invest his IRA in Prudential real estate partnerships on an unsolicited basis. The truth was that the customer had inherited the house from his mother and rented it to his nephew who he was forced to evict for non-payment. He was humiliated that he had evicted a relative, but had no choice. He was so embarrassed that he never told anyone. It is such tax return information that members use to structure post-claim suitability arguments around facts that they did not know when the recommendation was made. It is sleazy and dishonest and FINRA should not collude in such conduct.

Realizing that FINRA arbitration is not and never will be fair, a less offensive way to handle this issue is for member firms to plead the customer's annual income, net worth and other financial information in the Answer. Only if the customer contests the financial information should (s)he be required to produce specific documents refuting the misinformation in the Answer which is presumably obtained from the account documents they are required to produce later. Otherwise, there is no relevance to the issues in dispute. It is merely a FINRA supported fishing expedition meant to harass customers, discourage claims and improperly influence arbitrators. The production of tax records of partners, business associates and other non-parties is never proper. It is

the equivalent of the member firms being required to produce the tax returns of other customers and non-parties.

Similarly, only if a member firm's Answer contains specific statements asserting that a "recommendation" was based on a customer's similar conduct or investments at another firm would the customer be required to produce the records of all other accounts for the prior nine years. As it is, FINRA encourages brokers to perjure themselves based on the discovery of previously unknown information.

Under both the current and proposed Discovery Guide Lists, FINRA encourages bad conduct by its members. They can provide general, vague, and evasive Answers to a Statement of Claim and then do a financial colonoscopy on the customer, courtesy of FINRA and present a completely different defense at hearing based on previously unknown information around which they structure their perjured testimony. Only if the member firm is aware of the information prior to the claim, states that information in the Answer, and the customer disputes the information does it have any relevance to the issues in an arbitration proceeding.

**Uniform Time Periods:** Customers are generally required to produce documents as much as nine years old (six year rule plus three years). List 2, Item 15 has an unlimited time period for any and all documents from any source, for any "investment" for ever. Member firms discovery obligations, in contrast to this wildly overly broad requirement, are limited to much more narrow time periods as well as scope of information; i.e. List 1, #12 during the time period at issue, #13(b) and #14 not earlier than one year before or after, #17 one year before through filing of the claim (vs. Claimant's requirement that do not end with the filing of the claim), #20 three months before and after the trades at issue.

If the period of three years prior to the period in the complaint is relevant for the customer, it should also be relevant for the member firm. A broker's commission runs and income for the three years prior to abusing his customer often speak volumes about motive and method of operation in parting customers from their savings.

**Excuses Not to Produce:** While almost all of the customer's obligations are broad and all encompassing, member firms are given an excuse to withhold documents in most instances. Along with the general objections, customers never know what highly relevant documents are being withheld. Specific examples on proposed List 1 are as follows:

#2 requires correspondence "specifically relating" to the accounts or transactions at issue allowing the omission of any document relating generally instead of specifically or transactions not yet at issue because the customer has no idea what happened and few or no records prior to discovery. Also covered is advertising "sent" to customers of the firm, but not the advertising and sales literature and marketing material merely used by the RR to formulate his pitch but not "sent" to the customer.

A greater concern is the removal of the monthly statements unless separately requested. At many firms the broker copy of the statement contains a lot more information than the customer copy. If that is the case, those statements should be

produced in every case. I recently reviewed broker copies from a major firm and was surprised to learn that the RR was charging both a flat fee and commissions equaling 30% of the income in an income account. It would take months to discover this if the usual practice of limiting commission runs continues. All broker account statements that differ from the statements that customers receive should be mandatory.

#5 requires (a) All materials “prepared or used” and/or provided to the customer . . . but not relevant materials prepared or used and not provided to the customer or not prepared or used but provided to the customer (such as copies of news articles or outside research).

#6 requires all notes relating to the customer and/or accounts or transactions, but not concerning the securities in the transactions. Merrill Lynch analysts’ reference to top rated securities as POS comes to mind. FINRA should not be complicit in that type cover-up.

#7 requires production of all notes of the compliance review of customers’ accounts or trades, but not of the broker himself who may be doing the same thing to thirty-seven other customers at the same time.

#9 requires production of all communications between the broker and compliance relating to the specific securities and/or customer, but not the twenty-eight other customers being defrauded by the same RR in similar securities.

#11 requires all sections of the compliance manuals relating to the claims alleged in the Statement of Claim which rules out anything the customer has not yet discovered. Full copies of all compliance manuals in every case without confidentiality requirements are absolutely necessary in every case in order for the customer to have any chance of a fair hearing. FINRA knows enough about compliance manuals to know that they are not qualified for any confidentiality protection. They are required regulatory documents the disclosure of which could convey no competitive advantage to any other firm. They are kept confidential only from defrauded customers.

For an industry that is constantly whining about the burden of production, the hours spent tearing apart and redacting manuals in order to prevent a customer from being able to logically review and use them is completely hypocritical. FINRA should require its members to produce all manuals in every case without abusive confidentiality agreements or orders meant only to prevent other defrauded customers from comparing notes. As it now stands, the firm objects to producing any compliance document without a draconian confidentiality agreement causing immediate delay. In 2009 I received a manual five months after it was first due after the panel granted a confidentiality motion because Respondents claimed it to be proprietary. The manual at issue was an off-the-shelf copy from a third-party consulting firm which retained all rights. It was not proprietary to the member under any definition, but arbitrators have been trained to believe all compliance material is “proprietary” or “secret” or “confidential” or something that requires a protective order.

Even if the customers sign the agreement they will seldom receive all the documents because they can not compare it to another case or with another customer.

Even after receiving confidentiality agreement by order of panels that have been trained to always give members confidentiality orders, the next round of motions is over what is related to the claim. Members always take a minimalist view. When a member gets a confidentiality order on compliance documents, or other “required” documents, the odds of the customer getting the real documents or all of them is substantially reduced. A compliance manual is a must have document and it normally takes two or three rounds of motions to receive some version of it. FINRA knows it and is complicit in its member’s misconduct in this area.

#12 requires analysis only during the period at issue and gives members a pass for other accounts, transactions and securities of the same customer during another time period. Those analyses will be presented at hearing if they favor the member, but disappear forever if they show a pattern of misconduct.

#13(a) requires all exception reports to review activity in the customer’s account “related” to the allegations in the Statement of Claim or for the transactions at issue. It omits exception reports for the sixty-two other customer accounts being abused at the same time.

(B) is broader, covering other accounts, but only if “related” to the allegations in the Statement of Claim. That means you are back at (a) because no other claims will ever be “related” in the opinion of member counsel.

Brokers keep records of activity reports. Again, an industry always whining about the burden of production could just print them off and send them instead of spending hours redacting and separating reports. But that might provide customers useful information about similar, but not “related” misconduct.

#14 requires internal audit reports only if “focused” on the associated person or the accounts or discussing “similar” improper conduct by other individuals in the branch. Those qualifications will never be met. What does “focus” mean anyway, let alone similar? This was a retired 75 year old man that was a retired 79 year old woman; no similarity there and neither were ever put under a microscope for “focus.” That was a Fannie Mae preferred; this was a Freddie Mac preferred, completely different. Once again, send the internal audits. They’ll show up if they are favorable to the member firm, they should be produced when they are not.

#15 requires records of disciplinary action for conduct “similar” to that alleged in the Claim. Again, it will never be similar and the customer will never see it unless all disciplinary action is disclosed. Customers have to produce records of all other accounts for the last nine years, not just the “similar” ones.

#16 requires regulatory investigations for “similar” improper behavior which like the investigations and reports above will never occur. There will always be a difference that makes the investigation dissimilar. FINRA knows that and is completely disingenuous in pretending that they don’t.

#17 is a repeat of #16 except for “examination reports” that are “similar.” A farce; they will never be similar. Members should be ordered to produce all reports and if they

have no relevance the panel can disregard them. FINRA's effort to limit all evidence of a firm's pattern of misconduct and lack of supervision is outrageous. Put the information out there and let the arbitrators determine its relevance rather than giving member counsel the discretion to determine it for them. The panel is going to see the customer's tax returns, loan applications, insurance policies, their partner's tax returns and financial information and yet FINRA wants to deny the panel most information about the conduct of the offending office and firm.

#19 limits commission information to the transaction at issue and allow members to hide the nineteen other commissions for the exact same transaction in other accounts while the broker swears under oath that the trade was unsolicited and (s)he'd never heard of the security before.

#20 deals with "solicited" trades. It is a phony distinction because the parties will never agree whether a trade was solicited or not and FINRA has no definition of the term. How can you have a rule on a trade for which there is no definition? Does solicited mean "recommended?" Is there a definition for recommended? The fact is that members will go to great lengths to avoid providing a complete commission run showing all trades by a broker for all accounts. As an allegedly neutral administrator, FINRA should not be allowed to assist that effort to suppress relevant substantive information.

Without the full commission run in every case, the customer can not get a fair hearing. Brokers will deny a trade was recommended or solicited. Neither statements nor confirmations say if an order is solicited. They only say if an order was "unsolicited" and that is a term that is almost never explained to the customer. Many believe unsolicited means they didn't ask (solicit) the broker to buy the security for them. Even when the confirmation is blank, meaning solicited, the broker will invariably deny it at hearing swearing that it was a mere technicality and (s)he never recommended the trade to the customer and never solicited anything.

Making the production of commission runs dependent on a moving target for which there is no definition may be the most cynical part of this amendment. FINRA knows it will lead to endless arguments and multiple motions and hearings for the issue to be decided in every case and will further needlessly run up expenses for customers in a spending contest with major firms.

Complete commission runs should be required in every case. Sometimes it is defensive for the customer. Without them the RR is free to perjure him or herself about the customer directing all activity in the account on a completely unsolicited basis because there is no evidence of the other customers doing the same thing. Sometimes it's offense to affirmatively prove that the client was treated differently than all the other customers. But it's always necessary and without full commission runs in every case customers can not get a fair hearing. They were normally required prior to the Discovery Guide. The proposal appears to be a pretext to seemingly require commission runs but discourage actual production with an endless motion practice about whether trading was "solicited," an issue of fact which can not be determined without an evidentiary hearing. There is no doubt which party benefits from that and it is not the customer. More time, more costs, more forum fees.

**Confidentiality Agreements:** I mentioned this before concerning compliance manuals, but it is worth restating that the use of abusive confidentiality orders and agreements is pervasive and prejudicial to customers. It's too late to tell arbitrators to consider the facts in the Neutral Corner. They have been trained to give them in every case and even if that weren't true the third bullet point about "proprietary confidential business plans and procedures" subsumes all other arguments. Defense lawyers use the "P" word (proprietary) and panels are trained to fall in line.

FINRA knows and should definitively state that there are no documents required by the Discovery Guide that are "proprietary" or "confidential." It already instructs as to what personal information may be redacted so it is not a great leap. That's why the Lists are presumptively discoverable. If they are required by SEC Rule 17a-3 they are required regulatory records that can not be "proprietary" and must be automatically produced without frivolous objection. The original Discovery Guide was to eliminate this kind of abusive posturing and it has only made it worse by encouraging issuance of confidentiality orders without any justification other than members shouting the "P" word. Alternately, if FINRA believes there are documents on the Lists that should be "presumptively confidential" it should state as much and put that out for comment instead of trying to back-door the issue.

### **A BETTER GUIDE**

There is already a list of documents essential in every case where a broker's conduct is in question. The essential documents are mandated by SEC Rule 17a-3. Broker/dealers are required to keep and maintain most relevant records at the branch office or be able to promptly produce the records at the branch.<sup>3</sup> The following records are deemed by state securities commissioners as absolutely necessary to conduct a routine examination; they should in all cases be available to defrauded customers who have suffered ascertainable losses. The mandatory nature and maintenance of these records should belie objections of overly broad and burdensome.

Instead of a Discovery Guide intended to limit customer discovery while providing member firms with wide ranging fishing exhibitions meant to intimidate customers and discourage complaints, the Discovery Guide should mandate that all mandatory records be made available to every customer in every arbitration. They are required. They are maintained. They are available. FINRA should not attempt to keep defrauded customers from receiving those documents with an ambiguous, contradictory and confusing Discovery Guide where the "exceptions" swamp the rule to its member firms advantage. Regulatory records are required for a purpose and part of that purpose should be to allow defrauded investors to obtain adequate discovery in arbitration. It would not increase member's record keeping obligations one bit. FINRA Enforcement is generally not interested in enforcing its rules; customers should be given the opportunity.

---

<sup>3</sup> See NASD publication New and Amended Recordkeeping Requirements Checklist, Frequently Asked Questions About the Amendments to Broker/Dealer Books and Records Rules under the Securities Exchange Act of 1934 which is attached.

**Required Documents in Every Case:** The documents without which a customer can not get a fair hearing in every case along with the SEC rule requiring them are as follows:

**Office Records:** 17a-3(g), 17a3(h), and 17a-4(k) require that the firm keep current as to each office the books and records listed below that reflect the activities of the office as well as records of the persons who can explain the information in the records listed below. Brokers often provide records out of context with impenetrable codes lacking explanation and customers should have access to someone who can be required to explain those documents.

**Memoranda Of Brokerage Orders And Dealer Transactions:** Rule 17a-3(a)(6) is the only record of original entry which shows who entered an order, the terms and conditions, the time of execution, when the order was received and whether discretionary authority was exercised. In most over-the-counter transactions, especially in 2<sup>nd</sup> and 3<sup>rd</sup> tier FINRA firms, the broker normally sets his own mark-up or commission independent of any standard commission schedule. This is in every case relevant. In cases where the firm acts as principal, it is also the only way to discover the spread, which is a cost to the customer in addition to the mark-up or mark-down. To limit these documents to only unauthorized trading cases is to withhold relevant information in most other type cases.

**Associated Person Compensation Records (AKA Commission Runs):** Rule 17a-3(a)(19) requires that a record be maintained showing each purchase and sale of a security attributable to an associated person for compensation purposes. It includes the amount of compensation and all agreements pertaining to the relationship between the broker/dealer and the broker. This is relevant in every case. Member firms object to this simple required document in every case because it is one of the few documents which identify what the broker is doing in other accounts. Cross reference pages, another source are being removed from the lists under the FINRA proposal, although members have denied their existence for years.

Having full commission runs for the entire time a customer maintained an account with a brokerage firm is both necessary for the presentation of the customer's case and as a defense against broker perjury. It is quite common for a broker to mark orders as "unsolicited" and deny any responsibility for a recommendation as a defense. Commission runs may add credibility to this claim if the Claimant's purchase is an isolated instance, but it will tend to refute such a defense if 13 other customers also purchased the same security, all marked unsolicited. Without commission runs in every instance, the brokers are free to claim that they were simply an order taker with no input in the purchase or sale decision. A customer can not get a fair hearing without them, the records are required and should be produced in every case. There are claimant lawyers with years of experience that have never seen a real commission run, only the phony customer-only runs created solely for arbitration, but NASAA knows better and state regulators have access in every inspection. Defrauded customers should have the same access.

Additionally, in a boiler room case, the records of all the representatives in a given branch is compelling evidence that churning is the firm's only business. There are

far too many boiler rooms which FINRA seems incapable of regulating and the defrauded customers should have a fair opportunity to demonstrate their true business practices.

**Associated Person Complaint Records:** Rule 17a-3(a)(18)(i) provides a record of each written customer complain and not the self-serving rationalization that registered persons are allowed to file with the CRD. Customers should be provided the full complaint file and not simply those that the member considers “similar” which to member firm lawyers normally means identical as to time, place, age and other attributes which eliminate all “similar” complaints.

**Customer Account Records:** Rule 17a-3(17) requires all the information upon which a representative and his supervisors determined that any recommendation to a customer was suitable. This should be basic. It should be produced in every case and customer financial records are relevant only if they dispute the information.

It is a sign of FINRA’s member bias and contempt for customers that it emphasizes endless exceptions to disclosure for its member firms while institutionalizing free ranging fishing expeditions into the finances of customers, their families and business associates for unrelated and irrelevant information with which to embarrass and harass claimants. Any documents or information needed to make a recommendation should be on the record prior to making the recommendation as required by SEC Rule 17a-3, not after the complaint has been filed. Only if a customer disputes the financial information on the customer account forms should that customer’s other financial records or tax returns have any relevance to the arbitration. They are otherwise not at issue and FINRA’s statements that broad and detailed records of the customer’s financial history are important to arbitrators are an entirely cynical and abusive practice meant to convince arbitrators to disregard securities law in favor of post claim suitability determinations.

## SUMMARY

FINRA arbitration is biased, expensive, time consuming and steadily moving to a pervasive motion practice in which the customers always lose.<sup>4</sup> The amendments to the Discovery Guide do nothing to improve that. The Commissioners should direct FINRA to return with a fair and equitable Discovery Guide based on SEC Regulations concerning Books and Records instead of member wish lists. Customers should be put on a level playing field at hearing if they are fortunate enough to draw a panel which cares anything about the evidence, itself a long shot.

---

<sup>4</sup> FINRA Dispute Resolution has made state blue sky laws completely irrelevant because arbitrators are trained and encouraged to ignore them. No arbitration panel has ever given a statutory award in the two states in which I practice. With customers receiving, at best, 30% of damages the only thing at issue in FINRA arbitration is how badly the customer will lose in the 70% to 100% range.

## DOCUMENT PRODUCTION LISTS

### General Objections

There is no provision for general objections in the Code of Arbitration Procedure or the Discovery Guide. The Code provides that requests must be specific and relate to the matter in controversy. There is no such requirement for objections. However, the Discovery Guide states that a party "may object to the production of any document," and that if any party objects to any document, "objections should set forth the reasons the party objects to producing the documents." The plain language appears to preclude general objections that may or may not apply to documents which may or may not exist. If a party objects to a specific document, it should identify that document and provide a specific objections. Common objections by Morgan Stanley from the attached examples are listed below.

Morgan Stanley objects to each of the requests to the extent:

1. any portion of any request or any purported instruction or definition seeks to impose obligations greater than those imposed by the Arbitration rules of the NASD;
2. protected by any other applicable (unspecified) privilege;
3. protected by any other applicable privilege such as the right of privacy;
4. otherwise immune from discovery;
5. otherwise immune or protected from discovery or disclosure;
6. other evidentiary privilege;
7. confidential or confidential information;
8. sensitive documents;
9. sensitive and confidential financial information;
10. commercially sensitive information relating to Morgan Stanley's business, internal policies, procedures, programs and/or guidelines;
11. investigative information and/or consulting experts privilege;
12. self-evaluation privilege;
13. not within their possession, custody or control;
14. encompass any time period other than that during which Claimant maintained an account at Respondent and conducted the trading at issue;
15. exceed matter in controversy and therefore impose undue burden, hardship, oppression and expense upon Respondents;
16. seek cumulative documents; will only produce documents sufficient to disclose requested information;
17. conditioned on Claimants production;
18. any request for documents which "relate to", or "relating to" a subject matter;
19. documents have been filed with public agencies or are obtainable from some source other than respondent;
20. vague and ambiguous, burdensome and oppressive;
21. information to which claimant not entitled to require inappropriate expense;
22. call for the production of "all documents;"
23. documents created before or after the relevant time period;
24. documents that were created after the Statement of Claim was filed;
25. request is outside the scope of discoverable documents pursuant to NTM 99-90; or well beyond the scope of permissible discovery, as defined by NTM 99-90.
26. documents destroyed in World Trade Center on September 11, 2001;
27. documents created after Claimants commenced this proceeding;

28. to extent purports to encompass any time period other than that during which Claimants maintained accounts at Morgan Stanley and conducted trading at issue;
29. that exceed the matter in controversy and therefore impose undue burden, hardship oppression and expense upon Respondents;
30. expressly conditioned upon reciprocal cooperation and production by Claimants;
31. to be produced at a mutually convenient time (not the time set by rule);
32. to extent impose undue burden, hardship, oppression and expense;
33. to extent equally available to the propounding party;
34. object to inclusion of Broker X within definition of “associate person” as not having “substantial involvement” in claimant’s account and will limit responses to Broker Y;

**COMMENT:** The General Objections are perhaps the most pernicious of the standard dirty tricks utilized by Morgan Stanley as well as other NASD member firms. Without identifying a specific document, a Respondent may withhold responsive documents, regardless of their substantive value as evidence. The Claimant is not aware that the documents exist, what objection or privilege is being claimed, and has no opportunity to challenge the objection. If Morgan Stanley determines that relevant compliance department documents containing the details and scope of a fraud would hurt its defense, it may secretly designate them as burdensome, confidential, sensitive or self-investigative, and the documents vanish without specific objection and without disclosing to the arbitrators that the document exists. There is no opportunity for claimant to ask the panel for a determination of the relevance, privilege or confidentiality.

Perhaps the most offensive general objection is the claim of “self-investigative” privilege or “other applicable” (but unspecified) privilege, or “privileges” such as the right of privacy or “otherwise immune or protected” from discovery or disclosure. Most of these privileges, self investigative for example, are not commonly recognized, have never been approved by a federal appeals court and are not commonly recognized in the context of securities litigation by federal district courts. Morgan Stanley simply withholds whatever relevant, responsive documents required by the Discovery Guide it doesn’t want the panel to see without comment based on undisclosed privileges and protections that would not normally be allowed in a legal setting. Even within the industry-friendly confines of its captive litigation forum, this is outrageous.

### **General Limitations**

Document production is limited to the following:

1. documents in their possession at the time production is made;
2. will not undertake a continuing obligation to update;
3. will not commit to produce all documents at address designated by claimant;
4. will not prepare a privilege log, identify documents no longer in Respondents’ possession, custody or control, or; manner in which documents were disposed.
5. based on information known to those to whom Morgan Stanley has assigned the responsibility of gathering documents.
6. expressly reserve the right to use any documents which may be subsequently uncovered;
7. Specific objections and responses to the individual requests incorporate and do not waive general objections and limitations.

**COMMENT:** This series of limitations allows Morgan Stanley to “ethically” destroy documents prior to “the time of production,” refuse to identify privileges, documents

withheld or when destroyed and assign the task to summer interns or temporary employees who can be counted on to be ignorant of what documents do or do not exist. This almost guarantees an incomplete production of required documents.

#### LIST 1 : TO BE PRODUCED IN ALL CUSTOMER CASES

- 03-07587: No objections, but reserves the right to object to certain categories at a later time.

1) All agreements with the customer, including, but not limited to, account opening documents, cash, margin, and option agreements, trading authorizations, powers of attorney, or discretionary authorization agreements, and new account forms.

- 03-08275: Subject to foregoing general objections.

**COMMENT:** Morgan Stanley conditions all responses to general objections but normally will produce documents that the customer has already seen and might have retained.

2) All account statements for the customer's account(s) during the time period and/or relating to the transaction(s) at issue.

- 03-08275: Subject to foregoing general objections.

**COMMENT:** Morgan Stanley refuses to provide the broker or office copy of the account statements which may have additional information such as commissions on individual transactions and a cumulative commission total for the year.

3) All confirmations for the customer's transaction(s) at issue. As an alternative, the firm/Associated Person(s) should ascertain from the claimant and produce those confirmations that are at issue and are not within claimant's possession, custody, or control.

- 03-00123 Object that it is duplicative of account statements.
- 03-08275: Subject to foregoing general objections.

**COMMENT:** Morgan Stanley conditions all responses to general objections but normally will produce documents that the customer has already seen and might have retained.

4) All "holding (posting) pages" for the customer's account(s) at issue or, if not available, any electronic equivalent.

- 02-02593: No response.
- 02-04998: Require confidentiality stipulation;
- 02-07298: Limits to "electronic."
- 03-00123 Object that it is duplicative of account statements.
- 03-08275: Subject to foregoing general objections and limited to BKD pages for claimant's accounts.
- 04-01650: Limits to "electronic."

**COMMENT:** Holding pages also broadly include "cross reference" pages, however, which indicate how many other customers of an individual broker own the same stock and when purchased. These are almost never produced and their existence denied because they might provide substantive evidence of other customers purchasing the same stock at

the same time when the broker claims the customer's purchase was isolated and unsolicited.

5) All correspondence between the customer and the firm/Associated Person(s) relating to the transaction(s) at issue.

- 02-02593: No response.
- 02-07298: Limit to "between Claimant & Respondent."
- 03-07840: Limited to extent "available."
- 03-08275: Subject to foregoing general objections.
- 04-01650: Limit to "between Claimant & Respondent."
- 04-00415: Object to any electronic communications as overly broad and unduly burdensome.
- 04-03003: E-mails unavailable as a result of September 11, 2001.
- 04-03747: E-mails prior to October 9, 2001 unavailable as a result of September 11, 2001.
- 04-03685: Limits production to correspondence between Claimant and named Respondents relating to specific transactions at issue.

**COMMENT:** Morgan Stanley insists that all e-mails were destroyed in the World Trade Center. As cases from that period work through the system, the more general objections are more troublesome. Morgan Stanley specifically limits its responses to named respondents so that if the customer wrote the individual financial advisor or office manager and it is damaging, the letter can be withheld if those individuals are not named as a Respondents. By limiting the response to the specific transactions at issue it can withhold documents concerning general investment objectives and suitability issues.

6) All notes by the firm/Associated Person(s) or on his/her behalf, including entries in any diary or calendar, relating to the customer's account(s) at issue.

- 02-04998: Objects as vague and overbroad.
- 02-07298: Limited to day-timer only, otherwise vague, ambiguous, overly broad, unduly burdensome, not related to matter in controversy
- 03-02735: Objects on basis of general objections as well as unduly burdensome, and not relevant.
- 03-07840: Limited to extent "available"
- 03-08275: Subject to foregoing general objections.
- 04-00415: Subject to the general objections and specifically object to any electronic communications as overly broad and unduly burdensome.
- 04-01650: Limited to day-timer only, otherwise vague, ambiguous, overly broad, unduly burdensome, not related to matter in controversy

**COMMENT:** Morgan Stanley limits the response to the day-timers which can be routinely edited, reviewed, and filled with self-serving entries after the fact. It refuses to provide electronic notes which have safeguards against after-the-fact dating and e-mail records which are original entries also more difficult to falsify.

7) All recordings and notes of telephone calls or conversations about the customer's account(s) at issue that occurred between the Associated Person(s) and the customer (and any person purporting to act on behalf of the customer), and/or between the firm and the Associated Person(s).

- 02-04998: Objects as vague, not specific and overly broad.

- 02-07298: Limited to day-timer only, otherwise vague, ambiguous, overly broad, unduly burdensome, not related to matter in controversy.
- 03-02735: Limited to notes by associated person and object on grounds set forth in the General Objections, and further as overbroad, unduly burdensome, not relevant.
- 03-08275: Subject to foregoing general objections and further object the request is overbroad as to time.
- 04-01650: Limited to day-timer only, otherwise vague, ambiguous, overly broad, unduly burdensome, not related to matter in controversy.

**COMMENT:** Morgan Stanley limits the response to day-timers which can be routinely filled in after the fact. In dealing with documents that it knows the customer has not yet seen, it finds these items, identified by SICA, approved by the SEC and adopted by the NASD, vague, overly broad, unduly burdensome, ambiguous, and seeking private information, etc. After five years of the Discovery Guide, Morgan Stanley, like all the major firms claims to still have no idea what is required of it.

8) All Forms RE-3, U-4, and U-5, including all amendments, all customer complaints identified in such forms, and all customer complaints of a similar nature against the Associated Person(s) handling the account(s) at issue.

- 02-02593: objects entirely as not relevant and information destroyed in World Trade Center
- 02-04998: Objects as confidential client and proprietary information that is not relevant, but will produce a CRD.
- 02-07298: Objects to complaints as vague, ambiguous, overly broad, unduly burdensome, not related to matter in controversy
- 03-00123: Object that other customer complaints are overly broad, unduly burdensome, irrelevant, vague, not specific and do not relate to the matter in controversy.
- 03-02735: Object to customer complaints and any information concerning supervisors based on general objections as well as overbroad, unduly burdensome and not relevant.
- 03-04130: Other than RE-3, U-4 and U-5, and subject to general objections and limitations object to the request as vague and ambiguous, overly broad, unduly burdensome, improperly requires speculation and not related to the matter in controversy.
- 03-07840: Limited to CRD
- 03-08275: Subject to foregoing general objections and further objects the term “similar nature” is vague and ambiguous, not related to the subject matter of this matter, is overbroad as to time, is unduly burdensome, not reasonably calculated to lead to admissible evidence, and seeks documents that are equally available to the propounding party and agrees to limited production of CRD Report and R#-3 form.
- 04-01650: Objects to complaints as vague, ambiguous, overly broad, unduly burdensome, not related to matter in controversy
- 04-03003: Limited to those firm determines to be “similar” and object that all other are overly broad, not related to the matter in controversy and violates the privacy rights of third parties.
- 04-03747: Limited to those firm determines to be “similar” and object that all other are overly broad, not related to the matter in controversy and violates the privacy rights of third parties.

- Sears: Objects as a violation of privacy rights of Financial Advisor's and unnamed third parties. Demands secrecy agreement.

**COMMENT:** This is an example of the insidious bait and switch where the firm offers the NASD CRD instead of the designated forms. The NASD CRD is extremely limited in what it discloses; far more than a CRD from a state and doesn't include most customer complaints. In addition, even though it could simply withhold all relevant documents as "not similar," Morgan Stanley often makes the exception explicit. In this case it may withhold documents because complaint A was for a 70 year old man and complaint B was for a 60 year old woman; not similar even though they concern the same suitability claim for the same stock by the same broker in the same week. Morgan Stanley claims extremely broad privacy rights, unsupported by any written policy, for its other customers who have also complained.

9) All sections of the firm's Compliance Manual(s) related to the claims alleged in the statement of claim, including any separate or supplemental manuals governing the duties and responsibilities of the Associated Person(s) and supervisors, any bulletins (or similar notices) issued by the compliance department, and the entire table of contents and index to each such Manual.

- 02-02593: Object proprietary, confidential, internal documents; produce index only to selected manuals & demand confidentiality agreement
- 02-04998: Objects that the request is for documents not related to the controversy, is overly broad and beyond the scope of the Discovery Guide, but will produce the Table of Contents and Index from selected compliance manual.
- 02-07298: Table of contents only to selected manuals, demands confidentiality agreement; otherwise objects to complaints as vague, ambiguous, overly broad, unduly burdensome, not related to matter in controversy
- 03-00123: Object that the request seeks confidential proprietary information and trade secrets and is overly broad, unduly burdensome, irrelevant, vague, not specific and do not relate to the matter in controversy.
- 03-00889: Demand confidentiality stipulation and will provide table of contents for Branch Manager's Manual and Compliance Guide to extent firm feels they are relevant but makes no mention of compliance procedures manual or compliance updates.
- 03-02735: Limits to section on suitability and table of contents and index to a selected manual (one out of three) and otherwise objects on the grounds of the General Objections and as overbroad, unduly burdensome and not relevant.
- 03-04130: Subject to general objections and after execution of an acceptable confidentiality agreement will produce a Table of Contents from the Branch Managers Manual and the Account Executive Compliance Guide from which Respondents will produce relevant requested portions. Otherwise object to the request as vague and ambiguous, overly broad, unduly burdensome, and not related to the matter in controversy.
- 03-04984: : Object as over broad, unduly burdensome and not calculated to lead to admissible evidence, but will produce the table of contents and index for a compliance manual subject to a confidentiality agreement.
- 03-05643: Objects to "Compliance Department Procedures Manual," "Administrative Policy Manuals," "Branch Office Manager Supervisor's Guides," "Account Executive Compliance Guides," Morgan Stanley Funds Multi-class

Manuals” as vague, overbroad, unduly burdensome and not calculated to lead to admissible evidence as well as confidential and proprietary. Objects to other manuals on the same basis but agrees to provide tables of contents for selected (but not all) manuals subject to confidentiality stipulation.

- 03-07840: Table of Contents only for selected manuals with demand for confidentiality stipulation
- 03-08275: Subject to foregoing general objections and further objects that it requires Respondents to speculate as to what claimant’s counsel deems “related to the claims alleged in the statement of claim, but after execution of a confidentiality agreement, will produce a Table of Contents from the FA Compliance Guide and Branch Managers Manual.
- 04-00415: Subject to the general objections and after execution of a confidentiality agreement, will produce a Table of Contents from the Branch Managers Manual and the Account Executive Compliance Guide from which Respondent will produce relevant portions. Otherwise, object as vague and ambiguous, overly broad, unduly burdensome and not related to the matter in controversy
- 04-01650: Table of contents only to selected manuals, demands confidentiality agreement; otherwise objects to complaints as vague, ambiguous, overly broad, unduly burdensome, not related to matter in controversy
- 04-03003: Object that the request seeks confidential documents without adequate protection. Demands confidentiality stipulation to produce incomplete index of some manuals and no bulletins.
- 04-03747: Object that the request seeks confidential documents without adequate protection. Demands confidentiality stipulation to produce incomplete index of some manuals and no bulletins.
- 04-03685, Sears: Object as confidential documents without adequate protection. Demands confidentiality stipulation to produce incomplete index of some manuals and no bulletins.

**COMMENT:** One of the top items which Morgan Stanley refuses to produce in almost all instances. Even when ordered to do so, it refuses to produce relevant sections of “all” manuals or bulletins or updates of the manuals. The normal tactic is to offer a table of contents to claimant and agree to produce “relevant” sections selected from that document by Claimant. It doesn’t produce a table of contents for all of its manuals, however, and no index of periodic bulletins. If claimants plays this game, they have automatically agreed to forego the third to half of compliance material for which they are not provided a table or index. Morgan Stanley will then argue over the sections requested from the incomplete indexes and argue endlessly about the relevance of those. The confidentiality requirements are to prevent claimants from comparing production in order to be able to request documents missing from the tables of content. Compliance manuals are not confidential and the NASD’s encouragement of arbitrator orders to the contrary is extremely harmful to the investing public. Relevant sections of compliance manuals should be available to be attached to statements of claim in order to promote a meaningful hearing of the facts.

10) All analyses and reconciliations of the customer’s account(s) during the time period and/or relating to the transaction(s) at issue.

- 02-02593: Agreed to responsive non-privileged documents without identifying documents or privilege
- 02-04998: Objects as requesting privileged information.

- 02-07298: Agreed to non-privileged “profit and loss analyses” without identifying documents or privilege. Objects to other analysis as vague, ambiguous, overly broad, unduly burdensome, not related to matter in controversy
- 03-00123: Limits production to documents previously provided to Claimant and objects that additional documents do not relate to the matter in controversy and would likely be privileged.
- 03-02735: Objects on the grounds of the General Objections and as overbroad, unduly burdensome and not relevant.
- 03-04130: Subject to general objections and limitations will produce non-privileged profit and loss analysis only. Object to any additional documents as vague and ambiguous, improperly requires the Respondents to speculate as to documents being sought and not related to the matter in controversy.
- 03-04984: Limited to those created during relevant time account at Morgan Stanley.
- 03-07840: Limited to extent “available”
- 03-08275: Subject to foregoing general objections.
- 04-00415: Subject to the general objections and additionally object that the request is overly broad and unduly burdensome.
- 04-01650: Agreed to non-privileged “profit and loss analyses and reconciliations” without identifying documents or privilege. Objects to other analysis as vague, ambiguous, overly broad, unduly burdensome, not related to matter in controversy
- 04-03685: Agreed to non-privileged “profit and loss analyses” without identifying documents or privilege.

**COMMENT:** This is another case of limiting the response to only documents which are not useful, usually the profit and loss analysis which claimant has already done in order to file the claim. Supervisory and compliance reviews and analysis done during the relevant period are withheld as a matter of course. Customer commission to asset ratios and other routine management analysis is almost never produced.

11) All records of the firm/Associated Person(s) relating to the customer’s account(s) at issue, such as, but not limited to, internal reviews and exception and activity reports which reference the customer’s account(s) at issue.

- 02-02593: Objects as overbroad, unduly burdensome, oppressive not relevant but will produce non-privileged documents.
- 02-04998: Objects as seeking information protected by privilege.
- 02-07298: Limits to customer activity reports that reference Claimant’s accounts; otherwise objects as vague, ambiguous, overly broad, unduly burdensome, not related to matter in controversy
- 03-00072: Object as overbroad, oppressive, harassing, unduly burdensome, irrelevant but willing to produce internal reviews and activity reports that refer to Claimant account.
- 03-02735: Limits to associated person and Claimant and otherwise objects on the grounds set forth in the General Objections and as overbroad, unduly burdensome and not relevant.
- 03-04984: Object that the request is vague, overbroad, unduly burdensome and not calculated to lead to the discovery of admissible evidence.
- 03-07840: Limited to extent “available”
- 03-08275: Subject to foregoing general objections and further object that the request is overbroad and unduly burdensome.

- 04-00415: Subject to the general objections and limited to the specific trade complained about, otherwise object as vague, ambiguous, overly broad, unduly burdensome and improperly requires speculation as to which documents are sought.
- 04-01650: Limits to customer activity reports that reference Claimant's accounts; otherwise objects as vague, ambiguous, overly broad, unduly burdensome, not related to matter in controversy
- 04-03003: Limit to copies of customer activity reports that reference Claimant's account only. Beyond that, object that the request is vague and ambiguous, overly broad, unduly burdensome and not related to matter in controversy.
- 04-03747: Limit to reports that reference Claimant's accounts; otherwise object as vague and ambiguous, overly broad, unduly burdensome and not related to the matter in controversy.
- 04-03685: Limit to reports that reference Claimant's accounts; otherwise object as vague and ambiguous, overly broad, unduly burdensome and not related to the matter in controversy.

**COMMENT:** Morgan Stanley limits its production to a limited number of reports restricted to the customer accounts in preparation for List 5, #2 which requires the production of all activity reviews and exception reports concerning the Financial Advisor. It is a preemptory objection because Morgan Stanley will go to extraordinary lengths to avoid producing documents detailing other (often many other) red flags being generated by the typical rogue broker involved in multiple arbitrations.

12) Records of disciplinary action taken against the Associated Person(s) by any regulator or employer for all sales practices or conduct similar to the conduct alleged to be at issue.

- 02-04998: Objects as overly broad and not related to the matter in controversy.
- 02-07298: Objects as overly broad and not related to the matter in controversy
- 03-00123: Limited to disciplinary action in connection with Claimant's account only and objects that any additional request is "a desperate fishing expedition" and overly broad, unduly burdensome, irrelevant, not specific and do not relate to the matter in controversy.
- 03-04130: In addition to general objections and limitations Respondents specifically object to this request as overly broad and not relevant.
- 03-04984: Object that the request is vague, overbroad, unduly burdensome and not calculated to lead to the discovery of admissible evidence.
- 03-07840: Limited to extent "available"
- 03-08275: Subject to foregoing general objections and further objections of not relevant, vague and ambiguous, and overbroad, there are not responsive documents.
- 04-01650: Objects as overly broad and not related to the matter in controversy
- 04-00415: Subject to the general objections will produce documents related to the single customer incident only and objects to any other documents as vague and ambiguous, overly broad, unduly burdensome and improperly requires Respondents to speculate as to which documents are sought.
- 04-00415: Object as vague, ambiguous, overly broad, unduly burdensome and improperly requiring speculation as to which documents are sought.

**COMMENT:** Morgan Stanley consistently claims to have no idea what this request means and insists on limiting the response to claimant. Even when ordered to produce the

documents, it can choose to interpret the request as for similar conduct as an alternative to “all” sales practices (its an either or request) and find none of the other disciplinary action is similar, there being a difference in age, gender, state of residence, karma, or something.

### LIST 3 : **CHURNING**

1) All commission runs relating to the customer’s account(s) at issue or, in the alternative, a consolidated commission report relating to the customer’s account(s) at issue.

- 02-02593: Objects not relevant, proprietary, confidential Claimant’s commissions only.
- 03-08275: Subject to foregoing general objections.
- 04-01650: Limits to Claimant commissions, otherwise objects as vague, overly broad and unduly burdensome.
- 04-03685: Object as confidential and subject to a confidentiality agreement.

**COMMENT:** See List 5, Request #1.

2) All documents reflecting compensation of any kind, including commissions, from all sources generated by the Associated Person(s) assigned to the customer’s account(s) for the two months preceding through the two months following the transaction(s) at issue, or up to 12 months, whichever is longer. The firm may redact all information identifying customers who are not parties to the action, except that the firm/Associated Person(s) shall provide at least the last four digits of the non-party customer account number for each transaction.

- 02-02593: Objects as not relevant, over broad, burdensome, oppressive, proprietary, confidential.
- 03-00123: Object that the request is overly broad, unduly burdensome and harassing, irrelevant, vague, not specific and do not relate to the matter in controversy.
- 03-08275: Subject to foregoing general objections and further object that the request is not related to the subject matter of this action nor reasonably calculated to lead to discovery of admissible evidence and is **unintelligible** in that claimant has never identified the “transactions at issue” in this action.
- 04-01650: Objects as vague and ambiguous, overly broad, unduly burdensome, not related to the matter in controversy.
- 04-00415: Subject to the general objections and additionally as overly broad and unduly burdensome.
- 04-03685: Object as violating Financial Advisor’s privacy rights and subject to confidentiality agreement will produce records only as they pertain to Claimant’s account.

**COMMENT:** This is another request where Morgan Stanley professes not to understand, going so far as to call it “unintelligible.” One wonders how the SEC could have understood it. It is also a preemptive objection to List 5, #1 which requires compensation of any kind which Morgan Stanley routinely refuses to produce.

3) Documents sufficient to describe or set forth the basis upon which the Associated Person(s) was compensated during the years in which the transaction(s) or occurrence(s) in question occurred, including: a) any bonus or incentive program; and b) all compensation

and commission schedules showing compensation received or to be received based upon volume, type of product sold, nature of trade (e.g., agency v. principal), etc.

- 02-02593: not relevant, over broad, burdensome, oppressive, proprietary, confidential
- 02-04998: Objects as overly broad and not related to the controversy, beyond the scope of the Discovery Guide and seeking confidential and proprietary information.
- 03-00123: Object that the request is overly broad, irrelevant, vague, not specific and do not relate to the matter in controversy.
- 03-08275: Subject to foregoing general objections and further object that the request is not related to the subject matter of this action nor reasonably calculated to lead to discovery of admissible evidence and is **unintelligible** in that claimant has never identified the “transactions at issue” in this action.
- 04-01650: Objects as vague and ambiguous, overly broad, unduly burdensome, not related to the matter in controversy.
- 04-03685: Object as violating Financial Advisor’s privacy rights and confidentiality of documents, but subject to confidentiality agreement will produce some, but not all documents requested.
- 04-00415: Subject to the general objections and additionally as overly broad and unduly burdensome.

**COMMENTS:** Morgan Stanley also characterizes this request as “unintelligible” because it is a comprehensive statement of compensation of Associated Persons which would encompass branch office managers as well as Financial Advisors. It is also a peremptory objection to the more common unsuitability claim of List 13, #2.

#### LIST 5 : FAILURE TO SUPERVISE

- 03-07587: No objections, but reserves the right to object to certain categories at a later time; requires a confidentiality agreement prior to producing documents concerning compensation

1) All commission runs and other reports showing compensation of any kind relating to the customer’s account(s) at issue or, in the alternative, a consolidated commission report relating to the customer’s account(s) at issue.

- 02-02593: Object not relevant, proprietary, confidential; will produce reports showing revenue from Claimant’s account only
- 02-04998: Objects as overly broad, not related to the controversy and beyond the scope of the Discovery Guide, but will provide documents that show commissions in Claimant’s account.
- 02-07298: Commission run microfiche at World Trade Center
- 03-00123: Limited to Claimant’s accounts only and objects that any additional request is overly broad, irrelevant, not specific and does not relate to the matter in controversy.
- 03-02735: Limit to basis for compensation; object to additional documents on basis of general objections and as vague, overbroad, unduly burdensome and not relevant.
- 03-04130: Subject to general objections and limitations will produce redacted commission runs only.
- 03-07840: Limited to extent “available”
- 03-08275: Subject to foregoing general objections.

- 04-01650: Limited to commissions paid by Claimant only; otherwise objects as vague, overly broad and unduly burdensome.
- 04-03003: Limit to commissions from Claimant's account only after confidentiality stipulation. Otherwise object the request is vague and ambiguous, overly broad, unduly burdensome, not related to the matter in controversy, violates broker's privacy rights and seeks confidential documents without adequate protection.
- 04-03747: Limit to commissions in Claimant's accounts only with confidentiality stipulation; otherwise object as vague and ambiguous, overly broad, unduly burdensome, not related to the matter in controversy, violates broker's privacy rights and seeks confidential documents without adequate protection.
- 04-03685: Object as seeking confidential documents without adequate protection. Subject to confidentiality agreement, will produce some records.

**COMMENT:** All commission runs are one of the top categories that Morgan Stanley uniformly refuses to provide. It prefers the alternative, a consolidated report showing only commissions paid by the individual claimant. It has gone to the extreme of claiming that all commission runs were destroyed at the World Trade Center for cases predating September 2001. They have even claimed it for accounts opened after 9/11, the subject of a Wall Street Journal story. Without a full commission run showing activity in other customer accounts, the securities purchased and sold and the frequency of the trading, a Claimant can not get a fair hearing. Denied commission runs and with Morgan Stanley claiming that cross reference records do not exist, a financial advisor can claim the trades were not recommended and entirely the customer's idea even though twenty other customers made the same trades on the same days. A consolidated commission report showing only the customer's trades is worthless and it is Morgan Stanley's goal in each and every case except those where the trading is in only one account where the commission runs miraculously appear. A claimant deserves to see what a broker was doing in other accounts just as the broker is entitled under the Discovery Guide to see what the customer was doing at other brokerage firms.

2) All exception reports and supervisory activity reviews relating to the Associated Person(s) and/or the customer's account(s) that were generated not earlier than one year before or not later than one year after the transaction(s) at issue, and all other documents reflecting supervision of the Associated Person(s) and the customer's account(s) at issue.

- 02-02593: Object overbroad, unduly burdensome, oppressive not relevant.
- 02-04998: Objects as overbroad, not related to the controversy and beyond the scope of the Discovery Guide, but will provide documents that relate to Claimant's account only.
- 02-07298: Limit to CAR's that reference Claimant; otherwise object vague and ambiguous, overly broad, unduly burdensome and not related to the matter in controversy.
- 03-00123: Limited to Claimant's accounts only and objects that any additional request is "a desperate fishing expedition" and overly broad, unduly burdensome, irrelevant, not specific and do not relate to the matter in controversy.
- 03-02735: Object on grounds of general objections, and overbroad, unduly burdensome and not relevant.
- 03-04130: Subject to general objections and limitations will produce customer activity reports relating to Claimant's accounts only and object to further documents as vague and ambiguous, overly broad, unduly burdensome and not related to the matter in controversy.

- 03-07840: Limited to extent “available”.
- 03-08275: Subject to foregoing general objections and further object as vague, ambiguous, **unintelligible**, overbroad, and unduly burdensome.
- 04-01650: Limit to CAR’s that reference Claimant; otherwise object vague and ambiguous, overly broad, unduly burdensome and not related to the matter in controversy.
- 04-03003: Limited to customer activity reports that reference Claimants’ accounts in issue; otherwise object that the request is vague and ambiguous, overly broad, unduly burdensome and not related to the matter in controversy.
- 04-03747: Limited to customer activity reports that reference Claimants’ accounts in issue; otherwise object that the request is vague and ambiguous, overly broad, unduly burdensome and not related to the matter in controversy.
- 04-03685: Agree to produce responsive documents referring to Claimant only and not to the Associated Person.

**COMMENTS:** Morgan Stanley limits its production to a limited number of reports restricted to the customer’s accounts when the request is for those concerning the associated person. All exception reports and supervisory reviews is highly relevant evidence of failure to supervise a broker. All responsive documents must be produced as substantive evidence that the broker had other (perhaps many other) accounts also showing high turnover and other indicia of abuse requiring supervisory review. Claimants should have a view of the financial advisor’s other problem accounts to the same extent that Morgan Stanley has the right to see all claimants other brokerage accounts with other firms.

3) Those portions of internal audit reports at the branch in which the customer maintained his/her account(s) that: (a) focused on the Associated Person(s) or the transaction(s) at issue; and (b) were generated not earlier than one year before or not later than one year after the transaction(s) at issue and discussed alleged improper behavior in the branch against other individuals similar to the improper conduct alleged in the statement of claim.

- 02-02593: Object overbroad, unduly burdensome, oppressive not relevant
- 02-04998: Objects as overly broad, not related to the controversy and beyond the scope of the Discovery Guide, and further seeks attorney client or work product privileged information.
- 02-07298: Limit to reports that reference Claimant; otherwise object vague and ambiguous, overly broad, unduly burdensome, violates self-evaluative privilege, is invasive of employee privacy and not related to the matter in controversy
- 03-00123: Limited to Claimant’s accounts only and objects that any additional request is “a desperate fishing expedition” and overly broad, unduly burdensome, irrelevant, not specific and does not relate to the matter in controversy.
- 03-04130: Subject to general objections and limitations will produce copies of internal audit reports to the extent they reference Claimant. Beyond that object to further documents as vague and ambiguous, overly broad, unduly burdensome privileged, invasive of privacy of Morgan Stanley employees and not related to the matter in controversy.
- 03-04984: Object as vague, overbroad, unduly burdensome and not calculated to lead to the discovery of admissible evidence.
- 03-08275: Subject to foregoing general objections and further object as vague, ambiguous, **unintelligible**, overbroad, and unduly burdensome.

- 04-01650: Limit to reports that reference Claimant; otherwise object vague and ambiguous, overly broad, unduly burdensome, violates self-evaluative privilege, is invasive of employee privacy and not related to the matter in controversy
- 04-00415: Limited to the transaction in question and subject to general objections, otherwise object as vague, ambiguous, overly broad, unduly burdensome and improperly requiring speculation as to which documents are sought.
- 04-03003: Limited to internal audit reports that reference Claimants' accounts in issue; otherwise object that the request is vague and ambiguous, overly broad, unduly burdensome, invades attorney-client and **self-evaluative privilege**, is invasive of the privacy of Morgan Stanley employees and is not related to the matter in controversy.
- 04-03747: Limited to internal audit reports that reference Claimants' accounts in issue; otherwise object that the request is vague and ambiguous, overly broad, unduly burdensome, invades attorney-client and **self-evaluative privilege**, is invasive of the privacy of Morgan Stanley employees and is not related to the matter in controversy.

**COMMENT:** This is a continuation of Morgan Stanley's tactic of limiting production of documents which are presumptively discoverable. The request itself is excessively limited and Morgan Stanley refuses to comply with even this reduced demands. There is no recognized self-evaluative privilege and Morgan Stanley and the other brokerage firms should not be allowed to create it as a matter of NASD common law. The Supreme Court allowed forced arbitration on the condition that it protect investor's statutory rights. Allowing privileges unknown to federal courts in securities cases violates those rights.

4) Those portions of examination reports or similar reports following an examination or an inspection conducted by a state or federal agency or a self-regulatory organization that focused on the Associated Person(s) or the transaction(s) at issue or that discussed alleged improper behavior in the branch against other individuals similar to the improper conduct alleged in the statement of claim.

- 02-02593: Objects as overbroad, unduly burdensome, oppressive not relevant
- 02-04998: Objects as overly broad, not related to the controversy and beyond the scope of the Discovery Guide, but will provide documents that relate to Claimant's account.
- 02-07298: Limit to reports that reference Claimant; otherwise object vague and ambiguous, overly broad, violates self-evaluative privilege, is invasive of employee privacy and not calculated to lead to admissible evidence.
- 03-00123: Limited to Claimant's accounts only and objects that any additional request do not relate to the matter in controversy.
- 03-02735: Limit to actual disciplinary action taken by regulator or employer; otherwise object based on general objections and as overbroad, unduly burdensome and not relevant.
- 03-04130: Subject to general objections and limitations will produce reports to the extent they reference Claimant. Beyond that, object to further documents as vague and ambiguous, overly broad, invasive of the privacy of Morgan Stanley employees and not calculated to lead to the discovery of admissible evidence.
- 03-04984: : Object as overbroad, unduly burdensome and not calculated to lead to admissible evidence, but will produce the table of contents and index for a compliance manual subject to a confidentiality agreement.

- 03-08275: Subject to foregoing general objections and further object as vague, ambiguous, **unintelligible**, overbroad, and unduly burdensome.
- 04-00415: Subject to the general objections and limited to the one trade in question, otherwise object as vague, ambiguous, overly broad, unduly burdensome and improperly requires speculation as to which documents are sought.
- 04-01650: Limit to reports that reference Claimant; otherwise object vague and ambiguous, overly broad, violates self-evaluative privilege, is invasive of employee privacy and not calculated to lead to admissible evidence.
- 04-03003: Limited to reports that reference Claimants' accounts in issue; otherwise object that the request is vague and ambiguous, overly broad, invades the privacy rights of third parties and is not reasonably calculated to lead to the discovery of admissible evidence.
- 04-03747: Limited to reports that reference Claimants' accounts in issue; otherwise object that the request is vague and ambiguous, overly broad, invades the privacy rights of third parties and is not reasonably calculated to lead to the discovery of admissible evidence.
- 04-03685: Object as a violation of Financial Advisor's privacy rights or those of third parties. Subject to confidentiality agreement, will produce some records.

**COMMENT:** Once again, Morgan Stanley limits its response to a single account which is contrary to the plain wording of the request which already provides ample weasel room with its limitation to "similar" behavior which Morgan Stanley would not recognize without an exact DNA match between customers.

LIST 7 and LIST 9: **MISREPRESENTATION/OMISSIONS  
NEGLIGENCE/BREACH OF FIDUCIARY DUTY**

Copies of all materials prepared or used by the firm/Associated Person(s) relating to the transactions or products at issue, including research reports, prospectuses, and other offering documents, including documents intended or identified as being “for internal use only,” and worksheets or notes indicating the Associated Person(s) reviewed or read such documents. As an alternative, the firm/Associated Person(s) may produce a list of such documents that contains sufficient detail for the claimant to identify each document listed. Upon further request by a party, the firm/Associated Person(s) must provide any documents identified on the list.

- 02-02593: Objects as overbroad, unduly burdensome, oppressive not relevant
- 02-04998: Objects as overly broad, not related to the controversy and beyond the scope of the Discovery Guide.
- 02-07298: Limits to prospectuses, research reports or other offering documents if Claimant can identify the sources of RR’s recommendation. Otherwise objects as overly broad, unduly burdensome, not specific and not related to the matter in controversy.
- 03-00123: Limited to documents previously provided to Claimant and objects that any additional request is overly broad, vague, irrelevant, not specific and do not relate to the matter in controversy.
- 03-04130: Subject to general objections and limitations will produce copies of materials provided to Claimant and research files maintained by the broker. Beyond that, object as overly broad, unduly burdensome and not related to the matter in controversy.
- 03-04984: Object as overbroad, unduly burdensome and not calculated to lead to the discovery of admissible evidence, however, if Claimant identifies securities or transactions alleged to be unsuitable or unauthorized, Morgan Stanley will **consider** producing research reports.
- 03-07587: No objections, but reserves the right to object to certain categories at a later time
- 03-07840: Limit production to research reports and prospectuses to the “extent available”
- 03-08275: Subject to foregoing general objections and further object that the request is **unintelligible**.
- 04-01650: Limits to prospectuses, research reports or other offering documents if Claimant can identify the sources of RR’s recommendation. Otherwise objects as overly broad, unduly burdensome, not specific and not related to the matter in controversy.
- 04-03003: Limited to reports, prospectuses (or other offering documents) relating to proprietary mutual funds at issue within their possession, custody or control; otherwise object to the request is overly broad, unduly burdensome, and seeks information not specific or related to the matter in controversy
- 04-03747: Object as overly broad, unduly burdensome and not specific or related to the matter in controversy, but if Claimant identifies specific companies or funds, Respondents will meet and confer regarding the list and if tailored to Respondents satisfaction, will endeavor to collect and deliver “tailored” documents.
- 04-03685: Object as overly broad and unduly burdensome, but if Claimant identifies specific transactions, products or securities at issue that is reasonably tailored to Respondents satisfaction, will produce prospectus if one would have

accompanied securities and company specific research reports. Beyond that, object as overly broad and not reasonably calculated to lead to admissible evidence.

**COMMENT:** Morgan Stanley consistently refuses to provide the basis for its recommendations. Instead it requires the claimant to identify documents upon which claimant may have relied but which he or she has no idea exist. Respondents thereafter are free to withhold whatever documents Claimant can not identify, most importantly the “For Internal Use Only” sales aides which the Financial Advisors so often use instead of actually reading a prospectus or research report or broker notes from morning sales calls.

#### LIST 11: **UNAUTHORIZED TRADING**

1) Order tickets for the customer’s transaction(s) at issue.

- 02-04998: Objects as unduly burdensome.
- 03-00123: Object that the request is duplicative and redundant of the account statements, irrelevant and unduly burdensome.
- 03-04984: Objects as overbroad, unduly burdensome and not calculated to lead to admissible evidence.
- 03-08275: Subject to foregoing general objections, “There are no responsive documents. Respondents do not “order tickets.” Respondents use an electronic system.
- 04-00415: Object that Respondents do not use order tickets.
- 04-01650: Agree to produce electronic equivalent (“TARs”) when Claimant identifies transactions at issue. (TARs are not electronic equivalent.)
- 04-03747: **Order tickets do not exist.**
- 04-03685: Respondents state that they do not use paper order tickets.

**COMMENT:** Morgan Stanley consistently denies that order tickets exist even though they are required to be prepared and preserved by SEC Rule 17a-3(6) and Rule 17a-4(b)(1). They are allowed to do this because the Discovery Guide uses the commonly understood vernacular “order ticket” instead of the official term “memorandum.” These records are made and preserved in electronic form prescribed by the SEC as Morgan Stanley and its outside counsel are fully aware. Statements to the contrary are pure fraud which arbitrators are trained to accept without question or critical thought. It should be an embarrassment to the NASD that its members firms routinely deny the existent of required records.

2) Copies of all telephone records, including telephone logs, evidencing telephone contact between the customer and the firm/Associated Person(s).

- 02-07298: Ordered to produce, but didn’t.(Order #4)
- 03-00123: Objects that the request is an unreasonable burden and will agree only to produce notes of phone calls.
- 04-00415: Object as overly broad, unduly burdensome.
- 04-01650: Objects to anything other than Day-timer notes as vague, ambiguous, overly broad, unduly burdensome and not related to the matter in controversy.
- 03-04984: Objects as overbroad, unduly burdensome and not calculated to lead to admissible evidence, however if Claimants will identify the relevant telephone numbers, will consider the burden and expense.
- 03-08275: Subject to foregoing general objections.

- 04-03685: Request a list of phone numbers, whereupon will undertake a reasonable search to see if records exist.
- 04-03747: Object as overly broad, unduly burdensome and not related to the matter in controversy.

**COMMENT:** Once again, Morgan Stanley objects to any substantive documentary evidence which narrows the scope of its defense and purports to find it overbroad and unduly burdensome.

3) All documents relied upon by the firm/Associated Person(s) to establish that the customer authorized the transaction(s) at issue.

- 03-04984: Objects as vague, overbroad, unduly burdensome and not calculated to lead to admissible evidence.
- 03-08275: Subject to foregoing general objections and further object the request is **unintelligible** claimant has never identified the “transactions at issue.”
- 04-00415: In addition to the general objections, object as vague.

**COMMENT:** SICA, the NASD and SEC composed a request that Morgan Stanley and its outside counsel still finds, after five years, too vague and unintelligible to be applicable.

#### LIST 13: **UNSUITABILITY**

1) Copies of all materials prepared, used, or reviewed by the firm/Associated Person(s) related to the transactions or products at issue, including but not limited to research reports, prospectuses, other offering documents, including documents intended or identified as being “for internal use only,” and worksheets or notes indicating the Associated Person(s) reviewed or read such documents. As an alternative, the firm/Associated Person(s) may produce a list of such documents. Upon further request by a party, the firm/Associated Person(s) must provide any documents identified on the list.

- 02-02593: Objects as overbroad, unduly burdensome, oppressive not relevant
- 02-04998: Objects as overly broad, not related to the controversy and beyond the scope of the Discovery Guide.
- 02-07298: Limits to prospectuses, research reports or other offering documents if Claimant can identify the sources of RR’s recommendation. Otherwise objects as overly broad, unduly burdensome, not specific and not related to the matter in controversy.
- 03-00123: Limits production to documents previously provided to Claimant and otherwise objects as overly broad, vague, irrelevant, not specific and does not relate to the matter in controversy.
- 03-04130: Subject to general objections and limitations will produce copies of prospectuses provided to Claimant and research files maintained by the broker. Beyond that, object as vague and ambiguous, overly broad, unduly burdensome and not related to the matter in controversy.
- 03-04984: Object as overbroad, unduly burdensome and not calculated to lead to the discovery of admissible evidence, however, if Claimant identifies securities or transactions alleged to be unsuitable or unauthorized, Morgan Stanley will **consider** producing research reports.

- 03-07587: No objections, but reserves the right to object to certain categories at a later time; requires a confidentiality agreement prior to producing documents concerning compensation
- 03-07840: Limited to extent “available.
- 03-08275: (#28) Subject to foregoing general objections and further object as not relevant, overbroad, and equally available to claimant but agree to limit to “an exemplar of a brochure that would have been available to Claimant.”
- 04-01650: Limits to prospectuses, research reports or other offering documents if Claimant can identify the sources of RR’s recommendation. Otherwise objects as overly broad, unduly burdensome, not specific and not related to the matter in controversy.
- 04-03003: Limited to reports, prospectuses (or other offering documents) relating to proprietary mutual funds at issue within their possession, custody or control; otherwise object to the request is overly broad, unduly burdensome, and seeks information not specific or related to the matter in controversy
- 04-03747: Object as overly broad, unduly burdensome and not specific or related to the matter in controversy, but if Claimant identifies specific companies or funds, Respondents will meet and confer regarding the list and if tailored to Respondents satisfaction, will endeavor to collect and deliver “tailored” documents.
- 04-03685: Object as overly broad and unduly burdensome, but if Claimant identifies specific transactions, products or securities at issue that is reasonably tailored to Respondents satisfaction, will produce prospectus if one would have accompanied securities and company specific research reports. Beyond that, object as overly broad and not reasonably calculated to lead to admissible evidence.

**COMMENT:** Unsuitability is the most common claim made and relevant documents engender the most objections. Morgan Stanley consistently refuses to provide the basis for its recommendations, usually denying a recommendation has been made. Instead it requires the claimant to identify documents which he or she has no idea exist. Respondents thereafter are free to withhold whatever documents Claimant can not identify, most importantly the “For Internal Use Only” sales aides which the Financial Advisors so often use. Morgan Stanley further prefers to place the onus on Claimants to justify why they purchased a security denying that public customers have the legal right to rely on a registered investment professional but are instead required to conduct their own due diligence and be responsible for their own research decisions.

2) Documents sufficient to describe or set forth the basis upon which the Associated Person(s) was compensated in any manner during the years in which the transaction(s) or occurrence(s) in question occurred, including, but not limited to: a) any bonus or incentive program; and b) all compensation and commission schedules showing compensation received or to be received based upon volume, type of product sold, nature of trade (e.g., agency v. principal), etc.

- 02-02593: Objects as not relevant, over broad, burdensome, oppressive, proprietary, confidential
- 02-07298: Limits to redacted commission runs; otherwise objects as vague and ambiguous, overly broad, unduly burdensome, and not related to the matter in controversy.
- 03-00123: Object that the request is overly broad, irrelevant, not specific and do not relate to the matter in controversy

- 03-04130: In addition to the general objections and limitations, object as vague and ambiguous, overly broad, unduly burdensome and not related to the matter in controversy.
- 03-04984: Object as overbroad, unduly burdensome and not calculated to lead to the discovery of admissible evidence, however, if Claimant identifies securities or transactions alleged to be unsuitable or unauthorized, Morgan Stanley will **consider** producing research reports.
- 03-05643: Objects to “Morgan Stanley Financial Advisor Compensation, Benefits and Recognition Programs Booklets” and “MSDW Employee Handbooks” as vague, overbroad, unduly burdensome and not calculated to lead to the discovery of admissible evidence as well as confidential and proprietary.
- 03-07840: Limited to general booklet on compensation.
- 04-01650: : Limits to redacted commission runs; otherwise objects as vague and ambiguous, overly broad, unduly burdensome, and not related to the matter in controversy.
- 04-03003: Following confidentiality stipulation, will produce documents limited to compensation for transactions at issue; otherwise object the request violates broker’s privacy rights, is overly broad, unduly burdensome, not related to the matter in controversy, and seeks to impose the obligation to produce confidential documents without adequate protection.
- 04-03685: Object as violating Financial Advisor’s privacy rights and confidentiality of documents, but subject to confidentiality agreement will produce some, but not all documents requested.
- 04-03747: Following confidentiality stipulation, will produce documents limited to compensation for transactions at issue; otherwise object the request violates broker’s privacy rights, is overly broad, unduly burdensome, not related to the matter in controversy, and seeks to impose the obligation to produce confidential documents without adequate protection.

Morgan Stanley also characterizes this request as “unintelligible” because it is a comprehensive statement of compensation of Associated Persons which would also encompass branch office managers. The incentives and disincentives for selling or not selling different products has been amply demonstrated by the states in the sale of proprietary mutual funds. Morgan Stanley Financial Advisors were rewarded for proprietary fund sales with expense reimbursement checks and officer managers with bonus payments. The basis for all associated persons’ compensation (Financial Advisors and branch office managers) is basic information without which customers can not receive a fair hearing. It is presumptively discoverable in all suitability cases and produced in almost none.

Broker/Dealer Books and Records:

# New and Amended Recordkeeping Requirements Checklist

On October 26, 2001, the SEC adopted amendments to Rules 17a-3 and 17a-4 under the Securities Exchange Act of 1934 to clarify and expand record keeping requirements in connection with purchase and sale documents, customer records, associated person records, customer complaint records, and certain other matters. The amendments also require broker/dealers to maintain or promptly produce certain records at each office to which those records relate.

The following checklist helps identify the basic requirements for members under the new and amended recordkeeping requirements to the SEC broker/dealer books and records rules. Please note that this checklist is not meant to address pre-existing requirements under the SEC broker/dealer books and records rules.

Using this checklist does not alter or create a safe harbor from applicable regulatory responsibilities. You are responsible for ensuring compliance with these rules.

The effective date of the amendments to the books and records rules was May 2, 2003.

## Records to be made by Brokers and Dealers

### Memoranda of Brokerage Orders and Dealer Transactions

Ensure that, for each brokerage order, the order tickets:

- Show the terms and conditions of the order or instructions, and any modification or cancellation thereof;
- Identify the account for which the order is entered;
- Identify each associated person, if any, responsible for the account and any other person who entered or accepted the order on behalf of the customer, or if a customer entered the order on an electronic system, a notation of that entry;

**Note:** The memorandum need not show the identity of any person, other than the associated person responsible for the account, who may have entered or accepted the order if the order is entered into an electronic system that generates the memorandum and if that system is not capable of receiving an entry of the identity of any person other than the responsible associated person; in that circumstance, the member, broker or dealer shall produce upon request by a representative of a securities regulatory authority a separate record which identifies each other person.

- Describe whether the order was entered subject to discretionary authority;
- Include, to the extent feasible, the time of execution or cancellation; and
- Identify the time the order was received, the time of entry, and the price at which it was executed.

*Source:* Rules 17a-3(a)(6), 17a-3(a)(7)

*Record Retention:* Three years, the first two years in an easily accessible place.

**Note:** Under Rule 17a-3(a)(6), this memorandum need not be made as to a purchase, sale or redemption of a security on a subscription-way basis directly from or to the issuer if your firm maintains a copy of the customer's subscription agreement regarding a purchase, or a copy of any other document required by the issuer regarding a sale or redemption.

The SEC, in its Interpretive Release about the amendments, states that a broker/dealer that has assigned a team of associated persons to a customer's account may record the identity of the team on the order ticket, provided it creates and maintains a companion record that can be used to identify the associated person that entered that order. The companion record would be part of the firm's order ticket records and must be maintained, preserved, and available for examination in the same manner as the firm's order tickets. (See Question and Answer 7, Part A, *SEC Interpretive Release: Books and Records Requirements for Brokers and Dealers Under the Securities Exchange Act of 1934*, SEC Rel. No. 34-47910 (May 29, 2003) ("Interpretive Release")).

In the SEC's Interpretive Release concerning these requirements, it poses the following question: Under Rules 17a-3(a)(6) and (a)(7), is the broker/dealer required to record the time of receipt of an order to purchase a mutual fund, variable annuity, or direct participation plan that is effected on a basis other than subscription-way where the purchase price is determined only once daily at the close of business?

In response, the SEC states that if the time of receipt is material to an order, then the broker/dealer must record the time of receipt on the order ticket. Generally, for many types of transactions, the time of receipt may be material to the price or other terms of the execution of the order. For example, recording the time of receipt would be material if an intra-day time deadline existed that determined whether the order was priced as-of the date the order was received or the price as-of the next day. If the broker/dealer does not record the time of receipt of an order, the broker/dealer must be able to demonstrate that the time of receipt is not material to that order. (See Question and Answer 1, SEC Interpretive Release).

## ○ Associated Person Location and Identification Number Records

Ensure that, for each associated person, there is a record containing:

- a list of every office where each associated person regularly conducts business;
- their CRD number, if any; and
- every internal identification number or code assigned to that person by the broker/dealer.

*Source:* Rule 17a-3(a)(12)(ii)

*Record Retention:* Three years after the associated person has terminated employment and all other connections with the firm.

## ○ Associated Person Compensation Records

Ensure that, for each associated person, there is a record containing:

- each purchase and sale of a security attributable to that associated person for compensation purposes;
- the amount of compensation attributable to each purchase or sale, if monetary, and a description of the compensation, if non-monetary; and
- all agreements pertaining to the relationship between the broker/dealer and each associated person.

*Source:* Rule 17a-3(a)(19)

*Record Retention:* Three years, the first two years in an easily accessible place.

**Note:** New Rule 17a-3(a)(19)(i) requires each broker/dealer to create a record for each associated person listing each purchase and sale of a security attributable, for compensation purposes, to that associated person. The record has to include the amount of compensation if monetary and a description of the compensation if non-monetary. In the SEC's Interpretive Release, the SEC notes that, in order to comply with Rule 17a-3(a)(19)(i), a broker/dealer that has created a team of associated persons to handle a customer's account may create a single record that identifies each transaction attributable to a particular team for compensation purposes. In order to do this, the firm must also create and maintain as part of this record a companion record that identifies each associated person that has been a member of that team, including the dates the person joined and left the team, and the manner in which compensation is allocated among the members of the team. (See Question and Answer 7, Part B, SEC Interpretive Release.)

Rule 17a-3(a)(19)(ii) requires that a broker/dealer maintain a record of agreements pertaining to the relationship between each associated person and the broker/dealer, including a summary of each associated person's compensation arrangements such as commission and concession schedules. Some associated persons do not directly participate in securities transactions with customers. Generally, if an associated person is not directly involved with or compensated based on securities transactions with customers, the broker/dealer would not be required to create the record required pursuant to Rule 17a-3(a)(19)(ii). (For further explanation, please see Question and Answer 9, SEC Interpretive Release.)

## ○ Associated Person Complaint Records

Ensure that, for each associated person, there is a record of each written customer complaint received by the firm concerning that associated person which includes:

- the complainant's name, address, and account number;
- the date the complaint was received;
- the name of any other associated person identified in the complaint;
- a description of the nature of the complaint; and
- the disposition of the complaint.

**Note:** Instead of the record, your firm may maintain a copy of each original complaint in a separate file by the associated person named in the complaint along with a record of the disposition of the complaint.

*Source:* Rule 17a-3(a)(18)(i)

*Record Retention:* Three years, the first two years in an easily accessible place.

## ○ Customer Account Records

Ensure that, for each account with a natural person as a customer or owner, there is a record including:

- the customer's or owner's name;
- the customer's or owner's tax identification number;
- the customer's or owner's address;
- the customer's or owner's telephone number;
- the customer's or owner's date of birth;
- the customer's or owner's employment status (including occupation and whether the customer is an associated person of a broker/dealer);
- the customer's or owner's annual income;
- the customer's or owner's net worth (excluding value of a primary residence);
- the account's investment objectives;
- an indication of whether the record has been signed by the associated person responsible for the account, if any, and approved or accepted by a principal of the firm; and
- if the account is a discretionary account, the dated signature of each customer or owner granting the authority and the dated signature of each natural person to whom discretionary authority was granted.

Source: Rule 17a-3(a)(17)

**Note:** In the case of a joint account, the account record must include personal information for each joint owner who is a natural person; however, financial information for the individual joint owners may be combined.

There have been several questions about the definition of "natural person" referred to in Rule 17a-3(a)(17). The SEC's Interpretive Release notes that the account record requirement of Rule 17a-3(a)(17) does not apply to an account for which the customer or owner is not a natural person, such as the account of:

- a corporation,
- a partnership,
- a limited liability company, or
- a REIT.

(See Question and Answer 2, SEC Interpretive Release.)

The SEC's Interpretive Release states that the account record requirement does not apply to an account where the account is owned by the trustees of the trust or a trust that is a legal entity separate from the holders of its beneficial interests (which may be natural persons). (See Question and Answer 2, SEC Interpretive Release.)

The term "owner" in Rule 17a-3(a)(17) would generally apply to a Uniform Gift/Transfer to Minor Act ("UGMA" or "UTMA") account, an IRA account and a 401k account where the beneficiary of the account is a natural person. (See Question and Answer 2, SEC Interpretive Release.)

Rule 17a-3(a)(17) does not apply to a 401k account where the employer has established an omnibus account at the broker/dealer holding the assets of all of its employees. (See Question and Answer 3, SEC Interpretive Release.)

Rule 17a-3(a)(17) does not apply to a bank trust account where the bank has established an omnibus account at the broker/dealer holding the co-mingled assets of the bank's customers and the bank's customers are not aware that their assets are held by the broker/dealer. (See Question and Answer 3, SEC Interpretive Release.)

### Furnishing the Account Record

Ensure that, for each account with a natural person as a customer or owner, there is a record indicating that:

- The firm has furnished each customer that opens an account on or after May 2, 2003 with a copy of the account record that includes the information required by paragraph (a)(17)(i)(A) of Rule 17a-3 (or an alternate document containing that information) within 30 days of the opening of the account, and at least every thirty-six months thereafter.
- The firm has obtained account record information for each customer or owner of every account in existence before May 2, 2003, and furnished the customer with a copy of the account record that includes the information required by paragraph (a)(17)(i)(A) of Rule 17a-3 (or an alternate document containing that information) within three years of May 2, 2003.
- The firm has included with the account record or alternative document provided to each customer or owner an explanation of any terms regarding investment objectives.
- The firm has included with the account record or alternate document prominent statements that the customer or owner should mark any corrections and return the account record or alternate document to the firm, and that the customer or owner should notify the firm of any future changes to information contained in the account record.
- The firm has furnished the customer or each joint owner, and the associated person, if any, responsible for that account, with notification of any change in the account record to the name or address of the customer or owner on or before the 30th day after the date the firm received notice of the change. If it is an address change, the notifications should be sent to that customer's old address.
- For each change in an account's investment objectives, the firm has furnished each customer or owner and the associated person, if any, responsible for that account with a copy of the updated customer account record that includes the information required by paragraph (a)(17)(i)(B) of Rule 17a-3 (or an alternate document containing that information), on or before the 30th day after the date the firm received notice of the change (or, if the account was updated for some reason other than the firm receiving notice of a change, after the date the account record was updated).
- Each customer has been provided a copy of each written agreement entered into on or after May 2, 2003 pertaining to the account and, if requested by the customer, he or she was furnished with a fully executed copy of each agreement.

**Note:** The SEC explained in its Interpretive Release that "written agreements" include customer account agreements, margin agreements, options agreements, or securities lending agreements. (See Question and Answer 6, SEC Interpretive Release.) An instruction received by the broker/dealer from the customer would not constitute a written agreement for purposes of this rule. However, a written instruction sent by the customer to the broker/dealer would constitute a communication received by the broker/dealer relating to its business as such, and should be maintained in accordance with paragraph 17a-4(b)(4). *Id.*

- Each customer has been provided with a notice containing the address and telephone number of the department of the firm to which any complaints as to the account may be directed.

*Source:* Rules 17a-3(a)(17), 17a-3(a)(18)

*Record Retention:* Six years after the closing of the account or the date on which the information was replaced or updated, whichever is earlier.

**Note:** A firm may choose to exclude the customer's tax identification number and date of birth from the information provided to the customer.

According to the SEC's Interpretive Release, the account record information should, in the case of a trust, be sent to the same person that receives account statements for that account. (See Question and Answer 4, SEC Interpretive Release.)

The SEC posed the following question and answer regarding multiple accounts: If one customer has a personal account, a separate IRA account, and a trust account for his child at the same broker/dealer, and has agreed in writing to receive account-related documentation, such as account statements, on a combined basis, may the firm meet its requirements under Rule 17a-3(a)(17) by combining in one mailing the account record information for all three accounts? Would the answer be different if spouses living at the same address each had a personal account and agreed to receive account documents on a combined basis for their personal accounts?

In response, the SEC stated that if the customer has agreed in writing to receive account-related documentation on a combined basis for multiple accounts at the same address, the broker/dealer may send account record information regarding each of those accounts to the customer in a combined mailing. However, the account record information should be separated by account so the customer can easily identify the account record information that relates to each account. If spouses living at the same address have agreed to receive account documents on a combined basis for their personal accounts, the broker/dealer may send account record information regarding each of those accounts to the customer in a combined mailing. (See Question and Answer 5, SEC Interpretive Release.)

### **Exemption from the Account Record Information and Furnishing Requirements**

The account record and furnishing requirements of Rule 17a-3(a)(17) will only apply to accounts for which a firm is, or has within the past 36 months been, required to make a suitability determination under the federal securities laws or under the requirements of a self-regulatory organization of which it is a member. (See, e.g., NASD Rules 2310 and 2860(b)(16)(B), NYSE Rule 723, Chicago Board Options Exchange Rule 9.9 and MSRB Rule G-19.)

#### Communications Supervision Records

Ensure that there is a record (which need not be separate from the advertisements, sales literature, or communications) documenting that the firm has complied with, or adopted policies and procedures reasonably designed to establish compliance with, applicable federal and SRO requirements, of which the firm is a member, requiring principal approval of advertisements, sales literature or other communications with the public by the firm or its associated persons.

*Source:* Rule 17a-3(a)(20)

*Record Retention:* Three years, the first two years in an easily accessible place.

#### Contact Person Records

Ensure that there is a record for each office listing all individuals by name or title at that office who, without delay, can explain the types of records maintained at that office and the information therein.

*Source:* Rule 17a-3(a)(21)

*Record Retention:* Six years, the first two years in an easily accessible place.

## ○ Responsible Principal Records

Ensure that there is a record listing each principal responsible for establishing policies and procedures reasonably designed to ensure compliance with any applicable federal requirements or rules of an SRO of which the firm is a member, requiring principal acceptance or approval of records.

*Source:* Rule 17a-3(a)(22)

*Record Retention:* Six years, the first two years in an easily accessible place.

## ○ Office Records

Ensure that the firm makes and keeps current, as to each office, certain books and records that reflect the activities of the office. (This includes: blotters, order tickets, customer account records, records with respect to associated persons, customer complaints, records evidencing compliance with SRO rules with regard to communications with the public, records of persons who can explain the information in the broker/dealer's records, and records of each principal responsible for establishing recordkeeping compliance procedures.)

**Note:** The term "office" means any location where one or more associated persons regularly conduct the business of handling funds or securities or effecting any transactions in, or inducing or attempting to induce the purchase or sale of, any security.

*Source:* Rules 17a-3(g), 17a-3(h), 17a-4(k).

*Record Retention:* For the most recent two year period.

## Records to be Preserved by Brokers and Dealers

### ○ Communications with the Public

Ensure that there are originals of all communications received and copies of all communications sent (and any approvals thereof) by the firm (including inter-office memoranda and communications) relating to the firm's business as such, including all communications which are subject to SRO rules of which the firm is a member regarding communications with the public.

*Source:* Rule 17a-4(b)(4)

*Record Retention:* Three years, the first two years in an easily accessible place.

### ○ Organizational Documents

Ensure that the firm has all partnership articles or, in the case of a corporation, all articles of incorporation or charter, minute books and stock certificate books (or, in the case of any other form of legal entity, all records such as articles of organization or formation, and minute books used for a purpose similar to those records required for corporations or partnerships), all Forms BD and BDW, including all amendments thereto, and all licenses or other documentation showing registrations with any securities regulatory authority.

*Source:* Rule 17a-4(d)

*Record Retention:* Life of the enterprise and of any successor enterprise.

## ○ Special Reports

Ensure that the firm has each report which a securities regulatory authority has requested or required a broker/dealer to make and furnish to it pursuant to an order or settlement, and each securities regulatory authority examination report.

*Source:* Rule 17a-4(e)(6)

*Record Retention:* Three years after the date of the report.

**Note:** The SEC stated in its Interpretive release that Rule 17a-4(e)(6) does not require a broker/dealer to preserve documents or other materials delivered to the Commission in response to a subpoena. However, if those documents are otherwise required to be created and maintained pursuant to Rules 17a-3 and 17a-4, the broker/dealer must preserve them in compliance with those provisions. In addition, the SEC notes that a broker/dealer, under other applicable laws or rules, may have an obligation to preserve such reports, documents or other materials. (See Question and Answer 10, SEC Interpretive Release.)

## ○ Compliance, Supervisory & Procedures Manuals

Ensure that the firm has each compliance, supervisory, and procedures manual, including any updates, modifications, and revisions to the manual, describing the policies and practices of the broker/dealer with respect to compliance with applicable laws and rules, and supervision of the activities of associated persons.

*Source:* Rule 17a-4(e)(7)

*Record Retention:* Three years after the termination of use of manual.

## ○ Exception Reports

Ensure that the firm has all reports produced to review for unusual activity in customer accounts.

*Source:* Rule 17a-4(e)(8)

*Record Retention:* Eighteen months after the date the report was generated.

For additional information about the amendments to the SEC books and records rules, please go to NASD's books and records Web page at: [www.nasdr.com/books.asp](http://www.nasdr.com/books.asp). Please also view the SEC's Adopting Release concerning the amendments at: [http://www.nasdr.com/pdf-text/0180ntm\\_att\\_a.pdf](http://www.nasdr.com/pdf-text/0180ntm_att_a.pdf) and Interpretive Release at: <http://www.sec.gov/rules/interp/34-47910.htm>.